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

FROM: Joshua N. Auerbach, Assistant Attorney General

RE: Senate Bill 889 – Civil Enforcement Actions Brought by the Attorney General
- Statute of Limitations - (SUPPORT WITH AMENDMENTS)

Senate Bill 889, which was introduced at the request of the Attorney General, would clarify that civil actions brought in court by the Attorney General to enforce statutes enacted by the General Assembly are not subject to the separate one-year limitation period set forth in § 5-107 of the Courts and Judicial Proceedings Article. This limitation period on prosecutions for fines was first adopted in 1777, and it was never intended to limit civil regulatory enforcement, which, of course, did not exist in anything like its present form at the time of the law's enactment. As discussed below, the Maryland courts have already confirmed that CJP § 5-107 does not apply to enforcement actions brought by the Attorney General in administrative proceedings. SB 889 would clarify that CJP § 5-107 is equally inapplicable in court.

By way of background, the General Assembly has directed the Attorney General to enforce numerous statutes and, in doing so, has often conferred authority on the Attorney General to seek or impose penalties against those who violate the law. These statutes include, most notably, the Consumer Protection Act, the Securities Act, the Antitrust Act, and the civil rights enforcement law enacted last year (HB 772/SB 540). Penalties serve a powerful deterrent purpose under these statutes. The imposition of penalties protects Maryland consumers and investors and safeguards Marylanders' civil rights.

Each of these statutes contains a comprehensive set of provisions establishing rules and principles for the Attorney General's enforcement activities, specifying the circumstances when penalties may be imposed and the appropriate considerations for determining whether penalties should be imposed and, if so, in what amount. For example, the enforcement

provisions of the Consumer Protection Act occupy an entire subtitle within the Commercial Law Article of the Code, *see* Md. Code Ann., Com. Law. §§ 13-401 to 13-411, and those provisions include a section containing detailed instructions from the legislature concerning civil penalties, *id.* § 13-410. The civil rights enforcement law enacted last year is quite similar, incorporating both a comprehensive set of provisions to guide the Attorney General’s investigative and enforcement actions, *see* Md. Code Ann., State Gov’t §§ 20-1040 to 20-1040, as well as a section specifically addressing penalties, *id.* § 20-1046(b). Importantly, none of these statutes mentions CJP § 5-107. None contains any suggestion that the General Assembly intended for the Attorney General’s enforcement activities to be subject to the eighteenth-century limitation on fines separately codified at CJP § 5-107.

If CJP § 5-107 were nonetheless superimposed on these statutes, it would render meaningless, in a large number of cases, the penalty authority that the statutes confer, particularly in cases involving complex or systemic wrongdoing. Such wrongdoing—for example, predatory or discriminatory lending—often takes more than one year just to come to light. Then, it will often take a year or more for the Office of the Attorney General to conduct a thorough investigation of such misconduct—even longer if, as in many cases, the target of the investigation does not fully cooperate and requires OAG to go to court to enforce an investigative request or subpoena. (In one recent investigation, it took more than three years from OAG’s filing of a subpoena enforcement action for the court to issue an order requiring the defendant to produce the electronic data requested in the investigation.) Defendants in enforcement cases often incorrectly argue that, under CJP § 5-107, they cannot be penalized for egregious misconduct, because their liability for penalties expired under CJP § 5-107 before OAG even learned about the misconduct, or because their liability expired during the period when they were resisting OAG’s efforts to investigate the misconduct.

Notably, the Appellate Court of Maryland has twice rejected this argument in the context of enforcement actions brought by OAG through administrative proceedings, including in a case decided last year. *See In the Matter of Cricket Wireless, LLC*, 259 Md. App. 44, 67-76 (2023); *Maryland Securities Commissioner v. U.S. Securities Corp.*, 122 Md. App. 574, 588-94 (1998). Moreover, no Maryland appellate court has ever applied CJP § 5-107 to limit any civil statutory cause of action brought by the Attorney General, whether brought in administrative proceedings or in court.

However, thirty-five years ago, the U.S. District Court did misapply CJP § 5-107 to a case filed in federal court. *See Attorney General of Maryland v. Dickson*, 717 F. Supp. 1090 (D. Md. 1989). The decision in *Dickson*, which involved an odometer rollback scheme that harmed hundreds of Maryland consumers, has been criticized on other grounds by the Supreme Court of Maryland. *See Price v. Murdy*, 462 Md. 145, 152 n. 3 (2018). The Appellate Court of Maryland has similarly declined to follow *Dickson* in other respects. *See State v. Cottman Transmissions Systems*, 86 Md. App. 714, 736 n. 17 (1991). Nonetheless, for several decades, defendants in civil enforcement action have cited *Dickson* and argued that they cannot be penalized under CJP § 5-107 for anything they did more than one year before the initiation of the action. Senate Bill 889 would finally resolve this longstanding

issue and ensure that penalties are meaningfully available as an enforcement tool in actions brought by the Attorney General in court.

There are a number of policy reasons why a government agency should not be subject to limitations periods like those that apply to private actions. First, as noted above, many pernicious forms of illegal conduct take significant time to come to light. For example, the victims of the odometer rollback scheme in *Dickson* did not themselves become aware of and complain about the scheme until more than one year after the defendant Dickson had already sold more than 300 of the unlawfully altered vehicles. The U.S. District Court nonetheless found that the Attorney General could not seek penalties under the Consumer Protection Act for any of that wrongful conduct.

Second, government agencies should be allowed to investigate unlawful conduct to determine whether the law has been violated and the extent of the violation before filing an action. It would not be in anyone's interest for the government to bring an action before all the facts are developed. In particular, certain complex forms of misconduct take significant time to investigate properly. CJP § 5-107, with its one-year limit on the imposition of fines running from the date of the commission of the "offense," plainly was not written with complex financial fraud and other similar misconduct in mind. Even in cases where OAG is fortunate enough to learn of such misconduct within one year of its occurrence, the misapplication of CJP § 5-107 to OAG civil enforcement actions would have the unfortunate effect in many cases of forcing the Office to choose between conducting an investigation prior to bringing an enforcement action and retaining its authority to seek or impose penalties if it ultimately determines that a violation has occurred.

Third, and relatedly, businesses should have an incentive to cooperate with investigations, but limiting penalties based on a limitations period rewards dilatory behavior. A person who violates the law but who manages to delay OAG's investigation would be rewarded for doing so by insulating themselves from monetary penalties.

Fourth, a short limitations period could result in Maryland receiving less than its proportionate share from any enforcement effort brought jointly with other states who are not subject to a similar limitations period.

The Office of the Attorney General has submitted two amendments. The first removes a separate provision that would alter the statute of limitations for Antitrust actions, which we believe would be better addressed in a separate bill. The second clarifies the language of the limitations provision.

Senate Bill 889 will clarify that the limitations provision contained in CJP§ 5-107 does not apply to civil enforcement cases brought by the Attorney General and, in doing so, ensure that penalties are meaningfully available and effective in actions brought in court. For these reasons, the Office of the Attorney General urges the Judicial Proceedings Committee to give SB 889 a favorable report with the requested amendments.

cc: Members, Judicial Proceedings Committee