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**Before the Committee of the Whole  
Council of the District of Columbia**

**Public Hearing Regarding:**

**Bill 24-0658  
“Consumer Protection Procedures Amendment Act of 2022”**

**November 17, 2022**

Legal Aid of the District of Columbia<sup>1</sup> submits the following testimony regarding Bill 24-0658, the Consumer Protection Procedures Amendment Act of 2022. Legal Aid’s consumer law practice focuses on foreclosure prevention and debt collection defense. In each of these areas, we represent consumers faced with unfair, deceptive, or unlawful trade practices that arise in consumer-merchant relationships. The Consumer Protection Procedures Act (“CPPA”) is a critical tool in our practice.

Legal Aid supports the bill in its entirety. The Office of Attorney General (“OAG”) plays a vital role in enforcing the District’s consumer protection laws, none more important than the CPPA. The proposed amendments would significantly strengthen OAG’s ability to protect consumers from unfair, deceptive, and unlawful trade practices. The bill also would clarify several provisions of the act that will make it easier for courts to reject meritless arguments about its scope. One of those clarifications concerns the definition of “merchant.” That amendment would reinforce existing language in the CPPA establishing that a business that *supplies* goods or services to a consumer is a merchant (even if it is not the actual seller). We urge the Committee to consider an additional clarification to that definition to

confirm that suppliers of goods and services are merchants even in the absence of a direct contractual relationship between the supplier and the consumer.

The Department of Licensing and Consumer Protection (“DLCP”) has voiced concerns regarding provisions of the bill affecting DLCP’s consumer protection authority and functions. Legal Aid supports OAG’s efforts to accommodate those concerns with revisions to the bill. We do not, however, believe that enacting the important amendments in the bill should be delayed pending a study and eventual overhaul of the entire CPPA as proposed by DLCP.

### **The Bill Would Enhance Consumer Protection by Clarifying the Businesses and Trade Practices to Which the CPPA Applies**

Businesses defending CPPA claims brought by OAG or directly by consumers too frequently assert meritless arguments relating to the CPPA’s scope<sup>ii</sup>. As the OAG’s testimony on the bill explains, defeating such arguments delays the resolution of CPPA actions and wastes resources. The bill contains important clarifying language that would obviate two of those arguments. One relates to the definition of “merchant.” The other confirms that the CPPA applies to all unlawful trade practices, and not just the violations of law identified in the act.

#### Definition of “merchant”

First, the bill would clarify the definition of “merchant” to confirm longstanding judicial interpretation of the act. That definition currently states:

"merchant" means a person who does or would **sell, lease (to), or transfer**, either directly or indirectly, consumer goods or services, or a person who does or would supply the goods or services which are or would be the subject matter of a trade practice[.]

DC Code § 28-3901(a)(3) (emphasis added). The bill would amend the definition by striking the phrase “lease (to), or transfer” and replacing it with “lease (to), **supply**, or transfer.” B24-658, sec. 2(a)(1) (emphasis added).

The D.C. Court of Appeals has long interpreted the CPPA to require the existence of a “consumer-merchant relationship,” i.e., a relationship in which there is both a “consumer” and a “merchant” (each as defined by the act). As explained in the leading case:

[T]he CPPA . . . was designed to police trade practices arising only out of consumer-merchant relationships. The Act clearly contemplates complaints against "merchants" who "supply the goods or services which are or would be the subject matter of a trade practice." CPPA § 2(a)(3). **While a "merchant" is not limited to the actual seller of the goods or services complained of, he must be a "person" connected with the "supply" side of a consumer transaction.** Committee Report, at 13 [Council of the District of Columbia, Committee on Public Services and Consumer Affairs, Report on Bill 1-253 (Mar. 24, 1976)].

*Howard v. Riggs Nat'l Bank*, 432 A2d 701, 709 (D.C. 1981) (emphasis added). The proposed amendment to the definition of "merchant" would reinforce the Court of Appeals' understanding – based on the Committee Report that supported the original enactment of the CPPA – that a business that *supplies* consumer goods or services is a merchant, even if that business is not the "*actual seller* of the goods or services." *Id.*

Based on the *Howard* decision, local and federal courts have repeatedly recognized that a business connected with the supply side of a consumer transaction is a merchant. Yet parties who are not actual sellers of goods or services regularly contend that they cannot be a "merchant" and had no consumer-merchant relationship with the consumer because they did not have a contractual relationship with the consumer, even though they are connected with the supply side of the transaction and are dealing directly with the consumer.

In our work with homeowners, we see mortgage servicers regularly make these arguments in an effort to avoid CPPA liability. Note holders often hire mortgage servicers to manage their loans, including processing loan modification applications submitted by consumers experiencing financial distress. When, for example, a consumer asserts misrepresentations by the servicer in that process, the servicer often contends that it is not a merchant, and defends the CPPA claim on that basis. We believe that this argument has the potential to arise in other contexts as well. For example, a property manager hired by the consumer's landlord might misrepresent the features of an apartment in advertising for a vacancy or fail to remedy serious housing code violations causing serious harm to a tenant. But when the consumer asserts a CPPA claim, the property manager, like the mortgage

servicer, could seek to avoid liability on the theory that they have no consumer-merchant relationship with the tenant.

The bill obviates the need for the OAG, consumers, and courts to expend time and resources responding to these arguments by adding the word “supply” to the current “sell or lease (to)” formulation in the definition, clarifying that suppliers of consumer goods and services are merchants in their own right, consistent with the original intent of the Council.

Legal Aid, with OAG’s support, proposes a further amendment to the merchant definition that would resolve any doubt that suppliers need not be the actual sellers of the goods or services received by the consumer and need not have a contractual relationship with the consumer. We suggest adding this additional sentence at the end of the definition of merchant: “A person need not have a contractual relationship with the consumer to qualify as a merchant.”

If the amendment to the definition of merchant already in the bill is combined with our proposed addition, the entire definition, as amended, would read:

"merchant" means a person who does or would sell, lease (to), **supply**, or transfer, either directly or indirectly, consumer goods or services, or a person who does or would supply the goods or services which are or would be the subject matter of a trade practice. **A person need not have a contractual relationship with the consumer to qualify as a merchant**[.] [Emphasis on new language.]

#### Unlawful trade practices

An overarching purpose of the CPPA “is to assure that a just mechanism exists to remedy **all improper trade practices** and deter the continuing use of such practices[.]” DC Code § 28-3901(b)(1)(emphasis added). To that end, section 3904 (titled “Unfair or deceptive trade practices”) identifies a long list of specific trade practices that violate the act, including some practices that are themselves a violation of another law or regulation. See *id.* § 3904. The list is introduced by this language: “It shall be a violation of this chapter for any person to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby, **including** to: . . .” *Id.* The use of the word “including” makes clear that the list is not exhaustive.

Nonetheless, businesses defending CPPA claims sometimes argue that trade practices that violate laws other than the specific laws and regulations called out in the “including” list do not violate the act. Those arguments are especially specious because other provisions of the act state expressly that violations of law are violations of the act.

For example, the private right of action provision of the CPPA that allows consumers to file a court case against a merchant states: “A consumer may bring an action seeking relief from the use of a trade practice **in violation of a law of the District.**” DC Code § 3905(k)(1)(A) (emphasis added). Similarly, the provision outlining DLCP’s authority to enforce the act refers to investigations of **unlawful** trade practices: “The Department, in its discretion, may: (1) receive and investigate any consumer complaint and initiate its own investigation of deceptive, unfair, **or unlawful trade practices** against consumers. *Id.* § 3903(a)(1) (emphasis added). Further, in outlining DLCP’s complaint procedures, the act states: “[T]he Director shall investigate each such complaint and determine: . . . [w]hether the trade practice which occurred **violates any statute, regulation, rule of common law, or other law of the District of Columbia.**” *Id.* § 3905(b)(1)(B) (emphasis added).

The bill would put an end to the meritless defense that unlawful trade practices not identified in section 3904 are not violations of the act by replacing the phrase “unfair or deceptive” in the lead-in language to the list of trade practices that violate the act with “unfair, deceptive, **or unlawful.**” B24-658 sec. (c)(1) (emphasis added). Legal Aid supports this important clarifying amendment.

## **Conclusion**

Legal Aid supports Bill 24-658 in its entirety. The clarification of the definition of merchant in the bill as introduced and as supplemented with the additional language proposed by Legal Aid will protect consumers from improper trade practices by all businesses supplying goods and services in the District in a consumer-merchant relationship. In addition, confirming that the act covers all unfair, deceptive, and unlawful trade practices (and not just the violations of law specifically identified) will ensure that the CPPA is available to redress all violations of law that arise in those relationships.

We urge the Council to enact the bill during the current Council Period. Prompt enactment will provide immediate benefit to District consumers, who rely every day on the CPPA as the District’s principal consumer protection statute. A delay into the next Council Period would result in needless expenditure of resources and delay in

resolving claims as the OAG and Legal Aid confront meritless arguments by businesses attempting to avoid liability for consumer harm.

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<sup>i</sup> Legal Aid of the District of Columbia was formed in 1932 to “provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs.” Legal Aid is the oldest and largest general civil legal services program in the District of Columbia. Over the last 90 years, Legal Aid staff and volunteers have been making justice real – in individual and systemic ways – for tens of thousands of persons living in poverty in the District. The largest part of our work is comprised of individual representation in housing, domestic violence/family, public benefits, and consumer law. We also work on immigration law matters and help individuals with the collateral consequences of their involvement with the criminal justice system. From the experiences of our clients, we identify opportunities for court and law reform, public policy advocacy, and systemic litigation. More information about Legal Aid can be obtained from our website, [www.LegalAidDC.org](http://www.LegalAidDC.org).

<sup>ii</sup> The CPPA provides three avenues by which consumers can obtain relief from unfair, deceptive, and unlawful trade practices of businesses operating in the District. First, OAG is vested with broad authority to enforce the CPPA by investigating improper business conduct and, when necessary, bringing enforcement actions in court. Second, the CPPA establishes an administrative process in which DLCP, as the District’s principal consumer protection agency, investigates and adjudicates consumer complaints. And third, the CPPA contains a private right of action under which consumers can go directly to court, either individually or under the auspices of an interested non-profit organization, to seek damages against a business that has violated the act. Legal Aid and other D.C.-based legal services organizations play a vital role in assisting consumers in bringing those private actions.