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May 15, 2009

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

Re: Senate Bill 507 and House Bill 370

Dear Governor O'Malley:

We have reviewed Senate Bill 507 and House Bill 370, companion bills entitled "Maryland Locksmith Act," for constitutionality and legal sufficiency. While we generally approve these bills, we write to discuss a severable portion of the bills that we believe violates the Commerce Clause. We also write to point out differences between the two bills and a minor inconsistency.

Senate Bill 507 and House Bill 370 require that a business be licensed before the business and employees of the business may provide locksmith services in the State.¹ One of the requirements for licensure is that the business have a "fixed business address" in the State. New Business Regulation Article ("BR") § 12.5-206(c)(1). The fixed business address may not be a motel or hotel room, a motor vehicle, or a post office box. New BR § 12.5-206(c)(2). Instead, the fixed business address must be a single physical location in the State where a licensee regularly conducts business and at which the licensee or an employee of the licensee is physically present during normal business hours or other hours as provided in the application for a license. It is our view that to the

¹ "Provide locksmith services" is defined to include the repair and installation of locks as well as the opening of locks for which the key or combination is lost. New BR § 12.5-101(h). Thus, the license requirement applies to any person who performs these services in the State, regardless of whether their office is located in the State.

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extent that this provision requires a fixed business address in the State, it violates the Commerce Clause of the United States Constitution. It is also our view, however, that the in-state requirement is severable from the remainder of the bills. As a result, it is our view that the bills may be signed into law, but that the requirement that the licensee have a fixed business address in the State may not be enforced.

The Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, grants the Congress the power to “regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.” The Clause is also understood to have a negative aspect that prohibits states from interfering with, or imposing burdens on, interstate commerce. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). This aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988). Thus, state statutes that discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). A law that does not discriminate against interstate commerce, on the other hand, will be upheld if it serves a legitimate local purpose and the burden on interstate commerce is not excessive in relation to the local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). “[T]he extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Id.*

Some courts have held that an in-state office requirement applies evenhandedly to both in-state and out-of-state businesses, and thus that the *Pike v. Bruce Church* test should be applied to these requirements. *Dun & Bradstreet, Inc. v. McEldowney*, 564 F.Supp. 257, 259 (D. Idaho 1983); *Com. v. Allied Bond and Collection Agency*, 476 N.E.2d 955, 958 (Mass. 1985). Others, however, have concluded that the practical effect of such a requirement is to discriminate against out-of-state companies. *Nutritional Support Services, L.P. v. Miller*, 830 F.Supp. 625, 628 (N.D. Ga. 1993); *Underhill Associates, Inc. v. Coleman*, 504 F.Supp. 1147, 1151 (D.C. Va. 1981). One factor distinguishing these cases is the level of presence in the State that is required. In *Allied Bond and Collection Agency*, the regulation did not set requirements as to the size of the office or the hours of its operation, or bar the sharing of space with most other businesses. It required only that records related to transactions in the State be kept there and that a part-time employee or other agent be available to respond to regulatory inspections on days and at times when the office was open. *Id.* at 958-959, *see also Del. Op. Atty. Gen.* 99-IB09, 1999 WL 1095328 (Del. A.G. 1999); *Or. Op. Atty. Gen.* OP-6242, 1988 WL

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416269 (Or. A.G. 1988). In that situation, the court found that the requirement did not discriminate against interstate commerce. In *Georgia Ass'n of Realtors, Inc. v. Alabama Real Estate Com'n*, 748 F.Supp. 1487, 1493 (M.D. Ala. 1990), the Court recognized that a requirement that a business maintain an office in the State where records were available for inspection would be valid, but held that a requirement that the business maintain a "place of business" in the state from which it operates its business was discriminatory and invalid. *Id.* at 1493-1494.

Senate Bill 507 and House Bill 370 do not simply require an office staffed by a part-time employee where records are available for inspection; the bills require the maintenance of an office from which the licensee regularly conducts business. As a result, the requirement is more like that found invalid in *Georgia Association of Realtors* than the one upheld in *Allied Bond and Collection Agency*, and is at risk of being found to discriminate against interstate commerce, thus rendering it virtually *per se* unconstitutional.

Even if the bills do not discriminate against out-of-state businesses, it is our view that a court would likely find that the burden imposed on interstate commerce by the requirement outweighs the local benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) involved an administrative order requiring that fruit grown in the state be processed there also. The Court noted that it "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Id.* at 145. Courts upholding in-state office requirements have differentiated them from the processing requirement in *Pike v. Bruce Church* because the requirements serve the purpose of regulating businesses by allowing inspection of their records, and that interest outweighed the burden on commerce. *Dun & Bradstreet, Inc. v. McEldowney*, 564 F.Supp. 257 (D. Idaho 1983); *Com. v. Allied Bond and Collection Agency*, 476 N.E.2d 955 (Mass. 1985). Other cases have held that this justification could support a requirement that records be kept in the State, but a requirement that a licensee actually conduct business from an office in the State imposed a greater burden than could be justified by that interest and would be invalid under the rationale in *Pike v. Bruce Church, Inc.* *Codar, Inc. v. State of Ariz.*, 95 F.3d 1156 (9th Cir. 1996); *Nutritional Support Services, L.P. v. Miller*, 830 F.Supp. 625, 628 (N.D. Ga. 1993); *Georgia Ass'n of Realtors, Inc. v. Alabama Real Estate Com'n*, 748 F.Supp. 1487, 1493-1494 (M.D. Ala. 1990).

As noted above, Senate Bill 507 and House Bill 370 require that the licensee actually conduct business from the in-state office. Moreover, while the bills do require that records be maintained at the fixed business address, they do not require the records be made available for inspection at that location. Instead, records requested by law enforcement agencies or by the Department are to be provided by mail or by transmitting a copy electronically. Clearly, this requirement would function in the same way regardless of whether the records are kept in the State or elsewhere. Thus, the recordkeeping requirement provides little justification for the burden placed on commerce by the in-state office requirement.

It has been suggested that the in-state office requirement would make it easier for Maryland residents to contact the locksmiths with whom they do business. This same rationale was rejected in *Underhill Associates, Inc. v. Coleman*, 504 F.Supp. 1147, 1152 (E.D.Va. 1981), with the Court holding that a person wishing to have face to face contact with their broker would most likely choose one nearby, while there was no showing that communication by mail and telephone would be insufficient for others. This rationale provides even less justification for an in-state office requirement with respect to locksmiths. The nature of locksmith services is such that a person is unlikely to choose one located far from the place that the services are to be rendered.² The mere fact that a locksmith is located across a state border does not mean that the business is less accessible to a particular person, and in some cases it may mean that they are more accessible. Thus, this interest also cannot outweigh the burden imposed on commerce by the in-state office requirement.

² To the extent that the bill is aimed at businesses who misrepresent themselves as local locksmiths when they actually operate a call center that refers work to locksmiths, thus adding to the costs of services, *see* Fiscal and Policy Note, this purpose is served without violation of the Commerce Clause by new § 12.5-505 and by Chapters 10 and 11 of 2009, which provide that misrepresentation of location in directories and telephone listings is false advertising under the Consumer Protection Act. To the extent that the bill is concerned with “fly-by-night” locksmiths, *see* testimony of DLLR, the State’s interest is served by the requirement of a fixed address. No other interests that might be served by the in-state office requirement are reflected in the legislative history.

For the above reasons, it is our view that the in-state office requirement in Senate Bill 507 and House Bill 370 is unconstitutional. It is also our view that this requirement is severable from the remaining requirements of the bill. The primary focus in questions of severability is what would have been the intention of the legislative body, had it known that the statute could only be partially effective. Article 1, § 23, Annotated Code of Maryland; *Davis v. State*, 294 Md. 370, 383 (1982). Generally, there is a presumption in favor of severability. *O.C. Taxpayers v. Ocean City*, 280 Md. 585, 600 (1977). Moreover, where the dominant purpose of the statute may be largely carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion. *Cities Service Co. v. Governor*, 290 Md. 553, 576 (1981). In this case, it seems clear that the dominant purpose of the statute – the regulation of locksmiths – can be carried out without the in-state office requirement. Even the fixed business address may be given effect, so long as the fixed business address is not limited to Maryland. As a result, it is our view that the in-state office requirement is severable and that the bill may be signed into law.

We also note that there is a difference between the two bills. Senate Bill 507 provides, at page 5, lines 23-25 that:

- (b)(2) The application owner or designee fee is nonrefundable.
- (c) The applicant shall sign the application under oath.

The equivalent provisions of House Bill 370 provide that:


- (b)(2) The application fee is nonrefundable.
- (c) The applicant owner or designee shall sign the application under oath.

Either version is legally sufficient.

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Finally, we note that certain provisions of the bill are not completely consistent with the licensing scheme in the bills, under which *businesses* are licensed, and *employees* receive identification cards from the licensee. For example, new § 12.5-201(b) requires a licensee to carry a valid photo identification card, which is somewhat incongruous if the licensee is the business rather than the employee. Perhaps these inconsistencies should be addressed in future legislation. It is also our view that the legislation should be amended to remove the requirement that the required fixed place of business be in this State.

Very truly yours,


Douglas F. Gansler
Attorney General

DFG/KMR/mlb

cc: The Honorable Joan Carter Conway
The Honorable James J. King
The Honorable John P. McDonough
Joseph Bryce
Karl Aro