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May 20, 2021

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

RE: House Bill 1210, "Corporate Diversity – Board, Executive Leadership, and Mission

Dear Governor Hogan:

We have reviewed and hereby approve for legal sufficiency and constitutionality House Bill 1210. Nevertheless, we write to advise about the bill's implementation to mitigate against a risk that should this bill be legally challenged, a reviewing court would find it violates the Equal Protection Clause of the U.S. Constitution or Maryland's Constitution.[1]

House Bill 1210 requires defined entities in the State to demonstrate either (1) membership of "unrepresented communities" in their board or executive leadership; or (2) support for "underrepresented communities" in their mission in order to qualify for State capital grants, tax credits, or contracts worth more than $1.0 million. "Underrepresented community" is defined in the bill as "a community whose members

[1] The Court of Appeals has stated that with regard to the Equal Protection Clause of the U.S. Constitution, "the decisions of the United States Supreme Court are not only controlling as to our interpretation and application of the equal protection clause of the fourteenth amendment but also persuasive as we undertake to interpret Article 24 [of Maryland's Declaration of Rights]." *Attorney General v. Waldron*, 289 Md. 683, 704-705 (1981).

self-identify: (i) as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native; or (ii) with one or more of the racial or ethnic groups listed in item (i) of this paragraph." The bill also requires the Department of Commerce and the Governor's Office of Small, Minority, and Women Business Affairs ("GOSBA") to develop a State equity report that compiles diversity data relating to corporate boards, leadership, and missions. An entity that "(i) has an annual operating budget or annual sales less than $5,000,000; and (ii) does not qualify for a state benefit is excluded" from the bill's requirements. Additionally, the bill requires an entity subject to the foregoing that submits an annual report to the State Department of Assessments and Taxation to submit related diversity data. The Department of Commerce and GOSBA are directed to adopt regulations to implement the bill.

If the bill is implemented to require entities to have a certain racial composition on its board or executive leadership in order to receive a State benefit, an equal protection issue would be raised. The use of race in a government program must meet the requirements of the Equal Protection Clause of the U.S. Constitution. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. A government program that uses a race classification is constitutional only if it meets the strict scrutiny standard, which requires that the program be narrowly tailored to support a compelling government interest. *City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). "Because a race or gender-conscious program is constitutionally suspect, the Supreme Court has essentially put the burden on a government entity with such a program to justify the program with findings based on evidence." 91 *Opinions of the Attorney General* 181, 183 (2006). *See also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 784 (2007) ("The government bears the burden of justifying its use of individual racial classifications.").

In order to qualify for State capital grants, tax credits, or contracts worth more than $1.0 million, House Bill 1210 requires defined entities to demonstrate either (1) membership of "unrepresented communities" in their board or executive leadership; or (2) support for underrepresented communities in the entity's mission. The term membership is not defined, but presumably it means that the requirement can be met by showing at least one member on the entity's board or in its executive leadership self-identifies as a member of an underrepresented community. Moreover, even if that standard cannot be met, House Bill 1210 allows the entity to qualify by showing support for underrepresented communities in the entity's mission. We recommend that the regulations adopted by the Department of Commerce and GOSBA consider a number of race neutral

efforts an entity could take that would make it compliant with the second qualifying requirement.[2]

A number of examples of race neutral measures that promote corporate diversity are available. For example, the Security and Exchange Commission ("SEC") launched a self-assessment tool for assessing the diversity policies and practices of entities regulated by the agency. The assessment was used to provide information to the SEC for its Diversity Assessment Report, which was the agency's implementation of the "Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies" issued by the SEC and five other federal financial regulatory agencies on June 10, 2015.

According to the information collected by the SEC from the Diversity Assessment Reports submitted to it, regulated entities are using a variety of methods to support and promote diversity. These efforts include: issuing written diversity and inclusion policies; having a senior level official with experience in diversity and inclusion who oversees and directs the firm's diversity and inclusion efforts; engaging in outreach to minority and women organizations as well as to educational institutions serving significantly or predominantly minority and women student populations; evaluating performance under the entity's workforce diversity and inclusion programs; including diversity and inclusion objectives in performance plans; considering supplier diversity in its procurement and business practices; and publishing information about its diversity and inclusion efforts on its website.[3] Another example is "the Rooney Rule" used by the National Football League to address the significant lack of minority head coaches in the League. The rule requires teams to interview at least one minority candidate for a vacant head coach position. At least one analysis showed the Rule increased diversity among coaches in the League.[4]

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[2] Even if the State had sufficient evidence of discrimination to establish the factual predicate required to impose race-based remedial measures, the Supreme Court has made clear that the State also would have to show that the race-based equity criteria is narrowly tailored to accomplish the State's asserted purpose. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

[3] *See* SEC_Diversity_Assessment_Report_Year_One_Summary Report.pdf.

[4] *See* dubois-rooney-0310-21.png (575×522) (fivethirtyeight.com).

In summary, so long as the implementing regulations do not require a race-based quota on the board or in executive leadership in order for an entity to receive a State benefit, the bill is not clearly unconstitutional.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber