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May 11, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 72, "Budget Reconciliation and Financing Act of 2015"

Dear Governor Hogan:

We have reviewed and hereby approve House Bill 72, the Budget Reconciliation and Financing Act of 2015 ("BRFA"), for constitutionality and legal sufficiency. While we approve the bill, we write to address two amendments to the bill that may raise noteworthy constitutional concerns.

The first, which both amends § 4-306 of the Transportation Article and adds Section 25 to the bill, establishes financial parameters, consistent with the Maryland Transportation Authority's ("MdTA") 2016-2020 financial forecast, to prevent any problems associated with a large decrease in toll revenues.¹ The amendment to § 4-306 reduces, for a five year period, the statutory limit on the aggregate outstanding and unpaid principal balance of MdTA revenue bonds. Section 25 prohibits MdTA from supplementing the Transportation Authority Fund with funds appropriated or transferred from the Transportation Trust Fund ("TTF") or with funds transferred from any other source; requires MdTA to spend a minimum amount annually for operating and capital expenses; and requires MdTA to maintain a certain level of funds for debt service. As MdTA is a non-budgeted agency, and as the predominant subject matter of these amendments is toll revenue, not tax revenue, we have considered whether this amendment to the BRFA violates the single-subject rule of Article III, § 29 of the Maryland Constitution.

¹ Moody's Investors Service, a credit rating agency, recently cited a decline in the debt service coverage ratio below the targeted level due to a toll decrease as a potential reason MdTA's credit rating could be downgraded. See "Moody's Affirms Aa3 on Maryland Transportation Authority's Transportation Facility Revenue Bonds," *Global Credit Research*, April 3, 2015.

The Court of Appeals has said that an act meets the single-subject requirement if its provisions are “germane” to the same subject matter. *Migdal v. State*, 358 Md. 308, 317 (2000); *Porten Sullivan Corp. v. State*, 318 Md. 387, 407 (1990). “Germane” means “in close relationship, appropriate, relative, [or] pertinent.” Two matters can be regarded as a single subject because of a direct connection between them or because they each have a direct connection to a broader common subject. When single-subject questions have arisen in the context of the Budget Reconciliation and Financing Act, this Office has considered whether the various provisions of the bill deal with the single subject of adjusting the finances of State and local government. See Bill Review Letter on Senate Bill 172 of 2014 from Attorney General Douglas F. Gansler, dated May 14, 2014 (the purpose of the BRFA is “to balance the State operating budget and provide for the financing of State and local government”); Letter to William S. Ratchford, II from Richard E. Israel, dated April 1, 1993 (“one-subject of adjusting the finances of State and local government”); and Letter to the Honorable Christopher Van Hollen, Jr. from Robert A. Zarnoch, dated October 11, 1991 (the single subject of “budget balancing”).

The amendment to § 4-306 of the Transportation Article and the addition of § 25 to the BRFA appear to address perceived concerns about MdTA’s ability to access funding from the TTF or general fund to finance a reduction in toll rates charged at MdTA facilities. Section 25 restricts MdTA’s ability to supplement toll revenues with funds from the TTF or any other source, and it establishes certain limitations, in the form of minimum operational standards that are consistent with MdTA’s current financial forecast, to ensure that MdTA does not otherwise attempt to pay for a toll rate decrease by substantially reducing the amount of cash it maintains on hand for debt service or the amount it spends on its capital or operating programs. As an important purpose of the amendment appears to be the preservation of the TTF and other State funds, there arguably is a nexus between the amendment and the single subject of balancing the State budget and providing for the financing of State and local government. By restricting MdTA’s ability to use State funds to finance a reduction in toll rates, the amendment seeks to preserve those funds for budgeted State programs.²

² To the extent that funds have been lawfully appropriated from the State Treasury to an agency, the funds may be expended. Moreover, no statute can limit the constitutional power of the Governor or General Assembly in the appropriation process. 62 *Opinions of the Attorney General* 106, 107-108 (1977). *Id.* Here, however, the only limitation on the Governor’s authority to appropriate funds relates to TTF funds. It would appear the Governor could still include a general fund appropriation in the budget bill, but he could not appropriate funds from the TTF or transfer funds from any source.

We recognize, however, there is an argument that the minimum spending levels in § 25(1) and (2) of the amendment are inconsistent with the purpose of the BRFA. Spending requirements in the BRFA, even those that are not technically constitutional spending mandates, appear to be contrary to the single subject of balancing the budget and adjusting the finances of State and local government.³ On the other hand, when viewed in the context of the amendment's other provisions, the minimum spending requirements in § 25(1) and (2) appear to serve a function that is related to the amendment's purpose of preserving the TTF and other State funds. Faced with the restriction on using State funds to finance a reduction in toll rates, MdTA arguably could seek to finance a toll reduction by making cuts to its operating and capital programs or by reducing its debt service coverage. The amendment's spending limits address this concern by preventing MdTA from making substantial changes that are inconsistent with the spending and debt service levels specified in its current financial forecast. Thus it is our view that the minimum spending requirements in § 25(1) and (2) are not clearly unconstitutional, although they do raise legitimate single-subject concerns and would be the hardest provisions in the BRFA to defend. Accordingly, when read in its entirety, we cannot conclude that the amendment is "clearly unconstitutional."⁴

The other amendment to the BRFA that may raise a constitutional concern relates to the State and county earned income tax credit set forth in § 10-704 of the Tax-General Article. Under § 10-704, an eligible individual may claim a nonrefundable State earned income tax credit in an amount equal to 50% of the individual's federal earned income tax credit⁵ or the individual's State income tax liability for the tax year, whichever is less. In

³ We note also that the amendment was adopted in Conference Committee. Amendments that are adopted in such a way as to avoid normal review and consideration may be vulnerable to a single-subject challenge. *See, e.g., Migdal v. State*, 358 Md. at 322.

⁴ The Office of the Attorney General "applies a 'not clearly unconstitutional' standard in reviewing bills passed by the General Assembly prior to their approval or veto by the Governor." 93 Op. Att'y Gen. 154, 161 n.12 (citing 71 Op. Att'y Gen. 266, 272 n.12 (1986)). "This standard of review reflects the presumption of constitutionality to which statutes are entitled and the Attorney General's constitutional responsibility to defend enactments of the Legislature, while also satisfying the duty to provide the Governor with our best legal advice." *Id.*

⁵ The amount of the federal earned income tax credit varies depending on the taxpayer's household income and the number of qualifying children. As an example, the maximum amount of the federal earned income tax credit that may be claimed in tax year 2015 by a taxpayer with two qualifying children is \$5,548. *See* 2015 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates, *Internal Revenue Service*.

the event the nonrefundable credit would reduce a taxpayer's liability to zero, the taxpayer may claim a refundable State earned income tax credit equal to 25.5% of the federal credit, minus any pre-credit State income tax liability.⁶ An eligible individual also may claim a nonrefundable earned income tax credit against the county income tax, and a county may provide, by law, a refundable county earned income tax credit.⁷

As introduced, the BRFA amended § 10-704 so as to limit eligibility for the State refundable earned income tax credit to Maryland residents. The bill was then amended to similarly limit eligibility for the State nonrefundable earned income tax credit, as well as both the refundable and nonrefundable county earned income tax credit, to Maryland residents. While we believe the provisions limiting the *refundable* State and county earned income tax credit to Maryland residents are on sound constitutional footing, those provisions limiting the nonrefundable earned income tax credit raise constitutional concerns.

The Privileges and Immunities Clause, the Equal Protection Clause,⁸ and the Commerce Clause of the U.S. Constitution limit a state's authority to apply different tax rules to nonresidents. See *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (quoting *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 79 (1920)) ("Where nonresidents are subject to different treatment, there must be 'reasonable ground for ... diversity of treatment.'"); *Zobel v. Williams*, 457 U.S. 55, 60 (1982) (generally a law will survive equal protection scrutiny "if the distinction it makes rationally furthers a legitimate state purpose"); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) ("the Commerce Clause prohibits ... measures designed to benefit in-state economic interests by burdening out-of-state competitors").

⁶ The amount of the State refundable earned income tax credit is set to gradually increase from 25.5% of the federal earned income tax credit in tax year 2015 to 28% of the federal earned income tax credit in tax year 2018. TG § 10-704(b)(2)(ii).

⁷ No Maryland county has established a refundable county earned income tax credit, though Montgomery County has a grant program that operates in a similar fashion. See Fiscal Note to House Bill 72 – Revised, March 24, 2015, at 12.

⁸ The equal protection guarantees embodied in Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the U.S. Constitution generally are considered to be *in pari materia*. See *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 640 (1983) (the State and federal equal protection guarantees "generally apply in like manner and to the same extent; nevertheless, the two provisions are independent of each other so that a violation of one is not necessarily a violation of the other").

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As applied to the refundable earned income tax credit, the effect of the residency requirement is that only Maryland residents may receive a tax refund payment. Thus the State is ensuring that State money is used to promote the purpose of the earned income tax credit program, i.e., the safety and welfare of low-income Maryland residents. However, in the case of the nonrefundable earned income tax credit, the constitutional argument for the different tax treatment is not as strong. In that case, rather than precluding a nonresident from claiming a tax refund, the residency requirement prohibits a nonresident taxpayer from applying the earned income tax credit to reduce his or her Maryland income tax liability. While we believe this latter scenario raises constitutional concerns, we do not believe the amendment is clearly unconstitutional.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brian E. Frosh".

Brian E. Frosh
Attorney General

BEF/DS/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro