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PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEES ON
CONSUMER PROTECTION & COMMERCE AND JUDICIARY

TWENTY-FOURTH STATE LEGISLATURE
REGULAR SESSION, 2008

Thursday, January 31, 2008
3:00 p.m.

TESTIMONY ON HOUSE BILL NO. 2326 – RELATING TO MORTGAGES.

TO THE HONORABLE ROBERT N. HERKES AND TOMMY WATERS, CHAIRS, AND MEMBERS OF THE COMMITTEES:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify regarding House Bill No. 2326, Relating to Mortgages. While the Department is in strong support of initiatives designed to protect our citizens from the ravages of equity stripping and real estate fraud, it has concerns that the current version of this bill will not effectuate its desired goal. In this regard, we would respectfully request that the Committee give favorable consideration to another bill which seeks to achieve the same laudatory protections as House Bill No. 2326. That bill is House Bill No. 3104 Relating to the Prevention of Mortgage Rescue Fraud. My

name is Stephen Levins, and I am the Executive Director of the Department's Office of Consumer Protection.

House Bill No. 2326 proposes to add a new chapter to the Hawaii Revised Statutes, designed to protect Hawaii consumers from persons who prey on homeowners facing property foreclosures, liens, or encumbrances. These so-called mortgage rescuers offer phantom help to homeowners, taking a fee of a few thousand dollars for supposedly negotiating with the homeowners' secured creditors. After collecting the money, many do little or no work and essentially abandon the homeowners. In the most insidious cases, the consultant will persuade families to deed their house to investors for a year. The homeowners supposedly can use that time to clear up their credit and refinance the property, then take back title free and clear. In many cases the homeowners wind up becoming tenants and then being evicted. The purpose of House Bill No. 2326 is to protect these vulnerable homeowners by requiring that they be provided with adequate disclosures prior to signing a contract with an equity purchaser and imposing a cooling off period during which the homeowner may be able to get out of their obligations under the contract. While the Department appreciates the intent of House Bill No. 2326 it has several concerns about its provisions. The following list is indicative of difficulties associated with this measure:

1. Section 3, page 2, lines 3-5. The definition of "residence in foreclosure" is unnecessarily limiting, since it requires that the owner be in residence at the foreclosed property.
2. Section 4, page 4, lines 3-5 exempts mortgage brokers from the requirements of the bill. This occupation should not be exempt, especially since there have been several recent instances in Hawaii in which there have been allegations that mortgage brokers have engaged in improprieties, including equity stripping, against homeowners. If mortgage brokers engage in the conduct regulated by this bill there is no logical reason to exclude them from its provisions.
3. Section 4, page 4, lines 6-9 exempts real estate brokers or real estate salespersons from the requirements of the bill. During the past few years the Office of Consumer Protection has become aware of several instances in which persons employed as either real estate brokers or salespersons have engaged in the same improper conduct that this bill seeks to eliminate. Enactment of this provision would unnecessarily immunize all of the approximately 21,000 registered agents and brokers currently licensed to do business in the State of Hawaii.
4. Section 4, page 4, lines 10-14 [§4(9)] exempts any nonprofit organization that offers counseling or advice to homeowners in foreclosure or loan

default and should refer directly to applicable Hawaii law that governs credit counselors. See, section 477E of the Hawaii Revised Statutes.

5. Section 12, page 8, lines 21-22 [§12(a)] should require that a foreclosure consulting contract be provided to "each" homeowner to prevent a foreclosure consultant from providing the foreclosure consulting contract to only the least sophisticated homeowner.
6. Section 12, page 9, lines 4-8. These disclosures should be on the first page of the consulting contract. Significant information, such as the name and address of the consultant, and where the notice of cancellation is mailed, should not be buried in the contract.
7. Section 12, page 9, lines 4-8 [§12(b)] should specify that a foreclosure consulting contract include the date that "each" homeowner signed the contract so that it is clear that each homeowner has the full period during which the contract can be cancelled. This is to prevent the foreclosure consultant from having the least sophisticated homeowner sign the contract first and thus starting the cancellation period clock for the other homeowners.
8. Section 12, page 12, lines 11-14 [§12(h)] should require that the foreclosure consultant provide a copy of a fully executed foreclosure

consulting contract to "each" homeowner to ensure that each homeowner has notice of the right of cancellation.

9. Section 12, page 12, lines 1-10. The cancellation provision should include language stating that there is no penalty or obligation until the foreclosure consultant has performed all of their obligations and that cancellation can occur any time until all services have been performed.
10. Section 20, page 14, lines 11-13. The prohibition on unconscionable conduct should be expanded to also include misrepresentations, omissions, and waivers of rights.
11. Section 21, page 14, lines 15-19. The definition of "foreclosure purchaser" is too restrictive. It should also include anyone who acquires any interest in a distressed property, whether it is received directly or indirectly, and should not be limited to those transactions that involve a subsequent reconveyance or the promise of a subsequent reconveyance. Foreclosure purchasers seeking to take unfair advantage of Hawaii homeowners facing foreclosures will structure the purchase of the residence in foreclosure in whatever manner it takes to get title to the property and avoid the requirements of this bill. In order to get around the requirements of this bill, foreclosure purchasers will promise homeowners many things but simply not provide the homeowner with the right to

repurchase their home. The initial conveyance of title from the distressed homeowner facing foreclosure to the foreclosure purchaser is the point at which the homeowner loses the opportunity to sell the residence in foreclosure and receive the equity in the property, negotiate a payment plan with the foreclosing lender, or refinance the foreclosing mortgage loan.

12. Section 21, page 15, lines 1-6. The bill should make it clear that transfer of the property can not occur until the right to cancel the contract has elapsed.
13. Section 22, page 16, lines 14-19 [§22(b) (3)] the NOTICE OF TRANSFER OF DEED OR TITLE should require the dated signature of "each" homeowner.
14. Section 22, page 19, lines 1-6. The ability to cancel the conveyance contract is limited to three days, a period of time that may be too brief to fully protect the homeowner.
15. Section 24, page 24, lines 13-22 [§24(2) (B)]. Basing any payment the foreclosure purchaser is to pay the homeowner upon resale of the residence in foreclosure on the "net proceeds" of the resale ignores the equity stripping feature of foreclosure purchases. When a foreclosure purchaser is able to take unfair advantage of a Hawaii homeowner facing

foreclosure and acquires title to the residence in foreclosure by simply paying off any remaining mortgage loan balance, the foreclosure purchaser will often refinance the property for an amount near the full value of house, thus "stripping" the equity out of the house. The ingeniousness of equity stripping schemes is that the foreclosure purchaser realizes all the built up gain in property value at the time the property is acquired rather than having to wait until the property is sold. As a result, there will be little if any "net proceeds" available upon resale to return to the distressed homeowner.

16. Section 24, page 25, lines 1-4 [§24(3)] does not put any limit on the price the foreclosure purchaser can charge the homeowner upon the homeowner's repurchase of the residence in foreclosure. Without any limitation, the foreclosure purchaser may be able to acquire title from the homeowner for no or little consideration and then resell the property back to the homeowner at market or some inflated value. As a result, the Hawaii homeowners will not only lose the accumulated equity in their homes, but lose any insulation they had against the severe increase in property values by being required to purchase their own home back at market or some other inflated value.

17. The bill does not specifically address the amount that the foreclosure consultant can make if the homeowner is successful in buying back the home. Most applicable state statutes, as well as House Bill No. 3104, limit the profit to 125% of the total debt on the home paid by the purchaser.
18. Sections 31 and 41, page 28. The enforcement provisions are too limited. Currently, the Office of Consumer Protection (OCP) is primarily responsible in the State of Hawaii for enforcing consumer protection laws. Pursuant to its authority, OCP has investigated and prosecuted several cases during the past few years related to "mortgage rescue fraud". This bill, as currently drafted, may limit the ability of OCP to continue to prosecute violators by restricting its role to investigation, and leaving the ultimate enforcement authority with the Office of the Attorney General. In addition, because licensed mortgage brokers and real estate agents have allegedly engaged in improper equity stripping schemes, any remedies provided should be cumulative to remedies provided by other laws including the State's licensing statutes.

The time is ripe for the Legislature to do something about the problems associated with mortgage fraud. During the past year, numerous complaints have been filed with the Office of Consumer Protection from people who sought help from equity

purchasers. Instead of receiving help, several found that they were being forced out of their home. Although many of the provisions of House Bill No. 2326 are meritorious, the above enumerated problems indicate that House Bill No. 3104 (which is modeled after laws in Minnesota and Illinois), is a better vehicle to help homeowners in distress.

Thank you for this opportunity to testify on House Bill No. 2326. I will be happy to answer any questions that the members of the Committees may have.



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--of Hawaii--

The Honorable Robert N. Herkes, Chair
The Honorable Angus L.K. McKelvey, Vice Chair
House Committee on Consumer Protection and Commerce

Hearing : Thursday, January 31, 2008, 3:00 p.m.
State Capitol, Conference Room 325

IN SUPPORT OF THE INTENT HB 2326

Chair and Members of the Committees:

My name is Ryker Wada, representing the Legal Aid Society of Hawai'i ("LASH"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled and other low and moderate income families who are consumers. We are testifying in support of the intent of HB 2326 as it would strengthen protections for consumers in the State of Hawaii. However LASH prefers HB 3104 as a vehicle to protect consumers against foreclosure rescue scams.

I supervise a housing counseling program in the Consumer Unit at the Legal Aid Society of Hawaii. The Homeownership Counseling Project provides advice to individuals and families about homeownership issues. Specifically the project provides information on how to prepare yourself before purchasing a home and what to do if you are in danger of losing your home through foreclosure. In the past Fiscal Year we serviced more than 200 clients in our Project.

HB 2326 seeks to impose certain restrictions on "foreclosure consultants" by requiring contracts to be in writing, containing full disclosures and a right to cancel. HB 2326 would help to protect consumers from foreclosure rescue scams and fraudulent distressed property consultants who offer "help" to homeowners who are in arrears or foreclosure. This "help" usually comes in the form of scam artists who take a fee for negotiating with a distressed homeowners mortgage company. Instead the homeowners get little or nothing for their fee and the scam artist has disappeared with the homeowner's money. A more insidious form of the foreclosure rescue scam involves the scammer taking title to the

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homeowner's property with the homeowner staying in the property as a renter and attempting to buy it back over the next few years. The terms of these deals usually make it impossible for homeowners to buy back their property, allowing the scammer to walk off with all or most of a homes equity.

LASH anticipates a growing number of foreclosures in the coming years as the so-called exotic mortgage products mature and consumers are not able to keep up with their adjusted mortgage payments or find a suitable refinance. With the growing number of foreclosures, there will only be an increase in the number of foreclosure rescue scams and wronged consumers in the State of Hawaii.

The Legal Aid Society of Hawaii strongly supports the intent behind HB 2326, and its efforts to protect the consumers in the State of Hawaii, however LASH prefers HB 3104 as a vehicle to protect consumers against foreclosure rescue scams and "foreclosure consultants."

Conclusion:

We appreciate these committees' recognition of the need to protect consumers in the State of Hawaii. HB 2326 attempts to strengthen protections for consumers. We strongly support the intent behind HB 2326, but prefer HB 3104. Thank you for the opportunity to testify.