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May 13, 2011

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

Re: Senate Bill 803 and House Bill 1276

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 803 and House Bill 1276, "Drunk Driving Reduction Act." We write to point out an inaccurate cross-reference in the bill. Because of the possibility of confusion, we recommend that this cross-reference be corrected in the fall special session if possible.[1]

Senate Bill 803 and House Bill 1276 amend the law governing the modification of a suspension or issuance of a restricted license following certain drunk driving offenses. Under current law, the Motor Vehicle Administration ("the Administration") may modify a suspension or issue a restricted license under TR § 16-205.1(n)(1) if the licensee did not refuse a test; has not had a license suspended under § 16.205.1 during the past five years; has not been convicted under TR § 21-902 during the past five years; has a test result indicating an alcohol concentration of less than 0.15; and shows need for the licensee to drive in the course of employment, to attend an alcoholic prevention or treatment program, to get to work, or to obtain health care for the person or a member of his or her family. Section 16-205.1(n)(2) permits the Administration to modify a suspension or issue a restrictive license, including a restriction "that prohibits a licensee from driving or attempting to drive a motor vehicle unless the licensee is a participant in

[1] The bills take effect October 1, 2011.

the Ignition Interlock System Program" if the licensee did not refuse to take a test; the licensee has not been convicted under § 21-902 of the Transportation Article; the licensee has a test result indicating an alcohol concentration of less than 0.15; and the license is required for attending a noncollegiate educational institution or a regular program at an institution of postsecondary education. Finally, § 16-205.1(n)(4) permits the Administration to modify a suspension or issue a restricted license for a licensee who refused to take a test, or took a test that indicated an alcohol concentration of 0.15 or more if the licensee participates in the Ignition Interlock System Program for one year. Consistent with these provisions, Transportation Article § 16-205.1(b)(2)(iv) requires a police officer who stops or detains a person and requests that they take a test to advise that person of the administrative sanctions, "including ineligibility for modification of a suspension or issuance of a restrictive license unless the person participates in the Ignition Interlock System Program under § 16-404.1 of this title, that shall be imposed for refusal to take the test and for test results indicating an alcohol concentration of 0.15 or more at the time of testing," and § 16-205.1(b)(3)(viii) requires that the officer include in the sworn statement that is to accompany a driver's license confiscated under the section that the "person was fully advised of the administrative sanctions that shall be imposed, including the fact that a person who refuses to take the test or takes a test that indicates an alcohol concentration of 0.15 or more at the time of testing is ineligible for modification of a suspension or issuance of a restrictive license under subsection (n)(1) or (2) of this section."

Senate Bill 803 and House Bill 1276 repeal existing § 16-205.1(n) and enact new provisions. New § 16-205.1(n) applies only to a licensee who takes a test that indicates an alcohol concentration of at least 0.08 but less than 0.15; whose license has not been suspended under § 16-205.1 during the past five years; and who has not been convicted under § 21-902 of the Transportation Article during the past five years. Under the new § 16-205.1(n), the Administration may modify a suspension or issue a restrictive license if the Administration finds that the licensee is required to drive a motor vehicle in the course of employment, or the licensee is required to attend an alcohol prevention or treatment program, to get to work, to obtain health care treatment for the licensee or a member of their family, or the license is required for attending a noncollegiate educational institution or a regular program at an institution of postsecondary education. The new subsection (n) does not expressly mention the possibility of requiring participation in the Ignition Interlock System Program.

Senate Bill 803 and House Bill 1276 also create a new § 16-205.1(o), which applies only to a licensee who refused to take a test, took a test that indicated an alcohol concentration of 0.15 or more, or took a test that indicated an alcohol concentration of at least 0.08 but less than 0.15 at the time of testing and is ineligible for modification of a suspension or issuance of a restrictive license under subsection (n). The Administration may modify a suspension or issue a restrictive license under § 16-205.1 only if the licensee participates in the Ignition Interlock System Program for one year.

Senate Bill 803 and House Bill 1276 did not amend Transportation Article § 16-205.1(b)(2)(iv), which requires a police officer who stops or detains a person and requests that they take a test to advise that person of the administrative sanctions, "including ineligibility for modification of a suspension or issuance of a restrictive license unless the person participates in the Ignition Interlock System Program under § 16-404.1 of this title, that shall be imposed for refusal to take the test and for test results indicating an alcohol concentration of 0.15 or more at the time of testing." Section 16-205.1(b)(3)(viii), however, has been amended to require that the officer submit a sworn statement that "person was fully advised of the administrative sanctions that shall be imposed, including the fact that a person who refuses to take the test or takes a test that indicates an alcohol concentration of 0.15 or more at the time of testing is ineligible for modification of a suspension or issuance of a restrictive license under subsection (o) of this section."

As described above, subsection (o) expressly applies to persons who refuse the test and those whose test results reflect an alcohol concentration of 0.15 or more. Morever, subsection (o) requires participation in the Ignition Interlock System Program, and thus is consistent with the warnings given pursuant to § 16-205.1(b)(2)(iv). In short, the change of the cross-reference from subsection (n)(1) and (2) to subsection (o) is contrary to, and inconsistent with other provisions of the bill and of existing law. For this reason, it is our view that the cross-reference change is incorrect, and should not be given effect. *See Kaczorowski v. Mayor & City Council of Baltimore*, 309 Md. 505 (1987). Instead, police officers should continue to submit sworn statements reflecting that licensees were properly advised of the provisions of the law, including licensees' ineligibility for modification of a suspension or issuance of a restricted license without participation in the Ignition Interlock System Program.

Because this error appears in a section of law that is likely to be involved in many cases, and because it could lead to invalidation of completely proper administrative suspensions, it is our view that it should be corrected, if possible, during the special session to be held this fall.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Jamie Raskin
The Honorable Benjamin F. Kramer
The Honorable John P. McDonough
Joseph Bryce
Karl Aro