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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY
May 15, 2009

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

Re: Senate Bill 72, "Higher Education - Institutions of Postsecondary Education - Exempt Institutions"

Dear Governor O'Malley:

We have reviewed Senate Bill 72 and have concluded that, at least in part, the bill presents an unconstitutional restraint on truthful commercial speech and, therefore, violates both the First Amendment to the United States Constitution and Article 40 of the Maryland Declaration of Rights. Therefore, we must respectfully recommend that you veto the bill.

Although most institutions of postsecondary education in Maryland must receive a certificate of approval from the Maryland Higher Education Commission ("MHEC"), MD. ANN. CODE, EDUC. ("ED"), §11-202(a), there are certain institutions that may operate without such a certificate of approval,¹ namely:

- (1) A nonpublic institution of higher education operating under a charter granted by the General Assembly;
- (2) A religious degree-granting institution which certifies, in accordance with procedures established by the Commission, that it:
 - (i) Is founded and operated by a church or organization of churches as an integral part of the religious ministry of that church or organization;

¹ For ease of reference, institutions that may operate without a certificate of approval from MHEC are described herein as "exempt institutions" although that phrase does not appear in the law.

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- (ii) Offers sectarian instruction only designed for and aimed at persons who hold or seek to learn particular religious faiths or beliefs of churches or religious organizations, and provides only educational programs for religious vocations; and
- (iii) States on the diploma or degree the religious nature of the degree; and

(3) A church or other religious institution offering a postsecondary instructional program leading to a diploma or certificate only if designed for and aimed at persons who hold or seek to learn the particular religious faith or beliefs of that church or religious organization, and providing only educational programs for religious purposes.

ED §11-202(c). MHEC reviews and approves requests by institutions to be exempt from the certificate of approval process. COMAR 13B.02.04.02(B).

MHEC provided written testimony to the legislative committee documenting that it has received numerous complaints about misleading advertising by some of these exempt institutions. Apparently, certain exempt institutions “improperly explain, advertise and/or document their exempt status resulting in an assumption that the program is accredited.” For example, the Maple Springs Baptist Bible College & Seminary of Capitol Heights, Maryland states on its website that

By authorization of the Maryland State Higher Education Commission, the Seminary grants the Master of Arts in Biblical Studies, the Master of Arts in Christian Counseling, the Master of Arts in Church Administration, the Master of Religious Education, the Master of Divinity, and the Doctor of Ministry.

See <http://www.msbbcs.edu/index.htm> (last visited April 28, 2009). Similarly, The Family Bible Institute, College, Seminary and University in Baltimore, Maryland, claims that the “MARYLAND HIGHER EDUCATION COMMISSION recognizes that Family Bible Institute, College, Seminary & University qualifies for the status of a religious degree granting institution.” *See <http://www.familybibleministries.org/accred.html>* (last visited April 28, 2009). While the Maple Spring’s advertisement appears to be affirmatively misleading in claiming MHEC “authorization,” the Family Bible Institute’s advertisement seems to suggest that MHEC has evaluated the school’s qualification and granted it status as

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a religious degree granting institution. MHEC testified that in the last 10 months, it has received complaints about seven different exempt institutions, which is more than ten percent of the total number of exempt institutions in the State. The problem with such misleading statements, according to MHEC, is that “[s]tudents enroll believing that their credit hours will enable them to transfer to an accredited institution or to gain employment in any sector with their degree. Such is not the case.”

In an effort to prevent these misleading advertisements, MHEC proposed Senate Bill 72, which was introduced as departmental legislation by the Chair of the Education, Health, and Environmental Affairs Committee. The bill prohibits an exempt institution (except those chartered by the legislature) from:

- (1) mak[ing] any reference to approval or exemption by the Commission on any certificate, diploma, academic transcript, or other document issued by the institution; or
- (2) mak[ing] any representation as to approval or exemption by the Commission on any advertisement or publication or on a website.

See Senate Bill 72. The bill also establishes a \$5,000 fine for its violation.

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech.” This protection against abridgement of freedom of speech also applies to State governments. *Gitlow v. New York*, 268 U.S. 652 (1925). Article 40 of the Maryland Declaration of Rights also protects against government restraining free speech, providing “that every citizen of this State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.”²

² Until recently, Maryland Courts have been unwilling to consider a different scope of protection under Article 40 of the Maryland Declaration of Rights from that given to the First Amendment by the United States Supreme Court. See, e.g., *Sigma Chi Delta v. Speaker, Maryland House of Delegates*, 270 Md. 1, 4 (1973) (“We have said that the legal effect of the guarantee of freedom of speech and press ordained in Art. 40 is substantially the same as that enunciated in the First Amendment.”). Recently, however, the Court has signaled its willingness to consider interpretations of Article 40 that diverge from that of the First Amendment if they are properly framed for the court’s consideration. *State v. Brookins*, 380 Md. 345, 350 n.2 (2004); *The Pack Shack, Inc. v. Howard County*, 377 Md. 55, 64 n.3 (2003). We are not aware of a principled basis on the facts of this case for arguing that commercial speech should be treated differently under Article 40 from the way it is treated under the First Amendment.

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The prohibition on restricting free speech applies to commercial as well as non-commercial speech. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). While the Supreme Court has not set forth a clear test to determine the boundaries of commercial speech, it is clear that advertising, at least, is commercial speech. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1048 (2d ed. 2002) (discussing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983)).³

The tests for determining if a state may regulate commercial speech require asking:

- (1) Is the advertising false or deceptive or of illegal activities, areas which are unprotected by the First Amendment?
- (2) Is the government's restriction justified by substantial government interest?
- (3) Does the law directly advance the government's interest?
- (4) Is the regulation of speech no more extensive than necessary to achieve the government's interest?

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1050 (2d ed. 2002) (explaining *Central Hudson*).

In our view Senate Bill 72 is likely to fail the fourth test. Clearly, some of the advertising that is sought to be prohibited by Senate Bill 72 is false and deceptive. There is no doubt that the legislature can prohibit false and deceptive speech. Thus, the first part of the test is satisfied. There also can be no doubt that the second and third parts of the test are satisfied because of the substantial governmental interest in preventing false and deceptive advertising practices and that Senate Bill 72 directly advances that interest. The problem, however, is that Senate Bill 72 is likely to be found to be more extensive than necessary to

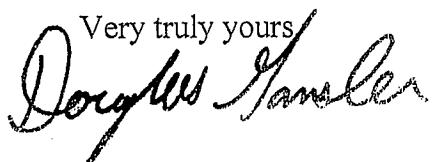
³ Although it is clear that an "advertisement," "publication," or "website" is commercial speech, it is less clear that a "certificate, diploma, academic transcript, or other document issued by the institution" would be found to be commercial speech. We can think of no noncommercial reasons that an exempt institution would place a reference to accreditation or exemption on such documents. Nonetheless, because the government's ability to restrict noncommercial speech is more limited than its ability to restrict commercial speech, Senate Bill 72's chances of surviving a constitutional challenge do not improve if the speech is determined to be noncommercial.

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achieve the government's interest. This is because it bans *truthful* advertising: under Senate Bill 72 an exempt college would be prohibited from truthfully advertising that it is exempted by MHEC from its certificate of approval process. Because the bill is more extensive than is necessary, the ban on speech in Senate Bill 72 is very likely to be held to violate the First Amendment. *See Comprehensive Accounting Services Co. v. Maryland State Board of Public Accounting*, 284 Md. 474 (1979) (invalidating prohibition on truthful advertising of accounting services).

We have also considered whether you could sign the bill but instruct MHEC and law enforcement to enforce it only against those exempt institutions that engage in false or deceptive advertising. In our view, however, having this law on the books, even if unenforced, would unconstitutionally chill the free speech rights of these exempt institutions. And its existence, even if unenforced, might give exempt institutions standing to bring suit against the State of Maryland. *See, e.g., Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997)(finding unconstitutional unenforced 30-day prohibition on lawyer solicitation of criminal defendants). Therefore, we urge you to veto the bill.

Next legislative session, we can work together to craft a bill that will stop these institutions from false advertising without chilling their First Amendment right to use truthful advertising. In the meantime, however, it is our view that to the extent that statements by these exempt institutions may be false or misleading, they could be prosecuted under the Maryland Consumer Protection Act. MD. ANN. CODE, COM. LAW §13-101 *et seq.* The Consumer Protection Division of the Office of the Attorney General stands ready to assist MHEC to prosecute any such violation.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable Joan Carter Conway
The Honorable John P. McDonough
Secretary James E. Lyons, Sr.
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