

Testimony on
H.B. NO. 2591 H.D. 1 -
RELATING TO GIFT CERTIFICATES

Before the

Senate Committee on Commerce, Consumer Protection, and Affordable Housing
Tuesday, March 25, 2007, 9:00 a.m., Conference Room 229

By

Matthew M. Matsunaga
Schlack Ito Lockwood Piper & Elkind

Please accept this testimony in **support** of HB 2591 HD1, which would clarify exemptions to the law governing gift certificates, **with the proposed amendment** attached hereto (which would codify case law regarding federal preemption on federal banking laws). I've also attached a background summary of recent legal developments in the gift card area for your information.

HB 2591 was originally a bill that required retailers to pay out in cash the balance of any gift card worth less than \$5, if requested by the consumer. The House Committee on Consumer Protection and Commerce, after hearing testimony in opposition to this idea, gutted this measure and changed it to the existing HD1. This Committee's hearing is the first public hearing on the proposals contained in this HD1.

The HD1, as passed by the House, makes sense; however, it also makes sense to add the following language to those items that should be exempt from existing state law on gift cards (added in subsection 10 to the attached draft):

Gift certificates that are issued by a federal financial institution, or by its affiliate or subsidiary, as such terms are defined in section 412:1-109.

In 2006, the U.S. District Court in New Hampshire ruled that Simon Mall's gift card program is not subject to New Hampshire state gift card laws restricting fees and expiration dates. The relationship between the issuing bank and the purchaser of a gift card – including the terms and conditions and associated fee structure – is governed by federal law. To the extent state laws attempt to impose additional restrictions or limitations on that relationship, they stand as an obstacle to the fulfillment of Congressional policies and goals embodied in federal banking laws and are therefore preempted. The "Simon Mall Decision" was affirmed last year by the U.S. Court of Appeals (First Circuit). This year, the U.S. Supreme Court declined to hear the appeal of this decision, thereby allowing the "Simon Mall Decision" to remain good case law.

Since the "Simon Mall Decision," New Mexico and Minnesota have passed legislation exempting federal banks and their affiliates from state gift card definitions (codifying the Simon Mall Decision). Iowa is in the process of doing the same. Hawaii should follow suit. This will provide clear guidance to federal financial institutions and their affiliates to encourage interstate commerce in our state and send a message that Hawaii will not be an obstacle to the fulfillment of Congressional policies and goals embodied in federal banking laws.

This will not hurt consumers. In fact, this will help consumers by giving them more choices. Gift cards issued by national banks and thrifts are already being sold in the marketplace here in Hawaii, charging purchase, monthly maintenance and replacement fees. For example, a recent purchase of a Visa gift card (issued by a federal bank) at Safeway contained the following fees: purchase fee (\$3.95), monthly maintenance fee (\$2.00 after 12th month) and lost/stolen replacement fee (\$5.95). Clarifying the law, as suggested, will encourage other federal financial institutions or their affiliates (such as American Express) to resume the sale of gift cards in Hawaii, thereby creating more competition. **Competition between gift card products will create better choices for Hawaii consumers.**

Regulation to protect consumers makes sense, but we need sensible regulation that acknowledges federal preemption in the banking industry. A well-informed consumer and healthy competition is much healthier to the economy than a law that effectively limits a well-desired product from the stream of commerce.

Thank you for this opportunity to testify.



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TO THE SENATE COMMITTEE ON COMMERCE,
CONSUMER PROTECTION, AND AFFORDABLE HOUSING

TWENTY-FOURTH STATE LEGISLATURE
REGULAR SESSION OF 2008

Tuesday, March 25, 2008
9:00 a.m.

**TESTIMONY ON HOUSE BILL NO. 2591, HD1 – RELATING TO GIFT
CERTIFICATES.**

TO THE HONORABLE SENATOR RUSSELL S. KOKUBUN, CHAIR, AND MEMBERS
OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to provide the following comments regarding House Bill No. 2591, HD1, Relating to Gift Certificates. My name is Stephen Levins, and I am the Executive Director of the Department's Office of Consumer Protection.

House Bill No. 2591, HD1, seeks to narrow Hawaii law's existing definition of gift cards by excluding several kinds of cards from the requirements of Haw. Rev. Stat. § 481B-13. Current Hawaii law prohibits merchants from charging fees for the issuance

and maintenance of all gift cards. The prohibitions were enacted in 2005, in large part, because the legislature was concerned with consumers being saddled with these types of fees during their use of gift cards. At that time, the statutory definition was broadly applied so that all electronic cards with a banked dollar value fell within the definition, including cards issued by financial institutions. House Bill 2951, HD1, seeks to significantly narrow the broad definition by specifically excluding numerous categories, such as: rebate cards, debit cards, payroll cards, prepaid calling cards, insurance claim cards, government benefit cards, transportation cards, and meal cards.

The following comments are illustrative of some of the Department's concerns with this proposal.

New **subsection (c)(1)** proposes to add two more "gift" cards issued as part of an "incentive" or "rebate" to a list of "gift" cards currently excluded "where no money or anything of value is given to the issuer by the consumer in exchange for the gift certificate". This proposed exclusion appears to be unnecessary since under current law a "gift certificate" is already defined as including only those "gift" cards "where the issuer has received payment for the full banked dollar value", "the issuer has received payment for the full face value of the certificate", or "that evidences the giving of consideration in exchange for the right to redeem the certificate . . . for goods, food, or services of at least an equal value."

New **subsection (c)(2)** proposes to exclude "a debit card or other legal device used to access a deposit account and that is subject to the Electronic Funds Transfer Act, title 15, section 1693 et seq." This type of card already appears to be covered by applicable federal law.

Proposed **subsection (c)(3)** is broadly worded and may create problems if an employee purchases a "gift" card from his or her employer. Under proposed subsection (c)(3), a "gift" card purchased by an employee acting as a private consumer from his or her employer would be excluded from the requirements of Haw. Rev. Stat. § 481B-13 because it is issued by the employer to an employee, even if the employee purchases the "gift" card as a gift for another person.

Proposed **subsection (c)(4)** excludes prepaid calling cards that may be used as gift cards. Absent compelling circumstances there is little reason to exclude these cards from the requirements of Haw. Rev. Stat. § 481B-13.

New **subsection (c)(5)** broadly excludes insurance claim cards used to pay an "insurance claim" despite the fact that the term "claim" does not appear to be defined in the Hawaii Insurance Code (Haw. Rev. Stat. Chapter 431). The Concise Oxford English Dictionary 262 (11th ed. 2004) defines "claim", in part, as a "request (money) under the terms of an insurance policy." As a result of that definition, an "insurance claim" could arguably be any request for payment under an accident, health or sickness insurance

contract, a credit life or credit disability policy, a motor vehicle insurance contract, a life insurance or annuity policy, a property insurance policy, some surety insurance arrangement, a motorcycle or motor scooter policy, and/or a long-term care insurance contract. The salient point being that because of the complexity and variety of insurance products any exclusion of insurance claim cards should probably make some reference to the Hawaii Insurance Code or Chapter 431 of the Hawaii Revised Statutes.

Proposed **subsection (c)(6)** is another broadly worded exclusion, in which the term "government benefit card", is not defined. Without knowing which government benefit cards fall within the definition of a "gift certificate", it is impossible to determine whether the protections provided by Haw. Rev. Stat. § 481B-13 are necessary.

New **subsection (c)(7)** proposes to exclude a "transportation card" without providing a definition.

The exclusion provided by new **subsection (c)(8)** proposes to excuse "electronic travel cards" from the requirements of Haw. Rev. Stat. § 481B-13. Again there is no definition. Since "electronic travel card" is not defined it is difficult to determine whether this is a valid exclusion. Conceivably, an electronic travel card could include any "gift" card that could be used to purchase travel-related goods or services.

New **subsection (c)(9)** proposes to exclude "meal cards" used to purchase food or beverage from a school. The Department has several concerns. First, does subsection (c)(9) cover only meal cards issued by or through a school? Second, if the proposed exclusion applies only to school-issued meal cards, should such meal cards be excluded from the "gift" card protections? Why should a school be allowed to charge exorbitant and hidden fees or impose unreasonably short expiration periods? Third, what about meal cards issued by a school that can be redeemed at a private vendor on or around a school campus or a privately run cafeteria? Should those cards be excluded from the requirements of Haw. Rev. Stat. § 481B-13? Fourth, what about meal cards issued through a private company that can be used not only at a school cafeteria but at other privately run food vendors? While a school-issued meal card used exclusively at a school-run cafeteria may possibly warrant exclusion, any other meal card would appear to operate more like a "gift" card calling for the protections offered by Haw. Rev. Stat. § 481B-13.

In view of the foregoing, it appears that the proposed language is in need of much clarification. Consequently, unless there are compelling reasons warranting the above enumerated amendments, the Department does not believe that the Committee should provide them with favorable consideration.

Testimony on House Bill No. 2591, HD1
March 25, 2008
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Thank you for this opportunity to testify on House Bill No. 2591, HD1. I will be happy to answer any questions that the members of the Committee may have.

Presentation to the
Senate Committee on Commerce, Consumer Protection & Affordable Housing
Tuesday, March 25, 2008
9:00 a.m., Room 229

HB2591, HD 1 Relating to Gift Certificates

Senator Russell Kokubun, Chair
and members of the Senate Committee on Commerce, Consumer Protection &
Affordable Housing

My name is Neal Okabayashi and I testify for First Hawaiian Bank in support of HB 2591, HD 1. As amended, the purpose of this bill is to confine the gift card law to stored value cards that are truly gift cards.

An electronic gift card is a type of stored value card. While the current definition of gift card does cover a gift card, it is so broad that it also covers other forms of stored value cards that are not gift cards such as the type of cards that are listed in the HD 1.

Last session, as part of an effort of others to amend the gift card law to permit fees, the Senate did amend the definition of gift card but that bill died in conference.

This HD 1 does not in any way permit or change the law on fees on gift cards. It simply excludes certain type of stored value cards which are not viewed as gift cards from the restrictions of the gift card law.

It is perhaps a cumbersome approach to list one by one, stored value cards which are not gift cards because it means that for every innovation in electronic banking, we must return to the Legislature for relief but the problem is that there is no definition of gift card which only covers gift cards but is also a clear and precise definition. For example, the OCC, which regulates national banks, defines a gift card that "is designed to be purchased by one consumer (purchaser) and presented as a gift to a second consumer (recipient)." The lack of precision caused the House to take the approach of HD 1. This same approach was used by Minnesota. Other states have taken the approach of just excluding bank issued gift cards from the gift card law.

Thank you for this opportunity to testify and I will be happy to answer any questions you may have.



Senator Russell Kokubun, Chair
Senator David Ige, Vice Chair
Committee on Commerce, Consumer Protection & Housing
State Capitol, Honolulu, Hawaii 96813

HEARING Tuesday, March 25, 2008
 9:00 am
 Conference Room 229

RE: HB2591, HD1, Relating to Gift Certificates

Chair Kokubun, Vice Chair Ige, and Members of the Committee:

Retail Merchants of Hawaii (RMH) is a not-for-profit trade organization representing about 200 members and over 2,000 storefronts, and is committed to support the retail industry and business in general in Hawaii.

RMH is not opposed to HB 2591, HD1, Relating to Gift Certificates.

This measure, as amended in the HD1 iteration, further clarifies Hawaii's gift certificate statute to address the increasingly accepted usage of electronic stored-value instruments which are neither used nor intended for use in the traditional meaning of "gifts."

We do, however, remain strongly opposed to the imposition or allowance of any fees and/or service charges, whether up-front or back-end, which ultimately will erode consumer confidence in the integrity of gift card / gift certificate programs.

Thank you for your consideration and for the opportunity to comment on this measure.

President

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Testimony on
**H.B. NO. 2591 H.D. 1 -
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