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May 6, 2013

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

***Re: House Bill 1313 and Senate Bill 942, "State Board of Physicians – Consultation, Qualification for Licensure, License Renewal, and Representation to the Public"***

Dear Governor O'Malley:

We have reviewed and hereby approve House Bill 1313 and Senate Bill 942, which are identical companion bills concerning the licensure of physicians in the State of Maryland. We write to identify a potential ambiguity associated with a provision allowing for licensure of a physician who has failed the licensure examination three or more times. We also note below a minor deficiency in the title of the bills.

House Bill 986 and Senate Bill 942 make certain modifications to the licensure requirements for practicing medicine in Maryland. Among other changes, the legislation would amend § 14-307 of the Health Occupations ("HO") Article, which provides that, "[e]xcept as otherwise provided in this title," an applicant for a license to practice medicine "shall pass an examination required by the Board [of Physicians] under this subtitle," and which also currently states, at subsection (g), that "[a]n applicant who has failed the [licensure] examination 3 or more times shall submit evidence of having completed 1 year of additional clinical training in an approved postgraduate training program following the latest failure."

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The Board has historically interpreted subsection (g) of HO § 14-307 to impose special requirements on an applicant who failed the licensure examination three times but who ultimately passed the exam – *not* to establish a special means for obtaining a license *without* passing the exam. In regulations implementing HO § 14-307, the Board generally requires, as a condition of licensure, that an applicant “[a]chieve a passing score on all steps of the United States Medical Licensing Examination (USMLE) with all the passing scores being achieved within a 10-year period ... and *with no more than three fails on any step.*” COMAR 10.32.01.03(G)(1)(g) (emphasis added). The Board permits those applicants who failed three times on any part, step, or component of an examination to obtain a license, under certain defined circumstances, by “submit[ting] evidence of having successfully completed 1 year of accredited postgraduate medical education” since the last examination failure, COMAR 10.32.01.03(G)(3), but it is our understanding that the Board has only done so where the applicant also passed the exam. Further implementing HO § 14-307(g), the Board’s regulations provide that, “on a case-by-case basis, the Board may consider licensure of an applicant *who has passed one of the examinations* ... with more than three fails on one or more parts, levels, steps or components, if the applicant can demonstrate, to the satisfaction of the Board” that the applicant has ten years of clinical experience meeting certain additional criteria, or holds a certification from certain specified professional boards. COMAR 10.32.01.03(G)(7) (emphasis added).

House Bill 1313 and Senate Bill 942 amend HO § 14-307(g) in a manner that may add ambiguity as to the criteria for licensure of an applicant who has failed the examination three or more times. The bills would repeal the requirement that such an applicant “shall submit evidence of having completed 1 year of additional clinical training in an approved postgraduate training program following the latest failure” – a requirement that has been permissibly interpreted as being “additional” *both* to the applicant’s prior clinical training *and* to achieving a passing score on the examination. Section 14-307(g) would instead provide that an applicant who has failed three or more times “may qualify for a license if the applicant: (1) Has successfully completed 2 or more years of a residency or fellowship ... (2) (i) Has a minimum of 5 years of clinical practice of medicine [meeting certain additional criteria]; or (3) Is board certified [as elsewhere defined in the legislation].” By omitting the requirement that the applicant undertake “1 year of additional clinical training” and substituting instead a provision stating that a three-times-failed applicant with certain clinical experience or professional credentials “may qualify for a license,” the bills may add ambiguity as to whether such an applicant is also required to pass the examination, notwithstanding the historical interpretation of subsection (g).

The legislative history on HB 1313 and SB 942 does not provide sufficient clarity to allow us to ascertain the legislature's intent. Testimony from the Board of Physicians on both bills describes them as giving the Board discretion to consider certain experience in granting an applicant a medical license "as long as the applicant has passed all required examinations, even if not passed within the specified time period." While that description most accurately described SB 942 as introduced, before it was amended to conform to HB 1313, it does demonstrate the Board's intent that passage of the examination still be required. The House Floor Report simply describes that portion of HB 1313 as authorizing "an applicant for a physician license who has failed a specified examination three or more times to qualify for a license underspecified circumstances." The Senate Floor Report on SB 942 describes the relevant amendments as striking the bill in its entirety and instead specifying ... the circumstances under which a physician who has failed an examination three or more times may still be allowed to practice in the State." Finally, the Fiscal and Policy Note on SB 942, as amended, states that the bill repeals the requirement for clinical training within one year following the latest failure "and instead authorizes such an applicant to qualify for a license if the individual" meets one of the three criteria specified in the bill and listed in the previous paragraph.

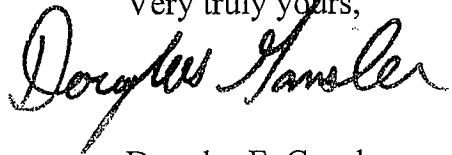
While the legislative history is not particularly instructive, it is our view that, given the Board's interpretation and the fact that the amended provision, by stating only that the applicant "*may* qualify" for a license under the circumstances described, would confer discretion on the Board, the Board could defensibly continue to interpret subsection (g) as requiring passage of the examination. Nevertheless, we strongly recommend that consideration be given to amending subsection (g) in the next legislative session to clarify the nature of the requirements imposed on an applicant who has failed the licensure examination three or more times.

We also note a minor deficiency in the title of House Bill 1313 and Senate Bill 942. In addition to the amendment discussed above, the bills would amend the provisions of the Medical Practice Act allowing a physician licensed in another state to engage in "consultation" with a licensed Maryland physician, *see* proposed HO § 14-302(2), and would add provisions to the Act allowing such a physician to engage in "clinical training" in the State, *see* proposed HO § 14-302.1. The title of the bills refers to new provisions for "certain consultations" and does not expressly refer to "clinical training." The provisions for "consultation," however, themselves refer to the requirements for "clinical training," *see* proposed HO § 14-302(2)(ii), and we view the reference to "certain consultations" to be sufficient for constitutional purposes to encompass, and give notice to a reader, of the provisions for "clinical training."

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With these comments, we find House Bill 1313 and Senate Bill 942 to be constitutional and legally sufficient.

Very truly yours,

A handwritten signature in cursive script that reads "Douglas F. Gansler". The signature is written in black ink and is positioned above the typed name.

Douglas F. Gansler  
Attorney General

DFG/DF/kk

cc: The Honorable Edward R. Reilly  
The Honorable Bonnie L. Cullison  
The Honorable John P. McDonough  
Stacy Mayer  
Karl Aro