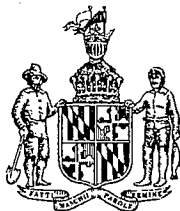


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May 8, 2012

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

RE: *House Bill 277 and Senate Bill 343*

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 277 and Senate Bill 343, identical bills entitled "State Government - Brokerage and Investment Management Services - Use of Minority Business Enterprises - Applications." We write to point out the limited application of the bills, and to discuss the proper interpretation and application of the requirements of the bills.

House Bill 277 and Senate Bill 343 make minor amendments to existing provisions of law addressing the use of minority business enterprises for brokerage and investment management services, and add parallel provisions to other portions of the law. The amendments to existing law raise no legal issues, but one of the sections amended, Labor and Employment Article, § 10-122, is repealed by Senate Bill 745, which converts the Injured Workers' Insurance Fund to the Chesapeake Employers' Insurance Company. It is our view that the intention of the legislature to repeal § 10-122 is clear regardless of signing order, but it would be safest to sign Senate Bill 745 after these bills.

The provisions adding new funds may be less comprehensive than intended. Many of the funds that appear to be newly included are currently held by the Comptroller and invested by the Treasurer and thus are already subject to the requirements of Article 95, § 22G. Among these are funds in Division I of the Economic Development Article, § 14-103, the Guaranty Fund for Private Career Schools, Nurse Support Program Assistance Fund, and other funds controlled by Maryland Higher Education Commission, § Education Article 11-1001, and the Homeownership Programs Fund, Partnership Rental Housing Fund, and Special Loans Program Fund in the Department of Housing and Community Development, Housing and Community Development Article, § 4-501.1.

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Other funds in the bills are not controlled by the agencies on which the bills purport to impose requirements with respect to the selection of brokerage and investment management services. Thus, the bills direct the Department of Business and Economic Development to use minority business enterprises "for any fund established under this article," but the Department only controls the Division I funds, while Division II includes independent state units such as MEDCO, MHHEFA, TEDCO, MARBIDCO, and MSA, along with regional development units. Similarly, the bills require the Maryland Higher Education Commission to use minority business enterprises for "any fund established under this Division III," but the Commission has no control over the funds in Division III other than its own, which are created in Title 11.

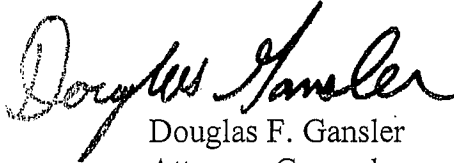
New language in State Personnel and Pensions Article, § 35-302 requires the State of Board of Trustees of the Maryland Teachers and State Employees Supplemental Retirement Plans to use minority business enterprises for brokerage and investment management services. It is our understanding that the supplemental plans do not use brokerage services, but use a third party administrator who buys shares of mutual funds through a clearinghouse. The supplemental plans do use investment services, and that contract is subject to regular procurement procedures, including the minority business enterprise provisions.

Finally, to the extent that the bills apply to funds not covered under existing law, it should be implemented consistently with the advice given in our bill review letter on Senate Bill 606 and House Bill 606 and Senate Bill 1277 (Chapters 600 and 601) of 2008. In that letter, we advised that the bills, which were not based on a disparity study or any other showing of necessity, "should not be read to make the specific goals or certification procedures established in State Finance and Procurement Article § 14-301, *et seq.*, applicable to procurement of brokerage and investment management services," and that the restriction that the agencies act in a manner that is consistent with their fiduciary duties should be read to include the duty to avoid actions "likely to lead to meritorious actions against the funds." Because there is still no disparity study that would provide a strong basis in evidence to support the creation of a race conscious program, this advice still holds.¹

¹ House Bill 916 requires the Governor's Office of Minority Affairs to conduct a study of the Maryland State Retirement and Pension System and all funds managed by the Board of Trustees for the Retirement and Pension System to determine the capacity to select minority fund managers across all asset classes consistent with the fiduciary responsibilities of the Investment Division of the State Retirement Agency and determine methods to best assure the recruitment and selection of minority companies for fund-to-fund management, or direct management by the Investment Division of the State Retirement Agency that are consistent with the fiduciary responsibilities of the Investment Division of the State Retirement Agency. This provision appears to contemplate a study based on what the State Retirement System does and how it

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Very truly yours,

A handwritten signature in black ink, appearing to read "Douglas F. Gansler". The signature is written in a cursive, flowing style.

Douglas F. Gansler
Attorney General

DFG/KMR/kk

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

functions, rather than one that focuses on use of minority firms as compared to their availability in the market. As such, it would not provide the constitutionally required strong basis in evidence for a race conscious program.