Testimony of Deputy Commissioner Amit S. Bagga
New York City Department of Consumer Affairs

Before the
New York City Council Committee on Small Business

Hearing on
Introduction 1499, 1501, 1507, 1508, 1515, 1516, 1521, and 1526, in relation to penalty mitigation programs

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Introduction

Good afternoon, Chairman Cornegy, and members of the committee. My name is Amit S. Bagga, and I am the Deputy Commissioner for External Affairs at the New York City Department of Consumer Affairs ("DCA"). I am joined today by several colleagues from the agency, as well as representatives from sister City agencies. I would like to thank the committee for the opportunity to offer testimony about a package of bills that proposes forgiving fines for violations of the law in exchange for the implementation of an assortment of public policy initiatives.

DCA commends the Council's attention to the needs of small businesses and welcomes the conversation about how to ease their regulatory burdens. The de Blasio administration, and DCA in particular, share the Council's overall goal of making life easier for small businesses in New York City, and we are pleased to have the opportunity to once again present to you the many proactive steps we have undertaken to do so, as well as offer some additional ideas for how we might continue to do so.

Following an overview of our efforts to reduce burdens on small businesses, we will share with you our concerns about the Penalty Mitigation Programs, which we are concerned might have negative unintended consequences and might not ultimately achieve what is intended.

Fine Reduction and Easing Burdens on Small Businesses

Since Mayor de Blasio has taken office, we have very aggressively reduced small business fines and invested millions in translation, outreach, and education. We are proud to report that compared to the prior administration's last year in office, when DCA assessed more than $32 million in small business patrol fines, we have now reduced those fines by *more than 50 percent.* This unprecedented scope of reduction represents DCA's steadfast commitment under this Administration to prioritizing education, outreach, training, and robust implementation of Cure Laws whenever possible.

We know that the average brick-and-mortar, mom-and-pop store in New York City needs as much support as possible to thrive, and we make it *our* business to ensure that these stores *stay* in business. Since January 2014, we have conducted hundreds of legal and informational trainings,

and significantly enhanced our customer service capabilities through our expanded licensing center at 42 Broadway.

DCA has also prioritized helping immigrant business owners, who are estimated to be two-thirds of all small business owners in New York City, meaning that language access is a critical component of our work. To this end, DCA has made its materials available in as many as 26 different languages, and routinely ensures that industry-specific information is available in languages commonly spoken by proprietors in a given industry. DCA staff speak approximately 20 different languages and the majority of our non-subway print and radio advertising dollars are dedicated to advertising in local and foreign-language media, as we know that such outlets are where many business owners get their news.

We have also been a pioneer agency within City government when it comes to revamping our processes and procedures to ease burdens on small businesses. In early 2014, we were the first agency to require all of our inspectors to carry with them laminated cards featuring 16 languages that business owners could simply point to in order to have their inspection conducted in that language, using telephonic translation. Additionally, we have made approximately 40 of our most commonly-used inspector checklists available on our website in plain language and in as many as 12 additional languages for businesses to easily access.

This level of accessibility is further enhanced by our signature "Business Education Days" program. On these days, DCA staff hit the streets, going door-to-door along commercial corridors across the five boroughs, to talk to business owners directly about their individual concerns, provide information, and go through questions they may have about their compliance on the spot. During these visits, no violations are issued and no fines are assessed. Since 2014, DCA has visited thousands of businesses across the city to educate owners about general retail and tobacco laws, Paid Sick Leave, the increase in the minimum wage, among the many laws that we enforce. Just last year, DCA visited 14 different neighborhoods, including Flatbush Avenue in Bedford-Stuyvesant, 116th Street in East Harlem, East Tremont Avenue in Throgs Neck, Forest Avenue in North Westerleigh, and Steinway Street in Astoria.

In 2014, we created the position of Business Compliance Counsel. This agency attorney is dedicated almost exclusively to providing licensees with information on legal compliance. In addition to being able to ask questions directly to our Business Compliance Counsel, proprietors can also access a live representative through our online "Live Chat" services, which have served more than 41,000 business owners since January 2014.

In addition to these initiatives, the City's Department of Small Business Services ("SBS") provides free compliance consultations with guidance on how to avoid common violations from various agencies, including the Departments of Health, Environmental Protection, Sanitation, Fire, Buildings, and, of course, Consumer Affairs. To date, the program has served more than 1,000 businesses.

Compliance Advisors are trained to understand regulatory requirements across multiple agencies. They are available to visit businesses and provide an on-site consultation to help a new or existing businesses understand how to comply with some of the City's most prevalent regulatory

requirements. Advisors can also help if you've already received a violation by providing guidance on what the violation is for and how it can be resolved.

Additionally, as part of the compliance consultation, business owners receive a customized checklist highlighting the most common violations they might have. Compliance Advisors conduct their consultations not only in English, but also Mandarin, Cantonese, Fuzhou, Spanish and Russian. Notably, these compliance consultations do not result in agency enforcement, making them particularly valuable for business owners.

As I mentioned a few moments ago, DCA has reduced small business fines by more than 50 percent since the beginning of this Administration. These efforts have largely been made possible as a result of DCA choosing to issue warnings for many different types of first-time violations, and also are a result of our successful implementation of the Cure Law, a joint initiative of the Council and the Mayor's Office of Operations.

The Cure Law made dozens of types of first-time violations "curable." DCA's successful implementation of this law, which includes a process that is *extremely* easy for businesses to follow, has saved local businesses millions of dollars in fines, and likely additional millions in saved time, energy, and hassle. Our partner agencies utilize similar cure policies with an emphasis on incentivizing correction versus assessing punitive penalties.

Penalty Mitigation Legislative Package – Overview

With respect to the package of bills we're here to discuss today, it is our view that while the stated public policy goals are laudable, taken together, we are concerned this package could undermine important consumer and worker protection laws passed by this Council in ways that outweigh the potential public policy benefits. These laws include the landmark Paid Sick Leave Law and our Consumer Protection Law. Diminishing DCA's ability to effectively enforce these laws could weaken many key protections this Council has enacted and would pose significant challenges for implementation, in addition to likely being cost-prohibitive.

Introduction 1499 ("1499") would require DCA, as well as and the Departments of Housing Preservation & Development ("HPD"), Sanitation ("DSNY"), and Buildings ("DOB"), to conduct a review of all violations we issue, tell the Mayor and the Council which ones should be eligible for a "Penalty Mitigation Program," and explain why violations left off this list were not included. Introductions 1501, 1515, 1521, and 1526 allow for a waiver of fines for violations that are related to scanner accuracy, signage, or recordkeeping in exchange for providing bathroom access to the public, the installation of energy efficiency measures, donation of organic waste, or donation of excess food, respectively. Introduction 1516 requires SBS to develop a program that would allow businesses to ask for a compliance consultation, and give them opportunity to fix any violations found during the consultation, thus avoiding fines, which is a function SBS already performs, as I've noted. Introduction 1508 allows for waiver of fines related to recordkeeping violations if businesses attend a compliance course that would be designed by DCA.

Implementation Concerns

We have several concerns about the feasibility of implementation of this legislative package. A major concern is that the proposed Penalty Mitigation Programs conflict with, and in many cases, could be more burdensome than, existing processes available to businesses under the Cure Law.

Currently, the Cure Law process is very straightforward for a business owner. After receiving a "curable" violation, an owner simply signs a letter stating that they will fix the violation within 30 days, and, as a result, they are relieved of any fine burden. Expanding the Cure Law to cover additional violations is an initiative the Administration is eager to work with the Council on.

In contrast, we believe the Penalty Mitigation Programs proposed by the package would likely be extremely challenging to implement and could also be more complicated for small businesses to navigate. First, the creation of these programs would require the development and implementation of a *completely new and separate* administrative process, one that cannot use existing resources. After receiving a violation, business owners would likely first have to appear before the Office of Administrative Trials and Hearings ("OATH"). If OATH finds a business owner guilty of the violation, an Administrative Law Judge would then have to determine, based on a City agency's testimony and data, whether or not the violation is eligible to have any associated fines forgiven under a Penalty Mitigation Program. Then, pursuant to an OATH determination, a business owner would have to come back to the appropriate agency to request to participate in a Penalty Mitigation Program. Businesses could only enter into a regulatory agreement with the City, if they are, in fact, eligible. Based on the nature of the agreement, businesses would be required to make capital improvements or undertake other time-consuming work to demonstrate compliance, which would cost them far more money than simply paying fines that are as low as $25, and not likely to be more than $250. Lastly, businesses would be subject to future inspection, which could lead to a whole host of challenges for them if they found they were unable to comply with the agreement. It is unclear as to how this process would be easier on businesses, especially compared to the existing "cure" process.

It should be noted that the broad expansion of compliance assessments required by the bills far exceeds the resources we have today. Our small corps of 35 inspectors is responsible for inspecting more than tens of thousands of brick-and-mortar businesses annually for compliance with important consumer protection and licensing laws. Our inspectors ensure that businesses such as tax preparers, pawn brokers, used car dealers, employment agencies, all known for engaging in consumer harm, are not defrauding consumers. Given their critical mandate, it would be challenging to expect that our inspectors could also assess restrooms for their level of "public accessibility," for example.

We will now take a moment to discuss the bill of greatest concern to us, Introduction 1508; provisions of which would allow fines associated with "record keeping" violations to be easily forgiven.

Recordkeeping Concerns – Introduction 1508

While one might presume that record keeping is a pesky, onerous task for a busy and hardworking business owner, it is in fact an analysis of records – whether they're missing, inaccurate, accurate, complete, or falsified – that enables DCA to determine whether or not egregious consumer or worker harm has occurred.

Analyzing records allows DCA to reconstruct past events or transactions to determine whether underlying laws were, in fact, broken. Easing the requirements for record keeping would be particularly problematic in certain licensing and labor law areas where record keeping is integral to our ability to enforce the law.

DCA does not typically fine businesses for "clerical errors" with respect to records. In cases of "missing" records, which is a common issue in the towing industry, widely known to be among the most egregious when it comes to consumer fraud, we have often found that the fact that the records are missing is not simply an "honest mistake," but rather evidence that deceptive or predatory practices are being concealed.

In the Paid Sick Leave context, a review of records is critical to enabling us to determine whether or not employees have been robbed of their right to take sick time. As you are aware, the passage and implementation of the Paid Sick Leave Law are signature accomplishments for both the Council and the Administration. It is almost exclusively through a review of *existing records* that we are able to determine whether or not an employer is out of compliance. For example, because of an analysis of employee records, we were able to secure $380,000 in worker restitution – nearly three-and-a-half times more than the fines we assessed – for approximately 2,400 CVS employees who were denied access to paid sick leave. This case, along with the large majority of cases we bring based on record keeping violations, came not as the result of the records showing "clerical errors" or simply being "incomplete," but rather because the information *in* the existing records showed clear non-compliance. In the CVS case, and in many others, the issue is not that the businesses didn't know how to keep their records and need training on how to do so; the issue is that records were kept and that the kept records demonstrated that the businesses have not followed the law.

Importantly, many records that are routinely kept by businesses help to demonstrate compliance not only with City laws, but also with state and federal laws. In several cases, the payroll records being reviewed by our investigators for paid sick leave compliance are the very same records other agencies review for compliance with payment of the minimum wage and overtime wages. Because the absence or falsification of such records would render an employer subject to punitive action by state or federal authorities, undermining the importance of record keeping via City law is likely to only hurt, not help, businesses in our city.

In the consumer protection context, it is worth noting that in the used car and process server industries, both of which we license, record keeping is a critical tool that enables us to determine whether or not consumers have been sold sometimes dangerous cars at high interest rates through predatory and deceptive practices, or whether or not individuals who are supposed to be "served"

with legal documents actually received them. Based on our many years of enforcement experience, we believe that the legislative proposals before us today ease record keeping requirements in a manner that could unintentionally have an adverse impact on consumers and workers.

There are very important reasons for why record keeping violations were not previously included in the Cure Law, and we hope that the examples we have provided are illustrative of that.

Linking Penalty Mitigation and Specific Policies: Key Challenges

While we appreciate the Council's intent with this package to ease burdens on small businesses – again, a commitment that the Administration deeply shares – we are concerned these bills link fine forgiveness to the implementation of unrelated policy initiatives.

The central purpose of having penalties in consumer, worker, and environmental protection laws is to establish an important (but not overly punitive) incentive to comply with these laws. We are concerned that allowing fines for one category to be waived in exchange for unrelated behavior, such as potentially exchanging the failure to provide Paid Sick Leave for public restroom access, might not result in a "cure" of the original issue and fundamentally undermines the original purpose of the violations. We are concerned these proposals could inadvertently supplant existing policies identified as priorities by the Council, thus sending mixed signals to businesses how they must comply with existing laws.

Conclusion

We would like to reiterate that we appreciate both the value of the public policy goals the Council is seeking to accomplish, as well as your goal of reducing burdens on small businesses. Under Mayor de Blasio's leadership, we have been quite successful in reducing a large variety of burdens that small business owners might face – and we broadly agree that more can be done.

We are eager to work closely with the Council on ways in which we can further make life easier for our city's small businesses, such as expanding the Cure Law, as a start. DCA already has a list of approximately 20 different violation types we would seek to make "curable;" we'd very much welcome the opportunity to discuss those with the Council in the near future.

While we believe an expansion of the Cure Law would ultimately help businesses, we are concerned that implementation of the Penalty Mitigation Programs proposed by this legislative package will not do so. As a result, we also do not believe these programs are likely to result in the realization of the public policy goals the Council has identified. Additionally, we remain concerned about the ways in which the bills could undermine important consumer protection, worker protection, and environmental protection laws that the Council has prioritized, and we do not believe that the implementation of these bills would be feasible.

Thank you for the opportunity to testify today; we look forward to working closely with you on this, and other, issues. My colleagues and I will be happy to answer questions. Before we do our

colleague from HPD, Anne Marie Santiago, will provide testimony on Introductions 1507 and 1518.