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May 13, 2011

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

**Re: *Senate Bill 638***

Dear Governor O'Malley:

We have reviewed Senate Bill 638, "Video Lottery Terminal Applicants and Licensees - Minority Business Participation - Modification and Sunset Extension" for constitutionality and legal sufficiency. We regret that we cannot recommend that you sign this bill.

Senate Bill 638 extends the sunset on the Minority Business Participation requirements for construction procurement related to the operation of video lottery terminals from July 1, 2011 to July 1, 2018. This provision was adopted by Chapter 4, Laws of the Special Session of 2007, which authorized video lottery operations, subject to the adoption of Article XIX of the Maryland Constitution. In the bill review letter on Senate Bill 3, which was enacted as Chapter 4, we noted that race and gender conscious remedies of the type contemplated by that bill were subject to strict scrutiny, meaning that they will be upheld only if the State can demonstrate a strong basis in evidence that race or gender conscious remedies are necessary to further the State's compelling interest in remedying the effects of identified past discrimination. *Bill Review Letter on Senate Bill 3 of the Special Session of 2007* (November 19, 2007). Moreover, the past discrimination to be remedied must have been identified with some specificity before race conscious remedies will be found to be appropriate. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

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Based on the legal requirements described in the bill review letter, we concluded that:

there must be both a study of procurement practices in the video lottery business in Maryland, and a consideration of race neutral alternatives before a race-conscious remedy such as compliance with the State minority business participation requirements can be implemented.

We further stated that "the goals for any program that is eventually implemented should be based on minority business availability in the markets used by video lottery [licensees], which may be different than those for State or county contracting." We went on to advise specifically that no program be implemented prior to the completion of a study that shows a need for the program, and the consideration or implementation of race neutral alternatives. It is our understanding that no study has been done.

The law in this area has not changed since we wrote our prior advice in 2007. In fact, the Fourth Circuit Court of Appeals recently reiterated the need for the State to specifically identify discrimination to justify a race-based remedy. In *H.B. Rowe Company v. W. Lyndo Tippett*, 615 F.3d 233 (4th Cir. 2010), the Fourth Circuit affirmed that "to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action [is] necessary." *Id.* at 241 (internal citations deleted). The *Rowe* court further required that such evidence be "corroborated by significant anecdotal evidence of racial discrimination." *Id.* Ultimately, the court in that case carefully examined the disparity study and anecdotal evidence presented by the State and found that it supported some portions of the minority business participation program but not others. Those not found to be supported were found invalid. *Id.* at 256-257.

No study has been performed nor is there anything in the bill file to support the need for the program or the goals that have been adopted by requiring compliance with State and local plans. Courts have consistently required that a showing of identified discrimination and the strong basis in evidence for the necessity of race or

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gender based remedial action be presented to the legislative body at the time that a program is adopted. *Rothe Development Corporation v. Department of Defense*, 545 F.3d 1023, 1039 (Fed. Cir. 2008). For these reasons, if you choose to sign this bill, it should not be implemented unless and until a study validates the need for such a remedy and a program narrowly tailored to reflect the results of that study is enacted.

Very truly yours,  


Douglas F. Gansler  
Attorney General

DFG/KMR/kk

cc: The Honorable Joanne C. Benson  
The Honorable John P. McDonough  
Joseph Bryce  
Karl Aro