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May 18, 2010

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

RE: Senate Bill 129 and House Bill 65

Dear Governor O'Malley:

We have reviewed Senate Bill 129 and House Bill 65, "International Marriage Brokers - Regulations," for constitutionality and legal sufficiency. While we approve the bills, we write to point out that the FBI is unlikely to provide certain information necessary to the operation of the law, and to address certain interpretive issues raised by the bills. We also address the relationship between these bills and the federal International Marriage Broker Regulation Act of 2005, Public Law 109-162, Title VIII, Subtitle D. Finally, we discuss the differences between the two bills.

Senate Bill 129 and House Bill 65 prohibit an international marriage broker from providing personal contact information concerning a recruit¹ to a client² before the international marriage broker has provided the recruit with: (1) the client's marital history information, (2) the client's criminal record information, and (3) certain basic human rights information,³ as well as obtained the consent of the recruit to the disclosure. The marriage

¹ A "recruit" is a person who is not a citizen or resident of the United States and who uses the services of, or is recruited by, an international marriage broker for dating, matrimonial, or social referral services.

² A "client" is a resident of the United States and the State of Maryland who uses the services of an international marriage broker to meet recruits.

³ The bills specifically permit the distribution of human rights information that is prepared by an organization that is not affiliated with the international marriage broker. This permits the international marriage broker to distribute the information pamphlet prepared by the Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as required by the federal International Marriage Broker Act of 2005, 8 U.S.C. § 1375a(a).

history information is to be provided by the client. The criminal record information, however, is to be obtained by the international marriage broker, who is to "conduct a State and national criminal history records check of the client, including a search of the sex offender registry." Criminal history record information is defined by reference to § 10-201 of the Criminal Procedure Article ("CP"), which defines the term to mean "data that are developed or collected by a criminal justice unit about a person and that pertain to a reportable event." It is our view that federal law does not permit an international marriage broker to conduct a national criminal records check of a client. An international marriage broker may, however, conduct a State criminal records check, and should also check the sex offender registry.

The Federal Bureau of Investigation ("FBI") was initially authorized to collect and preserve criminal record information in an appropriation act for the Department of Justice in 1921. That authority has since been transferred to the United States Attorney General, and is codified at 28 U.S.C. § 534. Pursuant to Executive Order 10450, effective April 27, 1953, the United States Attorney General was also authorized to provide criminal history record information to federal agencies for employment purposes.⁴ In *Menard v. Mitchell*, 328 F.Supp. 718, 726 (D. D.C. 1971), the court held that Congress, in authorizing the collection of these records, intended "only to facilitate coordinated law enforcement activities between the federal and local government, that is, to assist arresting agencies, courts and correctional institutions in the apprehension, conviction and proper disposition of criminal offenders," and "never intended to or in fact did authorize dissemination of arrest records to any state or local agency for purposes of employment or licensing checks." Congress responded to this holding by enacting Public Law 92-544, 86 Stat. 1109, 1115 (Oct. 25, 1972), which provides:

The funds provided for Salaries and Expenses, Federal Bureau of Investigation, may be used hereafter, in addition to those uses authorized thereunder, for the exchange of identification records with officials or

⁴ The National Crime Prevention and Privacy Compact and federal regulations define criminal history record information as:

information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, and release. The term does not include identification information such as fingerprint records if such information does not indicate the individual's involvement with the criminal justice system.

federally chartered or insured banking institutions to promote or maintain the security of those institutions, and, if authorized by State statute and approved by the Attorney General, to officials of State and local governments for the purpose of employment and licensing, and any such exchange to be made only for the official use of any such official and subject to the same restriction with respect to dissemination as that provided for under the aforementioned appropriation.

The United States Attorney General has, in practice, developed a list of requirements that must be met before dissemination of criminal history records information for state employment and licensing purposes will be approved. The requirement must:

- (1) exist as a result of a legislative enactment;
- (2) require that the criminal background check be fingerprint based;
- (3) authorize the submission of fingerprints to the State Identification Bureau for forwarding to the FBI for a national criminal history check;
- (4) identify the categories of licenses subject to criminal background checks; and
- (5) provide that an authorized government agency be the recipient of the results of the record check.

Applying these criteria to these bills demonstrates that the FBI is unlikely to perform national criminal history record checks pursuant to these bills. Senate Bill 129 and House Bill 65 exist as the result of a legislative enactment. They do not, however, require the submission of fingerprints, apply to either licensing or State employment, or provide that the results of the record check be an authorized government agency. Thus, the bills fall short of the FBI's requirements for the conduct of a national criminal history records check. Moreover, while there are additional federal laws that permit the dissemination of criminal history records information to private entities, none are applicable here.⁵ Specifically, the International Marriage Broker Regulation Act of 2005, while requiring an international marriage broker to gather information on the criminal background of clients, does not authorize the dissemination of national criminal background records to international marriage

⁵ See Pub. L. 108-458, title VI, § 6402(d)(1)(A) (Dec. 17, 2004) (criminal history records checks on private security officers); Pub. L. 105-277, div. A, § 101(b) [title I, § 124] (Oct. 21, 1998) (criminal history checks for nursing facilities and home health care agencies on employees involved in direct patient care); The National Child Protection Act of 1993, 42 U.S.C. § 5119a (criminal background checks on employees of child care, elder care, and health care providers, as designated by State law).

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brokers.⁶ 8 U.S.C. § 1375a(d)(2). So long as this is the case, it is our view that an international marriage broker must be deemed to have complied with the requirements of the law if he or she obtains a State criminal history record check and checks the national and State sex offender registries.

Maryland law provides that State criminal history record information may be disseminated only "in accordance with applicable federal law and regulations." CP §-10-219(a). Federal regulations require that dissemination of nonconviction information in a State criminal record information system be limited to criminal justice agencies, and permits dissemination to other entities only as authorized "by statute, ordinance, executive order, or court rule, decision, or order, as construed by appropriate State or local officials or agencies."⁷ 28 C.F.R. § 20.21(b). These limits are significantly less restrictive than the limits applicable to the dissemination of data from the national system. 28 C.F.R. § 20.33. Apart from these particular requirements, however, the federal regulations generally defer to state law regarding the dissemination of criminal history record information. *79 Opinions of the Attorney General* 128, 129 (1994). It seems reasonable to conclude that Senate Bill 129 and House Bill 65, by requiring that an international marriage broker "conduct a ... State criminal history records check," authorizes the dissemination of this information to international marriage brokers with respect to their clients. As a result, it is our view these bills permit an international marriage broker to conduct a State criminal history records check.

Senate Bill 129 and House Bill 65 and the International Marriage Broker Regulation Act of 2005, 8 U.S.C. § 1375a(d)(2)(A)(i) both require that an international marriage broker perform a search of the sex offender registry. The federal law expressly requires a search of the National Sex Offender Public Registry or of the State sex offender registry if the State is not yet participating in the National Sex Offender Public Registry.⁸ 8 U.S.C. § 1375a(d)(3)(A)(i). Maryland law permits information about registration statements in the State to be made available on the Internet. CP § 11-717(b). This has been done. Thus, both

⁶ This is presumably the reason that the boilerplate language used in Maryland statutes to permit national criminal history records checks was amended out of the bills. Leaving the requirement that a national criminal history records check be performed, however, leaves open the possibility that such checks could be performed if the federal law changes.

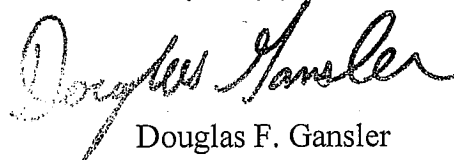
⁷ Nonconviction data is defined as "arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; information disclosing that the police have elected not to refer a matter to a prosecutor, that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed; and information that there has been an acquittal or a dismissal." 28 C.F.R. § 20.3(q).

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of these methods are available to an international marriage broker. Because the bills require a "State and national" records check, "including a search of the sex offender registry," it is our view that a check of both registries is both required and possible.

Section 2 of Senate Bill 129 requires the Department of Labor, Licensing, and Regulation ("DLLR"), in consultation with the Department of Public Safety and Correctional Services, to report on the feasibility of registering or licensing international marriage brokers, to make recommendations on whether to implement a registration or licensing scheme, and to provide draft legislation to implement any recommendation made. This provision does not appear in House Bill 65. Moreover, because this provision is not in conflict with anything in House Bill 65, it will take effect if Senate Bill 129 is signed, regardless of signing order. Therefore, you should sign Senate Bill 129 only if you want DLLR to produce the report. Finally, we also note that there is an error in the tabulation of § 19-601 in the Senate Bill that does not appear in the House Bill, in that there is no § 19-601(f) in the Senate Bill.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Catherine E. Pugh
The Honorable Jeannie Haddaway-Riccio
The Honorable John P. McDonough
Joseph Bryce
Karl Aro

⁸ As of July 3, 2006, all 50 states are linked to the National Sex Offender Public Registry. Office of Justice Programs, Press Release, July 3, 2006. Available on the Internet at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2006/BJA06041.htm> (last visited May 5, 2010).