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May 15, 2008

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

RE: Senate Bill 606 and House Bill 1277

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 606 and House Bill 1277, identical bills entitled "State Government - Brokerage and Investment Management Services - Use of Minority Business Enterprises." We write to discuss the proper interpretation and application of the requirements of the bills.

Senate Bill 606 and House Bill 1277 require four State agencies, Maryland Automobile Insurance Fund, Injured Workers' Insurance Fund, the Treasurer and the State Retirement and Pension System, to attempt to use minority business enterprises ("MBEs") for brokerage and investment management services "to the greatest extent feasible." This requirement is modified in each case by the requirements that the actions be "consistent with minority business purchasing standards applicable to units of State government," and "consistent with the fiduciary duties" of the affected agency. The bills further state that the agencies shall "undertake measures to remove any barriers that limit full participation by minority business enterprises," use a wide variety of media "to provide notice to a wide and varied range of potential providers about the brokerage and investment management services opportunities," and that the Governor's Office of Minority Affairs shall "develop guidelines to assist ... in identifying and evaluating qualified minority business enterprises in order to help the fund achieve the objective for greater use of minority business enterprises."[1]

[1]In the absence of a disparity study showing discrimination in this area, these guidelines should be race-neutral.

As we have previously advised on other bills, the Supreme Court has firmly established that race-conscious affirmative action programs are subject to strict scrutiny and may be upheld only if they are narrowly tailored to achieve a compelling public interest. *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). While it is established that the State has a compelling interest in remedying the effects of past discrimination, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. ____, 127 S.Ct. 2738 (2007), a State must also demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action is necessary to further that interest. This evidence must identify discrimination in the relevant industry, showing a disparity between the number of available minority contractors and the utilization by the State. *Croson*, 488 U.S. at 500-506. Moreover, the narrow tailoring aspect of the test requires "serious, good faith consideration of workable race-neutral alternatives." *Parents Involved*, 127 S.Ct. at 2760.

Read literally, the requirement that the agencies use minority business enterprises "to the greatest extent feasible," would require that an MBE be favored in contracting regardless of the qualifications of other bidders, the standards ordinarily imposed by the agency, or the percentage of brokerage and investment management opportunities that have already been awarded to MBEs under this preference. We are not aware of any disparity study in this area that could justify such an outright race-conscious preference. Moreover, even if there were such a study, a simple requirement that MBEs be used "to the greatest extent feasible" would not likely be found to be narrowly tailored to any findings of that study. In context, however, it is clear that it should not be read to require an outright race-conscious preference.[2]

First, it is important to note that while the bills each state that the agencies are to act in a manner "consistent with minority business purchasing standards ... under the State Finance and Procurement Article," it does not actually make them subject to those provisions. The term "consistent with" does not necessarily mean "compliant with." *Trail v. Terrapin Run, LLC*, 174 Md. App. 43, 56-57 (2007) *aff'd.* 403. Md. ___ (March 11, 2008). Thus, the bills should not be read to make the specific goals or certification procedures established in State Finance and Procurement Article § 14-301, *et seq.* applicable to procurement of brokerage and investment management services. Second, the requirement that the agencies act in a manner that is consistent with their fiduciary duties indicates that the agencies are not to ignore the existing professional standards that protect State funds. This would include avoiding action likely to lead to meritorious actions against the funds.

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[2] In interpreting a statute it is necessary to consider it in the context of the statutory scheme of which it is a part. *Centre Insurance Company v. J.T.W.*, 397 Md. 71, 85 (2007). Interpretations that avoid constitutional issues are also favored. *Bank of America v. Stine*, 379 Md. 76, 90 (2003).

Most importantly, the specific actions required by the bill, the elimination of barriers and the broad dissemination of information about brokerage and investment management services opportunities, are race-neutral. *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996); *Coral Const. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991). The bills themselves reflect this fact, as they state the purpose of the notice requirement is "to provide notice to a broad and varied range of potential providers."

For these reasons, we believe that Senate Bill 606 and House Bill 1277 do not require a race conscious program subject to strict scrutiny, but they are more appropriately viewed as requiring race-neutral measures to ensure fair and equitable procurement of brokerage and investment management services. If the data collected under the bills from the reports of the agencies and the identification of qualified MBEs should provide evidence that there is a disparity and these race-neutral measures are not succeeding in alleviating this disparity, a race-conscious program may be appropriate in the future.

Very truly yours,

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Attorney General

DFG/KMR/kk

cc: The Honorable Catherine E. Pugh
The Honorable Jay Walker
The Honorable Dennis C. Schnepfe
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