

CANDACE McLAREN LANHAM
Chief Deputy Attorney General

CAROLYN A. QUATTROCKI
Deputy Attorney General

LEONARD J. HOWIE III
Deputy Attorney General

CHRISTIAN E. BARRERA
Chief Operating Officer

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

PETER V. BERNS
General Counsel



WILLIAM D. GRUHN
Chief
Consumer Protection Division

ANTHONY G. BROWN
Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

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TO: The Honorable Luke Clippinger, Chair, Judiciary Committee

FROM: Joshua N. Auerbach, Assistant Attorney General

RE: House Bill 595 – Civil Enforcement Actions Brought by the Attorney General - Statute of Limitations - (SUPPORT WITH AMENDMENTS)

The Attorney General requested the introduction of House Bill 595, which is designed to clarify that civil enforcement actions brought by the Office of the Attorney General pursuant to statutory authorization by the General Assembly are not subject to the limitations period set forth in § 5-107 of the Courts and Judicial Proceedings Article. The predecessor to CJP § 5-107 was adopted in 1777. It has long provided a time limit for certain criminal prosecutions for fines, but 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 in the eighteenth century.

In particular, House Bill 595 would clarify that the one-year limitation period set forth in CJP § 5-107 does not limit the imposition of penalties under regulatory statutes that the Office of the Attorney General is charged with enforcing, like Maryland's Consumer Protection Act and Securities Act, as well as other statutes granting enforcement authority to the Attorney General, like the law enacted last year (HB 772/SB 540) conferring authority on the Attorney General to enforce civil rights law. The Consumer Protection Act and the Securities Act are comprehensive regulatory statutes with well-developed and well-refined enforcement provisions. Both confer enforcement authority on the Attorney General or an appointee of the Attorney General and authorize the imposition of monetary penalties against violators. 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 conferring specific discretion with respect to penalties, *id.* § 20-1046(b). There is no suggestion in any of these enforcement provisions 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. Moreover, under the doctrine of sovereign immunity, courts narrowly construe statutes of limitations in their application to the State and its agencies, and statutes of limitations are understood to bar a particular action by the State only if the General Assembly has clearly stated that it intends for the type of action at issue to be so limited. *See, e.g., Maryland Securities Commissioner v. U.S. Securities Corporation*, 122 Md. App. 574, 593 (1998).

Nonetheless, defendants in enforcement actions have at times wrongly claimed that CJP § 5-107 limits the Attorney General's ability to seek or impose civil penalties against those who violate the statutes. Defendants have argued that the Attorney General may not seek or impose penalties for any unlawful conduct that occurred more than one year prior to the initiation of an enforcement action, even in cases where the violations took more than year just to come to light, and even where the violations involved complex financial fraud that required intensive effort to investigate. Under this incorrect argument, a complex financial fraud that did not come to light for two years would not be subject to penalties under any circumstances. Indeed, under this argument, civil penalties would not be available as a practical matter in most cases involving complex financial fraud and other similarly complex violations, because it is only rarely possible in such cases to learn of and investigate the violations within one year of their occurrence. Accordingly, the Appellate Court of Maryland has twice rejected this argument in the context of enforcement actions brought by the Office of the Attorney General under the Office's own administrative processes—one brought by the Consumer Protection Division, and one by the Securities Commissioner. *See In the Matter of Cricket Wireless, LLC*, 259 Md. App. 44, 67-76 (2023); *Maryland Securities Commissioner*, 122 Md. App. at 588-94.

No Maryland appellate court has applied CJP § 5-107 to limit any civil statutory cause of action brought by the Attorney General. However, the U.S. District Court did misapply CJP § 5-107 to a case filed in federal court in *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 in *Price v. Murdy*, 462 Md. 145, 152 n. 3 (2018); and the Appellate Court of Maryland declined to follow *Dickson* in other respects in *State v. Cottman Transmissions Systems*, 86 Md. App. 714, 736 n. 17 (1991). House Bill 595 would clarify that CJP § 5-107 does not apply to any Attorney General enforcement actions and thereby eliminate the need to address the issue in other civil statutory enforcement contexts in the future.

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 substantial time to investigate properly, and, in some instances, it has taken more than a year just for the Attorney General to obtain a final court order requiring intransigent parties to comply with an investigative subpoena. 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 a thorough 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 even just for a few months 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.

House Bill 595 will help clarify what is already the law in Maryland, which is that the limitations provision contained in CJP§ 5-107 does not apply to civil enforcement cases brought by the Attorney General. For these reasons, the Office of the Attorney General urges the Judiciary Committee to give HB 595 a favorable report with the requested amendments.

cc: Members, Judiciary Committee