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April 21, 2016

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

RE: House Bill 437 and Senate Bill 537, "Department of Health and Mental Hygiene – Prescription Drug Monitoring Program – Modifications"

Dear Governor Hogan:

We have reviewed Senate Bill 537 and House Bill 437, identical bills entitled "Department of Health and Mental Hygiene - Prescription Drug Monitoring Program - Modifications," for constitutionality and legal sufficiency. While we approve the bills, we write to discuss a potential constitutional problem raised by a contingency in the bills.

Section 1 of the bills provides that an authorized provider who prescribes certain controlled dangerous substances must be registered with the Prescription Drug Monitoring Program before obtaining a new or renewal registration to dispense a controlled dangerous substance or to conduct research with a controlled dangerous substance. Section 1 is contingent on a determination by the Secretary of the Department of Health and Mental Hygiene ("the Secretary"), made in consultation with the Advisory Board on Prescription Drug Monitoring, the Joint Committee on Behavioral Health and Opioid Use Disorders, and stakeholders, that the requirement of registration with the Prescription Drug Monitoring Program will not adversely affect or delay the issuance of registrations to dispense a controlled dangerous substance or to conduct research with a controlled dangerous substance and that the process for obtaining the registration to dispense or conduct research is capable of delivering the registrations in a timely manner.

Section 3 of the bills requires, with some exceptions, a prescriber to request prescription monitoring data for a patient before initiating a course of treatment for the patient that includes prescribing or dispensing an opioid or a benzodiazapine, and to continue to do so every 90 days while the treatment continues. Section 3 also requires pharmacists to request prescription monitoring data prior to dispensing a monitored prescription drug in certain circumstances.

Section 3 is contingent on a determination by the Secretary, made in consultation with the Advisory Board on Prescription Drug Monitoring, the Joint Committee on Behavioral Health and Opioid Use Disorders, and stakeholders, that the Prescription Drug Monitoring Program is capable of achieving a reasonable standard of access and usability by prescribers and pharmacists, and that:

> requiring a prescriber to request prescription monitoring data for a patient in accordance with § 21-2A-04.2 of the Health-General Article, as enacted by Section 3 of this Act, is important to protect public health and promote good patient care.

It is well-established that the General Assembly has broad power to adopt contingent legislation. It is common practice in the General Assembly to make the effectiveness of one bill contingent on the passage or failure of another bill, approval of or funding from the federal government, or the conclusion of litigation. *See Department of Legislative Services, Legislative Drafting Manual* 142-145 (2016). The Court of Appeals has approved legislation that was contingent on voter approval of a constitutional amendment. *Smigiel v. Franchot*, 401 Md. 302 (2009).

Contingent legislation is also permissible where the legislative body has determined the conditions under which the law should take effect, but lacks the capability to determine when those factors are present, and thus, delegates that authority to an executive branch official. Thus, when Congress wanted the imposition of customs duties on articles of imported merchandise to equal the difference between the cost of producing the articles in a foreign country and the cost of producing and selling like articles in the United States, it could make that determination, and delegate to the President the power to set the actual duties. *Hampton v. United States*, 276 U.S. 400, 407 (1928). Similarly, such authority can be given to local authorities to determine such matters as the proper time to have a closed season for fishing in certain waters, where that determination depends on "complex and variant conditions that affect the taking of fish." *Ex Parte Lewis*, 101 Fla. 624, 633, 135 So. 147 (Fla. 1931); *see also Cargo of the Brig Aurora v. United States*. 11 U.S. (7 Cranch) 382 (1813) (addressing statutory restrictions on trade with Great Britain to be lifted when President declared by proclamation that Great Britain had ceased to violate the neutral commerce of the United States); *Mayor of Baltimore v. Clunet*, 23 Md 449, 469 (1865) (involving ordinance not to take effect until certain pending mandamus cases are dismissed).

Most of the determinations the bills require to be made by the Secretary raise no constitutional concerns. These include the determinations with respect to the ability of the systems now in place to issue registrations for the Prescription Drug Monitoring Program without delaying the issuance of registrations to dispense controlled dangerous substances and to perform research using controlled dangerous substances, as well as to provide the

prescription monitoring data that Section 3 requires prescribers and pharmacists to obtain. These are clearly matters that are more efficiently determined by the Secretary than by the General Assembly and are equally clearly within the recognized authority of the General Assembly to make the effectiveness of legislation contingent on certain determinations. Therefore, these requirements raise no constitutional issue.

On the other hand, the delegation of purely legislative power to a commission or other entity in the executive branch is invalid. *See*, *e.g.*, *Hampton v. United States*, 276 U.S. 400, 408 (1928); *Mayor of Baltimore v. Clunet*, 23 Md. 449, 468 (1865). A statute cannot be made contingent on the determination of an official of the executive branch, on the basis of discretion which has no standards. Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 364 (2002). Thus, in 96 *Opinions of the Attorney General* 139, 145-147 (2011), Attorney General Douglas F. Gansler opined that, in light of the delegation doctrine, a law would be constitutionally suspect if it authorized the Secretary of Natural Resources to approve local laws that would otherwise be preempted by State law, where the statute provided no criteria to guide the Secretary's decision.

The determination of whether requiring a prescriber to request prescription monitoring data is "important to protect public health and promote good patient care," comes very close to the line of what is reserved to the legislature, that is to decide what is best for the health, safety, and welfare of the State. We cannot say, however, that it is clearly unconstitutional. Moreover, in the event the provision were found to be unconstitutional, it is our view that this portion of the contingency would be deemed severable, and the statute could take effect without this determination.

Sincerely,

Brian E. Frosh
Attorney General

BEF/KMR/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Warren Deschenaux