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April 30, 2012

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

Re: House Bill 443

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 443, the "Maryland Health Benefit Exchange Act of 2012," which further refines the process through which the State will implement health care reform under the federal Affordable Care Act ("ACA"). We write specially to address a concern regarding the constitutionality of the procedure that would be established under the HB 443 for the selection of the "State benchmark plan," which in turn will define the "essential health benefits" required to be offered in many categories of health insurance plans under the ACA and HB 443. *See* Proposed Md. Code Ann., Ins. § 31-116. It is our view that, under certain circumstances, the selection of the State benchmark plan by the Health Care Reform Coordinating Council, a body the membership of which includes both members of the General Assembly and officials in the Executive Branch, could violate the separation of powers protected by Article 8 of the Declaration of Rights, and could potentially raise additional concerns under the prohibition against dual officeholding by legislators contained in Article III, § 11 of the Constitution. These concerns would not be implicated, however, if the Council, in selecting the State benchmark plan, reached the nine-vote threshold required for selection of a plan under HB 443 through the votes of those members of the Council who are affiliated with Executive Branch agencies and not with the legislature.

By way of background, the ACA requires that, beginning in 2014, all non-grandfathered plans in the individual and small group health insurance markets, offered both inside and outside the State's Health Benefit Exchange, must cover those items and services known as "essential health benefits." ACA §§ 1201, 1301(a)(1)(B), 1302, 1311(d) (42 U.S.C. §§ 300gg-6(a), 18021(a)(1)(B), 18022, 18031(d)). On December 16, 2011, the federal Department of Health and Human Services ("HHS") issued a bulletin indicating that it intends to propose regulations under which "essential health benefits" would be defined within each state through the selection by the state of a "state benchmark plan." Department of Health and Human Services, Center for Consumer Information and Insurance Oversight, "Essential Health Benefits Bulletin" (December 16, 2011). The state benchmark plan, under the anticipated HHS regulations, will "serve as a reference plan, reflecting both the scope of services and any limits offered by a 'typical employer plan' in that State as required by section 1302(b)(2)(A) of the Affordable Care Act." *Id.* at 8. Each state would select its benchmark plan from among ten plans already offered in the state's health insurance market: the largest plan by enrollment in the three largest small group insurance products in the state's small group market; the largest three state employee health benefit plans by enrollment; the largest three national Federal Employee Health Benefit Program plan options by enrollment; and the largest insured commercial non-Medicaid health maintenance organization operating in the state. *Id.* at 9. The anticipated process would be similar to processes utilized in the defining of benefits under the Children's Health Insurance Program and for certain Medicaid populations. *Id.* at 8.

Consistent with the ACA, HB 443 would provide that "[t]he essential health benefits required under § 1302(a) of the Affordable Care Act . . . shall be the benefits in the State benchmark plan," and the bill would require that the essential health benefits be provided both in (i) "all individual health benefit plans and health benefit plans offered to small employers, except for grandfathered plans, as defined in the Affordable Care Act, offered outside the Exchange," and (ii) "all qualified health plans offered in the Exchange." Proposed Md. Code Ann., Ins. § 31-116(a). HB 443 would establish principles that would guide the selection of the State benchmark plan, including an objective to "balance comprehensiveness of benefits with plan affordability to promote optimal access to care for all residents of the State." *Id.* § 31-116(b). Further, HB 443 would establish a process for the selection of the State benchmark plan. The benchmark plan would be selected by the Health Care Reform Coordinating Council, after a process of consultation with members of the public, from among the ten existing health benefit plans eligible to be the State benchmark plan under the ACA and HHS's anticipated regulations. *See id.* § 31-116(c). The selection would be made "only on the affirmative

vote of at least nine members of the Health Care Reform Coordinating Council." *Id.* § 31-116(c)(2).

You issued an Executive Order establishing the Health Care Reform Coordinating Council on March 24, 2010, shortly after the adoption of the ACA. On May 26, 2011, you issued another Executive Order expanding the membership of the Council. *See* COMAR 01.01.2011.10. As currently established, the Council consists of 16 members: ten officials of the Executive Branch (including a number of officials from independent agencies within the Executive Branch); three members of the Maryland Senate, appointed by the President of the Senate; and three members of the House of Delegates, appointed by the Speaker of the House. *See id.* Your May 26, 2011 Executive Order anticipates that the Council's responsibilities will include, among other things, "advis[ing] . . . on fundamental decisions critical to the successful implementation of Health Care Reform" and "provid[ing] oversight and direction for the implementation of reform." *See id.* There is no legitimate constitutional objection to the service of members of the General Assembly on boards, councils, and task forces undertaking fundamentally advisory roles like those described in your Executive Order, and, indeed, there are dozens of such advisory bodies and task forces established in State law.

In selecting the State benchmark plan, however, the Health Care Reform Coordinating Council would, in our view, be functioning as a regulatory body and not in a merely advisory capacity. Indeed, the selection of the benchmark plan will have a significant impact on the State's insurance markets and on the types of health insurance coverage available to those who are anticipated to obtain insurance after 2014 in the individual and small group markets, inside and outside the Exchange. The participation of members of the General Assembly in making the ultimate selection of the State benchmark plan, as part of a body created by Executive Order, raises separation-of-powers concerns.

Article 8 of the Declaration of Rights provides: "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." Article III, Section 11 of the Constitution states: "No person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate." In 1976, Attorney General Burch opined that these two constitutional provisions would be infringed by the service of members of the General Assembly on the Washington Suburban Transit Commission. 61 *Opinions of the Attorney General* 152, 159-62 (Jan. 22, 1976). Three years ago, we advised you, in a letter discussing the 2009 legislation reestablishing the Commission on the Establishment

of a Maryland Women in Military Service Monument (House Bill 944 and Senate Bill 367), that, because the legislation empowered the Commission, the membership of which included members of the General Assembly, to enter contracts regarding "the funding, design, construction, or placement of an appropriate monument," and not merely to give advice regarding a monument, the exercise by the Commission of those executive powers could infringe these two provisions. Bill Review Letter on House Bill 944 and Senate Bill 367 (May 15, 2009).

The Court of Appeals has described the separation-of-powers principles embodied in Article 8 of the Declaration of Rights as having some "elasticity" at the periphery. *See Schisler v. State*, 394 Md. 519, 558 n.31, 576 (2006); *Dep't of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 220 (1975). Nonetheless, the Court has confirmed that this flexibility does not extend to the core functions of the respective branches of government and that, particularly in view of the inclusion of an express protection of the separation of powers in the Declaration of Rights, "situations where separation of powers questions are involved should be carefully scrutinized and the doctrine afforded a high degree of protection." *Schisler*, 394 Md. at 562.

Article III, § 11 of the Constitution, meanwhile, prohibits members of the General Assembly from holding another "office of profit" or "office of trust." There is no "office of profit" at issue here, because members of the Health Care Reform Coordinating Council are not, under your May 26, 2011 Executive Order, entitled to any compensation for their service other than reimbursement for reasonable expenses incurred in the performance of their duties. COMAR 01.01.2011.10. With regard to "office of trust," the Court of Appeals has articulated a five-factor test for identifying such offices:

(1) the position was created by law and casts upon the incumbent duties which are continuing in nature and not occasional;

(2) the incumbent performs an important public duty;

(3) the position calls for the exercise of some portion of the sovereign power of the State;

(4) the position has a definite term, for which a commission is issued, a bond required, and an oath required; and

(5) the position is one of dignity and importance.

Board of Supervisors of Elections v. Attorney General, 246 Md. 417, 439 (1967). The fifth of these factors is the least important, and the third – whether the position exercises some portion of the sovereign power of the State – is the most important. *Duncan v. Koustenis*, 260 Md. 98, 105 (1970).

Here, concerns under both Article 8 of the Declaration of Rights and Article III, § 11 of the Constitution are substantially ameliorated by the one-time nature of the decision at issue – the selection of the State benchmark plan – and by the fact that the responsibilities of the Council are otherwise advisory in nature. In particular, it is our view that, because the Council's decision-making responsibilities are, at most, "occasional," the courts likely would not conclude that participation in the selection of the State benchmark plan would transform service on the Council into an "office of trust," though the law is far from clear in this regard. On the other hand, these constitutional concerns are at least arguably exacerbated by the importance of the decision at issue. The Council, to the extent that it is a regulatory entity, which in our view it would be in its selection of the State benchmark plan, is clearly an entity within the Executive Branch. Its membership, however, includes six members of the General Assembly. At a minimum, colorable separation-of-powers concerns would be raised by the selection of the State benchmark plan through the votes of members of the legislature cast in those legislators' other capacity as members of an entity functioning, for purposes of the selection, as an Executive Branch regulatory entity.

It is also our view, however, that these constitutional concerns would be significantly reduced either if the legislators who are members of the Health Care Reform Coordinating Council abstained from voting on the selection of the State benchmark plan, or if the votes of those members were not determinative of the outcome of the selection. As discussed above, ten of the 16 members of the Council are officials of Executive Branch agencies (including a number who are officials of independent agencies). HB 443 would provide that the State benchmark plan would be selected "only on the affirmative vote of at least nine members" of the Council. Proposed Md. Code Ann., Ins. § 31-116(c)(2). Thus, the bill would allow for the selection of a benchmark plan without regard to the votes of the six members of the Council who are also members of the General Assembly. It is our view that, if the State benchmark plan were selected in this manner – with the legislator members of the Council abstaining, or with their votes not

necessary to reach the nine-vote threshold for selection of a plan – the selection would not be subject to challenge on separation-of-powers grounds. This letter does not address other selection methods that could potentially be employed to avoid the concerns discussed here, and we look forward to assisting the Council as it proceeds with its work.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
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Karl Aro