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May 18, 2011

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

**Re: *Senate Bill 888 and House Bill 1277***

Dear Governor O'Malley:

On May 2, 2011, we sent you a letter stating that we had reviewed, and approved for constitutionality and legal sufficiency, identical bills Senate Bill 888 and House Bill 1277, titled "Trusts – Special Needs, Supplemental Needs, or Pooled Asset Special Needs Trusts – Public Benefits." While we continue to find that Senate Bill 888 and House Bill 1277 are constitutional and legally sufficient, we write to make you aware of potential challenges associated with the implementation of the legislation and to comment on the manner in which the legislation should be construed so as to avoid the most significant of these challenges.

In proposed new sections 14-114(c)(2)(ii), (iii), and (v) of the Estates & Trusts Article ("ET") of the Maryland Code, the legislation directs the State's Medicaid and other public assistance programs to promulgate regulations that would specifically "allow," among other things, for funds held in a Special Needs Trust, Supplemental Needs Trust, or Pooled Asset Trust "to be used for ... food [and] shelter"; for assets to be transferred to a Pooled Asset Trust "without an age limit"; and for "legally assignable income or resources to be assigned" to one of these specialized trusts "without limit." Such regulations, if promulgated, could be understood to differ from guidance provided by the federal Social Security Administration ("SSA") in its interpretation of federal laws governing eligibility for Medicaid, as well as federal and State regulations governing eligibility for other assistance programs. In its Program Operations Manual System, SSA

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states, for example, that disbursements for "food and shelter" from one of these specialized trusts may be required to be treated as income under certain circumstances for purposes of determining Medicaid eligibility, and that funds transferred to a Pooled Asset Trust "after age 65" may also be required to be treated as income for eligibility purposes. The additional income that would result from such a disbursement or transfer might, under certain circumstances, cause the trust beneficiary to lose eligibility for Medicaid, and, in addition, might cause the State to lose federal matching funds for services provided to the beneficiary.

We believe that Senate Bill 888 and House Bill 1277 can and should be construed in such a way that the most significant challenges associated with their implementation may be avoided. *First*, we do not read the legislation as requiring the State's Medicaid or other public assistance programs to create new categories of recipients who must be deemed eligible for benefits even if, by virtue of the person's use of a specialized trust in a manner that causes the realization of additional income under federal law, the State became ineligible for federal matching funds for services provided to that person. Though the legislation requires the State's assistance programs to "allow" specialized trusts to be used in ways that might result in the realization of additional income to the trusts' beneficiaries as a matter of federal law, the legislation does not require the assistance programs to deem individuals eligible for benefits despite having federally-recognized income that exceeds eligibility limits.

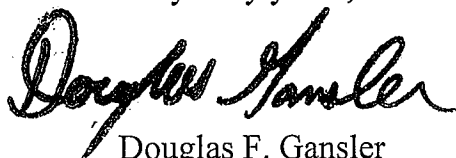
*Second*, we do not read the legislation as preventing the State's Medicaid or assistance programs, in promulgating the required regulations, from also advising of the existence of federal rules or guidance that may differ from the legislatively-required regulations and that may bear on the individual's eligibility for Medicaid or public assistance. The General Assembly obviously did not intend for the required regulations to mislead anyone into taking actions that would jeopardize program eligibility.

*Third*, although the legislation states, in new ET § 14-114(c)(2)(v), that the Medicaid program must allow "legally assignable" income or resources to be assigned to a specialized trust "without limit," we do not read this provision as requiring the State's Medicaid program to alter or repeal existing regulations concerning assignment of income to such trusts. The provision states that the income or resources must be "legally assignable" in the first instance; as such, other laws would continue to apply.

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With these comments, we continue to find that Senate Bill 888 and House Bill 1277 are constitutional and legally sufficient.

Very truly yours,

A handwritten signature in black ink that reads "Douglas F. Gansler". The signature is written in a cursive, flowing style.

Douglas F. Gansler  
Attorney General

DFG/SBB/kk

cc: The Honorable Lisa A. Gladden  
The Honorable Michael D. Smigiel, Sr.  
The Honorable John P. McDonough  
Joseph Bryce  
Karl Aro  
Joshua N. Auerbach  
David E. Beller