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To: The Honorable William C. Smith, Jr.
Chair, Judicial Proceedings Committee

From: Kira Wilpone-Welborn, Assistant Attorney General
Consumer Protection Division

Re: Senate Bill 1167 – Real Property - Residential Leases - Fee in Lieu of Security Deposit
(OPPOSE)

The Consumer Protection Division of the Office of the Attorney General (the “Division”) opposes Senate Bill 1167 sponsored by Senator Joanne Benson. The “fee in lieu of a security deposit” product purports to provide consumers a reasonable alternative to paying a lump sum security deposit or obtaining a surety bond by allowing landlords and tenants to agree to a fee, which the landlord would use to purchase insurance coverage. Proponents of the bill assert that this product would reduce barriers to obtaining rental housing. The bill as structured, however, requires consumers to bear all the risk and cost of the product with little to no benefit and could ultimately cause consumers to pay more over the course of a tenancy than they would pay as a security deposit. Most troubling, Senate Bill 1167 would make it easier for landlords to engage in unfair, abusive, or deceptive practices without adequate protections for consumers to obtain legal redress and damages for violations by landlords and insurers.

Maryland's Security Deposit Law

Maryland's Security Deposit Law defines “security deposit” to mean “any payment of money, including payment of the last month's rent in advance of the time it is due, given to a landlord by a tenant in order to protect the landlord against nonpayment of rent, damage due to breach of lease, or damage to the leased premises, common areas, major appliances, and

furnishings.” Md. Code Ann., Real Prop. §8-203(a)(3). Maryland’s Security Deposit law affords consumers who lease residential properties in Maryland important protections from unscrupulous landlords. For example, a landlord may not require a tenant to pay a security deposit that exceeds the equivalent of two months’ rent per dwelling unit, regardless of the number of tenants. Md. Code Ann., Real Prop. §8-203(b). A landlord must maintain security deposits in an account that is devoted exclusively to security deposits and bears interest. Md. Code Ann., Real Prop. §8-203(d). A landlord may only withhold a security deposit for unpaid rent, damage due to breach of lease, or for damage caused by the tenant beyond “ordinary wear and tear to the leased premises, common areas, major appliances, and furnishings owned by the landlord” and must provide a tenant a written list of the damages claimed together with a statement of the costs actually incurred. Md. Code Ann., §§8-203(f)(1) and (g)(1). A security deposit is not liquidated damages and may not be forfeited to the landlord for breach of the rental agreement, except in the amount that the landlord is actually damaged by the breach. Md. Code Ann., Real Prop. §8-203(f)(2).

Alternatively, a tenant can purchase a surety bond to protect the landlord against nonpayment of rent, damage due to breach of lease, or damage to the leased premises, common areas, major appliances, and furnishings. As with a traditional security deposit under section 8-203, the amount of the surety bond purchased and any security deposit paid may not exceed the equivalent of two months’ rent per dwelling unit. Md. Code Ann., Real Prop. §8-203(i)(3). Importantly, it is the tenant who purchases the bond rather than the landlord and the tenant must be advised in writing of all the tenant’s rights prior to the purchase of the security bond. Md. Code Ann., Real Prop., §8-203(i)(5). Additionally, before making a claim against the surety bond, a landlord must provide written notice to the tenant that includes a list of damages to be claimed and costs actually incurred; and, a tenant has the right to pay any damages directly to the landlord and has the right to dispute a landlord's claim. Md. Code Ann., Real Prop. §8-203(i)(7), (8), and (9).

Senate Bill 1167 Would Harm Consumers

Senate Bill 1167 does not include many of the protections afforded by the provisions in the Real Property Article related to security deposits and surety bonds. While the proposed “fee in lieu of security deposit” may appear to benefit consumers and open housing opportunities for low-income households, in fact, Senate Bill 1167 would likely harm consumers in several ways.

First, Senate Bill 1167 would permit landlords to collect, at the termination of the tenancy, amounts Maryland’s security deposit and surety bond law do not permit. At subsection 8-203.2(A)(3)(i), Senate Bill 1167 would permit a landlord to collect “fees, costs, or charges required under a lease,” which is inconsistent with language used in § 8-203 referencing deductions from security deposits and § 8-203.1 for surety bond coverage.¹ A “fee in lieu of a

¹ See Real Property § 8-203(f)(1)(i) (“The security deposit, or any portion thereof, may be withheld for unpaid rent, damage due to breach of lease or for damage by the tenant or the tenant's family, agents, employees, guests or invitees in excess of ordinary wear and tear to the leased premises, common areas, major appliances, and furnishings owned by the landlord.”; and Real Property § 8-203.1(i)(2)(i) (“...a tenant may purchase a surety bond to protect the landlord against: 1. Nonpayment of rent; 2. Damage due to breach of lease; or 3. Damage caused by the tenant or the tenant’s family, agents, employees, guests or

security deposit” product should be restricted to non-payment or rent, damage due to breach of lease, and damages beyond normal wear and tear, as is currently permitted by Maryland law.

Second, Senate Bill 1167 does not require a landlord who has purchased insurance to disclose to consumers the landlord’s actual costs to obtain the insurance or require that the fee charged to consumers be the actual cost of the insurance. As proposed, the landlord may inflate the monthly charge to consumers for unidentified amounts to “administer the insurance.” Presently, the Real Property Article does not allow landlords to charge for the administration of security deposits or for the administration of surety bonds. As a result, Senate Bill 1167 would permit landlords to charge tenants fees that exceed their costs to obtain insurance and unfairly profit from a tenant’s election to pay the “fee in lieu of security deposit.” By making this product a profit center, the bill encourages landlords to increase current security deposit requirements in order to make the payment of the fee more attractive. Further, the bill does not require a landlord to first apply the portion of the fee charged which is over and above the costs to obtain the insurance, and the interest earned on that money, towards any claimed losses as a result of nonpayment of rent, damage due to breach of lease, or damage to the leased premises before making a claim on the insurance.

Third, because consumers would not be interested parties to the insurance contract, consumers would not be able to make claims to the insurer, appropriately challenge an insurer’s decision to deny a claim, or dispute an insurer’s decision to pay a claim until after the tenant is subject to collection actions. Moreover, if an insurer sought subrogation against a tenant for a claim paid to a landlord or transferred a paid claim to a third-party debt collector as permitted in Senate Bill 1167, a tenant may not have sufficient information to defend the claim or understand a demand for payment of the claim. As a result, the tenant would pay both the monthly fee and to reimburse the paid claim. Thus, the “fee in lieu of security deposit” would ultimately provide no financial benefit to the consumer.

Fourth, Senate Bill 1167 does not clearly identify that the “fee in lieu of a security deposit” is not rent, nor collectable in a summary ejection action. Even more troubling, as proposed, section 8-203.2(B)(3) states that “an agreement to pay a fee in lieu of a security deposit is not a defense in an action brought by a landlord under § 8-401 of this title for a tenant’s failure to pay rent.” This bill could not only permit a landlord to seek an eviction under section 8-401 for non-payment of this fee, but also bar a tenant from arguing, pursuant to *Sager v. Hous. Comm’n of Anne Arundel Cnty.*, 957 F. Supp. 2d 627 (D. Md. 2013), that the landlord has misallocated her rental payment to these fees and thus does not have a basis to support an action under Real Property § 8-401. As such, at best, tenants continue to be left unprotected by the language in this bill; and, at worst, their rights and defenses to eviction are being discarded.

Finally, Senate Bill 1167 does not adequately protect consumers from landlords that violate the proposed provisions in the bill. As proposed, if a landlord does not use the fees paid by the consumer to purchase insurance coverage, the landlord is not required to return the fees with interest to the consumer or apply the amounts paid by the tenant toward a refundable

invitees in excess of ordinary wear and tear to the leased premises, common areas, major appliances, or furnishings owned by the landlord.”)

security deposit but is only required to use those funds to cover damage to the unit. As a result, a tenant who does not damage the unit is left without recourse to a landlord that willfully absconds with the monthly payment.

A “fee in lieu of security deposit” is not a reasonable alternative to a security deposit, which is limited in amount, is refundable, and provides consumers protections under section 8-203 of the Real Property Article. Likewise, a “fee in lieu of security deposit” is not a reasonable alternative to a surety bond, which allows a consumer to avoid an upfront security deposit payment by paying a small monthly fee and provides consumers protections as a party to the insurance contract and the financial cap protections under section 8-203 of the Real Property Article.

While reducing barriers to enter the rental housing market is necessary and important, those efforts should not exacerbate current inequities in the law that benefit landlords at the expense of tenants.² As proposed, tenants are again expected to pay a monthly fee that only protects the landlord and places all risk of financial insecurity on the tenant. Thus, perpetuating cycles of housing uninhabitability, instability, and homelessness.

For these reasons, the Division encourages the Judicial Proceedings Committee to issue an unfavorable report on Senate Bill 1167.

Cc: The Honorable Joanne Benson
Members, Judicial Proceedings Committee

² It is well documented that the majority of renters evicted are Black mothers with minor children. *See* Public Justice Center, “Justice Diverted: How Renters are Processed in the Baltimore City Rent Courts,” December 2015; and Matthew Desmond et al., *Forced Relocation and Residential Instability among Urban Renters*, 89 *Soc. Serv. Rev.* 227 (2015).