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May 7, 2009

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

*RE: House Bill 1263*

Dear Governor O'Malley:

We have reviewed and hereby approve House Bill 1263, "Mercury Switch Removal from Vehicles," for constitutionality and legal sufficiency. In our review of the bill, we have concluded that it does not violate the Commerce Clause of the United States Constitution.

House Bill 1263 requires motor vehicle manufacturers that have sold motor vehicles with mercury switches in this State to develop a mercury minimization plan and submit it to the Maryland Department of the Environment ("MDE") for review. The plan must contain information about the make, model, and year of vehicles that may contain a mercury switch, along with information about the location of the mercury switch or mercury switch assembly in the motor vehicle and how to remove them in a safe and environmentally sound way.<sup>1</sup> The plan must also include educational and training materials for mercury switch removal; a proposal for the storage or disposal of mercury switches; a plan for implementing and financing the removal, collection and recovery system; payment by manufacturers of the costs associated with the removal, collection and recovery of mercury switches, including a minimum of \$4 for each mercury light switch and \$6 for each antilock braking system mercury switch assembly removed by a vehicle recycler or scrap processing facility and \$1 to MDE for each mercury switch

<sup>1</sup> Hereinafter the term "mercury switch" is used to refer to both mercury switches and mercury switch assemblies.

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removed as well as the costs of packaging, shipping and processing mercury switches for recycling, storage or disposal. The bill further requires a vehicle recycler to remove mercury switches before sending a vehicle to a scrap processing facility unless the mercury switch is inaccessible due to damage to the vehicle or the scrap processing facility agrees to accept the vehicle with the mercury switch in place. A scrap processing facility must remove any mercury switch left in place before the vehicle is flattened, crushed, baled, or shredded.

The Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, grants the Congress the power to regulate Commerce among the several States. The provision has been interpreted not only to authorize Congress to act, but also to prevent states from regulating in ways that discriminate against or unduly burden interstate commerce. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949). A state law that facially discriminates against interstate commerce is virtually *per se* invalid, *Fort Gratiot Sanitary Landfill v. Michigan*, 504 U.S. 353, 359 (1992), and will be upheld only if it is shown to advance a "legitimate local purpose that cannot be adequately served by nondiscriminatory alternatives." *Owatonna v. Town of Harrison*, 520 U.S. 564, 581 (1997). When a statute regulates evenhandedly, it will be upheld if it serves a legitimate local purpose with only incidental effect on interstate commerce, unless the burden on interstate commerce is clearly excessive in relation to the local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). A non-discriminatory law might also be found invalid if it has the practical effect of controlling transactions that occur entirely outside the boundaries of the State, *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989), or if the regulated field is one in which the need to comply with different laws in each state would, in itself, constitute an undue burden on interstate commerce. *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 773-774 (1945).

House Bill 635 does not, on its face, discriminate against out-of-state manufacturers. All manufacturers who have sold vehicles with mercury switches in this State are equally subject to the bill's requirements. Nor does any reason appear why the requirements of the bill would, as a practical matter, have a discriminatory effect. In fact, it is less than clear that the bill would place any burden on commerce at all. As was said when the Maine mercury switch removal law was challenged under the Commerce Clause:

[T]he provision does nothing to disrupt interstate markets or the movement of goods destined for interstate markets. It simply requires that certain manufacturers pay a bounty to subsidize the recovery of a toxic substance

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contained in their products so that it will not be released through incineration or other means.

*Alliance of Automobile Mfrs. v. Kirkpatrick*, 2004 WL 305598 (D.Me. 2004) (unreported), *adopting Alliance of Auto. Mfrs. v. Kirkpatrick*, 2003 WL 21684464 (D.Me. 2003) (unreported). To the extent that there is any burden, it would be clearly outweighed by the local interest in reducing mercury emissions from the processing of vehicles. As noted in the bill itself, the "manufacture of new steel from mercury-containing scrap steel is a significant source of mercury pollution." In fact, "[a]utomobile scrapping is the fourth largest source of mercury pollution nationwide, behind waste incineration, coal-fired power plants and commercial/industrial boilers." Comment, *Do You Feel the Breeze? Why the Window of Opportunity to Enact Meaningful Mercury Switch Removal Legislation Is Opening . . . and Closing*, 14 Penn St. Envtl. L. Rev. 85, 91 (2005).<sup>2</sup> Mercury pollution has significant detrimental effects on the environment and on human health. See Testimony by Montgomery County Office of Intergovernmental Relations on House Bill 1263 before the Environmental Matters Committee; Testimony of Takoma Park Committee on the Environment on House Bill 1263 before the Environmental Matters Committee. Thus, any burdens imposed on interstate commerce by House Bill 1263 would clearly not outweigh the local benefits.<sup>3</sup>

It is also our view that the bill does not affect transactions that occur entirely out-of-state. House Bill 1263 applies only to manufacturers who have sold vehicles with mercury switches in the State of Maryland. A manufacturer who sold vehicles elsewhere that ended up in the State is not covered. Thus, while some of the vehicles involved will undoubtedly have been purchased elsewhere, all will be from manufacturers that have intentionally done business in the State, brought vehicles with mercury switches into the State and would likely assume that a fair number of their vehicles with mercury switches would ultimately be scrapped here. Clearly the bill does not have the type of effects found invalid in *Healy*, where regulation in one State had the effect of controlling the price that out-of-state shippers could charge for beer sold in other states.

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<sup>2</sup> Testimony before the committee reflects that vehicles scrapped in Maryland account for as much as 400 pounds of mercury each year. Testimony of Takoma Park Committee on the Environment on House Bill 1263 before the Environmental Matters Committee.

<sup>3</sup> To the extent that vehicles are shipped out of state for processing, there would be environmental and health benefits for those states as well.

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Finally, it is our view that this is not a situation where having differing laws from state to state would in itself impose an undue burden on commerce. As stated in the Maine case, if "other states were to follow Maine's lead on mercury switch recovery, the consequence would be akin to multi-state bottle bills, not the kind of interruption of interstate commerce that might arise if securities transactions could not be engaged in or if every state imposed its own unique regulatory scheme on interstate railroads." *Alliance of Auto. Mfrs. v. Kirkpatrick*, 2003 WL 21684464 (D.Me. 2003) (unreported). In fact, the bill was carefully designed so that a manufacturer currently participating in the National Vehicle Mercury Switch Recovery Program could use its participation in that program as its minimization plan, thus allowing a program currently in place nationwide to satisfy the manufacturer's responsibilities. If the National Vehicle Mercury Switch Recovery Program is terminated, the opportunity for manufacturers to develop their own plan will continue to provide the manufacturers the opportunity to coordinate their Maryland plans with those in other states.<sup>4</sup>

For the above reasons, it is our view that House Bill 1263 does not violate the Commerce Clause, and may be signed into law.

Very truly yours



Douglas F. Gansler  
Attorney General

DFG/KMR/kk

cc: The Honorable Tom Hucker  
The Honorable John P. McDonough  
Joseph Bryce  
Karl Aro

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<sup>4</sup> Mercury switch removal requirements are in place in at least nine other states: Ark. Ann. Code § 8-9-601 *et seq.*; 415 Ill.L.C.S. § 97/1 *et seq.*; Ind. Code § 13-20-17.7-0.5 *et seq.*; Iowa Code Ann. § 455B.801 *et seq.*; N.J. Stat. Ann. § 13:1E-99.82 *et seq.*; N.C. Gen. Stat. § 130A-310.50 *et seq.*; R.I. Gen Laws § 23-24.9-10; S.C. Code Ann. § 44-96-185; Utah Code Ann. § 19-6-1001 *et seq.*