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April 22, 2008

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 214

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of Senate Bill 214, which provides authority for and direction to the Board of Trustees for the State Retirement and Pension System to divest from Iran and Sudan. The divestment scheme of Senate Bill 214 grants the Trustees authority to divest investments in companies doing business in Iran and Sudan because of their oppressive governments. Because the bill relates to foreign countries, we have analyzed whether it is preempted under the Supremacy and Foreign Commerce Clauses of the United States Constitution. In our view, Senate Bill 214 is constitutional and not preempted by federal law.

Nothing in the Act conflicts with federal law regarding Iran and Sudan; thus, it is not preempted. Recent federal law authorizes state and local governments to divest assets in companies that conduct business operations in Sudan. Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516, 110th Cong., 1st Session (2007). Senate Bill 214 replaces the State's previous Sudan divestment law with provisions designed to comport with the recently enacted federal act. Therefore, the portions of Senate Bill 214 addressing divestment in Sudan are clearly constitutional.

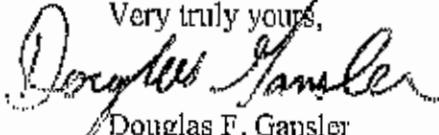
Although federal law is silent regarding divestment in Iran, in our view Senate Bill 214 does not present an unconstitutional interference with the federal government's power to conduct foreign affairs. The leading case on the subject dealt with divestitures from Sudan prior to enactment of the recently enacted federal act, *National Foreign Trade Council v. Giannoulias*, 523 F. Supp. 2d 731, 742 (N.D. Ill. 2007). To determine whether a state law is preempted by the federal government's federal affairs power, the court in *Giannoulias* noted that the appropriate test is whether the state law "stands as an 'obstacle to the accomplishment and execution of the full purposes and objectives'" of the federal government with regard to foreign policy. *Id.* at 742 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). In *Giannoulias*, the

court noted that while federal law at the time "expressly restrict[ed] how companies can and cannot do business in Sudan, it [was] silent regarding divestment of holdings connected with Sudan." *Id.* The court went on to determine that provisions of the Illinois Sudan Act regarding amendments to the Illinois Pension Code regarding divestment were not an unconstitutional interference with the federal government's power to conduct foreign affairs. *Id.* at 746.

Senate Bill 214 does not stand as an obstacle to the federal government's policy on Iran. The bill will have no more than an incidental or indirect effect on Iran, and thus it does not interfere with the Foreign Affairs Power of the federal government. First, the bill is narrowly drafted to apply only to companies that have made large investments that directly or significantly contribute to the development of Iran's petroleum or natural gas resources, thus reducing the potential impact of divestment pursuant to Senate Bill 214. Furthermore, the bill provides that, in carrying out divestment activities, the Trustees must abide by any future federal law or regulation that may be enacted addressing divestment in Iran. In addition, Senate Bill 214 prohibits the Trustees from carrying out divestment in Iran if Congress or the President declare that mandatory divestment interferes with U.S. foreign policy. Therefore, the provisions addressing divestment in Iran, like the Sudan provisions, are constitutional.

Moreover, we believe Senate Bill 214 does not violate the Foreign Commerce Clause because the State is acting as a market participant rather than a regulatory authority with regard to the pension it funds and administers. Although this market participant exception is a standard feature of domestic Commerce Clause jurisprudence,¹ it has not yet been applied to the Foreign Commerce Clause. Nonetheless, we perceive no basis for distinction. Thus, Senate Bill 214, by providing direction to the Trustees regarding the pension funds it administers, is requiring them to act as a market participant not as a regulator, which is not clearly unconstitutional.

In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of Senate Bill 214.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/SB/kk

cc: The Honorable Thomas V. Mike Miller, Jr.
The Honorable Dennis C. Schnepf
Joseph Bryce
Karl Aro

¹ "Since state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants, evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 685 (1999).