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April 29, 2009

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

*Re: House Bill 879*

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of House Bill 879, which provides authority for and direction to the Board of County Commissioners for Frederick County to divest from Iran and Sudan. The divestment scheme of House Bill 879 grants the Trustees authority to divest investments in companies doing business in Iran and Sudan because of their oppressive governments. Because the bill relates to foreign countries, we have analyzed whether it is preempted under the Supremacy and Foreign Commerce Clauses of the United States Constitution. In our view, House Bill 879 is constitutional and not preempted by federal law.

Nothing in House Bill 879 conflicts with federal law regarding Iran and Sudan; thus, it is not preempted. Federal law authorizes state and local governments to divest assets in companies that conduct business operations in Sudan. Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516, 110th Cong., 1st Session (2007). Therefore, the portions of House Bill 879 addressing divestment in Sudan are clearly constitutional.

Although federal law is silent regarding divestment in Iran, in our view House Bill 879 does not present an unconstitutional interference with the federal government's power to conduct foreign affairs. The leading case on the subject dealt with divestitures from Sudan prior to enactment of the recently enacted federal act. *National Foreign*

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*Trade Council v. Giannoulis*, 523 F. Supp. 2d 731, 742 (N.D. Ill. 2007). To determine whether a local law is preempted by the federal government's federal affairs power, the court in *Giannoulis* noted that the appropriate test is whether the local law "stands as an 'obstacle to the accomplishment and execution of the full purposes and objectives'" of the federal government with regard to foreign policy. *Id.* at 742 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)). In *Giannoulis*, the court noted that while federal law at the time "expressly restrict[ed] how companies can and cannot do business in Sudan, it [was] silent regarding divestment of holdings connected with Sudan." *Id.* The court went on to determine that provisions of the Illinois Sudan Act regarding amendments to the Illinois Pension Code regarding divestment were not an unconstitutional interference with the federal government's power to conduct foreign affairs. *Id.* at 746.

House Bill 879 does not stand as an obstacle to the federal government's policy on Iran. The bill will have no more than an incidental or indirect effect on Iran, and thus it does not interfere with the Foreign Affairs Power of the federal government. First, the bill is narrowly drafted to apply only to companies that have made large investments that directly or significantly contribute to the development of Iran's petroleum or natural gas resources, thus reducing the potential impact of divestment pursuant to House Bill 879. Furthermore, the bill provides that, in carrying out divestment activities, the Trustees must abide by any future federal law or regulation that may be enacted addressing divestment in Iran and Sudan. Therefore, the provisions addressing divestment in Iran, like the Sudan provisions, are constitutional.

Moreover, we believe House Bill 879 does not violate the Foreign Commerce Clause because the Board of County Commissioners is acting as a market participant rather than a regulatory authority with regard to the pension it funds and administers. Although this market participant exception is a standard feature of domestic Commerce Clause jurisprudence,<sup>1</sup> it has not yet been applied to the Foreign Commerce Clause. Nonetheless, we perceive no basis for distinction. Thus, House Bill 879, by providing authority to the Board regarding the pension funds it administers, is authorizing them to act as a market participant not as a regulator, which is not clearly unconstitutional.

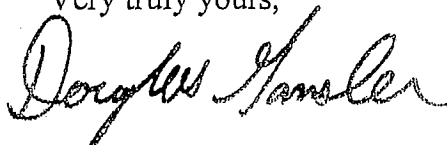
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<sup>1</sup> "Since state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants, evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 685 (1999).

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In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of House Bill 879.

Very truly yours,

A handwritten signature in cursive script, reading "Douglas F. Gansler". The signature is written in dark ink and is positioned above the printed name and title.

Douglas F. Gansler  
Attorney General

DFG/SBB/kk

cc: The Honorable John P. McDonough  
Joseph Bryce  
Karl Aro