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JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

March 20, 2008

**TESTIMONY ON S.B. 2373 SD 1 HD 1
A BILL FOR AN ACT RELATING TO
PSEUDOEPHEDRINE SALES
James R. Aiona, Jr., Lieutenant Governor
Office of the Lieutenant Governor**

**House Committee on Judiciary
Representative Tommy Waters, Chair
Representative Blake Oshiro, Vice Chair**

**Thursday, March 20, 2008, 2:25 P.M.
State Capitol Conference Room 325**

Good afternoon Chair Waters, Vice Chair Oshiro, and members of the Committee.

I am testifying in support of Senate Bill 2373 SD1 HD1, which would require retailers and pharmacies to maintain an electronic purchase logbook for sales of pseudoephedrine and pseudoephedrine combination products and to report the information to the Department of Public Safety (DPS) Narcotics Enforcement Division. I urge that the Committee pass the measure with the amendments offered by DPS in its written testimony.

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Two years ago, the Legislature and the Administration worked together to pass Act 171 SLH 2006, which limited the sale and purchase of non-prescription pseudoephedrine and pseudoephedrine containing products. Act 171 also required a purchaser to produce identification, as well as sign a log to ensure that that person did not purchase more than 3.6 grams per day and not more than 9 grams within a 30 day period.

Because of Act 171 and the continued vigilance and efforts of our law enforcement community, we have experienced a dramatic decrease in the number of clandestine drug labs in the State over the past three years, from seventeen in 2005, to five in 2006, to only two last year.

Currently, even with the Act 171 restrictions on the amount of pseudoephedrine products that can be purchased and the requirements for identification and signatures, a person can still beat the system by visiting multiple retailers and obtaining more than the allowable limits as there is no effective reporting mechanism in place to track or verify individuals' previous purchases of these products.

S.B. 2373 SD 1 HD 1 will strengthen and make more effective the current law by closing a reporting loophole left open in the 2006 legislation by requiring electronic recording and transmission of transaction activity to the Narcotics Enforcement Division of DPS to be reviewed and analyzed.

Thank you for the opportunity to testify.

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LINDA LINGLE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY

919 Ala Moana Boulevard, 4th Floor
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CLAYTON A. FRANK
DIRECTOR

DAVID F. FESTERLING
Deputy Director
Administration

TOMMY JOHNSON
Deputy Director
Corrections

JAMES L. PROPOTNICK
Deputy Director
Law Enforcement

No. _____

TESTIMONY ON SENATE BILL 2373 SD1 HD1
RELATING TO PSEUDOEPHEDRINE SALES

by

Clayton A. Frank, Director
Department of Public Safety

Committee on Judiciary
Representative Tommy Waters, Chair
Representative Blake K. Oshiro, Vice Chair

Thursday, March 20, 2008, 2:25 p.m.
State Capitol, Room 325

Representative Waters, Representative Oshiro, and Members of the Committee:

The Department of Public Safety (Department) supports Senate Bill 2373 SD1 HD1, which would require retailers and pharmacies to maintain an electronic purchase logbook for sales of pseudoephedrine and pseudoephedrine combination products. The intent of Senate Bill 2373 SD1 HD1 is to close the reporting loophole in Act 171 SLH 2006, which mandated that all retailers have customers produce proper identification and sign a log to ensure that the customer did not purchase more than 3.6 grams per day and not more than 9 grams in a 30-day period. It also required all retailers to maintain a logbook of all non prescription sales of pseudoephedrine containing products. Since the enactment of Act 171 SLH 2006, the State has seen a dramatic drop in the number of clandestine drug labs in the State from 17 in 2005, 5 in 2006 and just 2 in 2007, however with the decrease in the quality of methamphetamine and the increase in its street price it is just a matter of time when the criminals will revert back to manufacturing their own high quality methamphetamine using pseudoephedrine obtain from retail distributors. The 2004 statistics of U.S. businesses in Hawaii indicates that there are 1883 retail stores that

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are able to sell pseudoephedrine products in the State most of which are not pharmacies and unable to verify prior pseudoephedrine sales with their other retail counterparts. Presently a person wanting to beat the system could visit multiple retail store chains and obtain 3.6 grams of pseudoephedrine per visit and the retailers would not be able to verify or track those individuals' previous purchases.

Senate Bill 2373 SD1 HD1 will require that all retailers transmit the data of the identity and quantity of all pseudoephedrine and pseudoephedrine combination products to the Department's Narcotics Enforcement Division to be reviewed and analyzed.

The Department would like to request Senate Bill 2373 SD1 HD1 be amended to make Section 329-75(b), Hawaii Revised Statutes, conform with the Federal Combat Methamphetamine Epidemic Act of 2005, which did not allow for an exemption for pseudoephedrine products that were in liquid, liquid capsule or gel capsule form from the reporting and record keeping requirement.

The Department is requesting that the term "dispense" on page 1, line 4 and the term "dispensed" on page 1, line 13, be deleted to make it clear that a pharmacist filling a prescription from a physician for pseudoephedrine does not have to comply with the requirements of Section 329-75, Hawaii Revised Statutes.

The Department would also like to suggest the following amendments to Senate Bill 2373 SD1 HD1. On page 2 line 6 the term "controlled" should be deleted. Pseudoephedrine is not a controlled substance but a regulated chemical.

The Department is requesting to amend the language on page 3, lines 1-12 to not list a specific computer program (Excel) and therefore give the Narcotics Enforcement Division the ability to utilize or customize programs depending on the capabilities of the retailer or pharmacy. The Department is also recommending the following amendments to page 3 lines 1 through 19 of Senate Bill 2373 SD1 HD1 to allow NED to best utilize and enforce the requirements of this section. The amendments are as follows:

- "(4) The pharmacy or retailer shall record the information required under paragraph (3) on software provided by the narcotics enforcement division of the department and shall electronically

send to the narcotics enforcement division once a month. The information shall be retained by the pharmacy or retailer for a period of two years. The electronic log shall be capable of checking compliance against all state and federal laws, and shall be subject to random and warrantless inspection by county or state law enforcement officers.

(b) No person shall knowingly purchase, possess, receive, or otherwise acquire more than nine grams of any product, mixture, or preparation containing any detectable quantity of pseudoephedrine or its salts, isomers, or salts of optical isomers within a thirty-day period, except that this limit shall not apply to any quantity of such product, mixture, or preparation dispensed pursuant to a valid prescription.

~~[(b) The sales restriction in this section, as it applies to products, mixtures, or preparations containing any detectable quantity of pseudoephedrine, its salts, optical isomers, or salts of optical isomers, shall not apply to any products, mixtures, or preparations that are in liquid, liquid capsule, or gel capsule form if pseudoephedrine is not the only active ingredient.]~~

(c) Any person who violates subsection (b) is guilty of a class C felony.

~~[(e)](d)~~ The department, by rule, may exempt other products from this section, if the administrator finds that the products are not used in the illegal manufacture of methamphetamine or other controlled substances. A manufacturer of a drug product may apply for removal of the product from this section if the product is determined by the administrator to have been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine.

~~[(d)](e)~~ Notwithstanding any other provision of this chapter to the contrary, every wholesaler shall report to the administrator all sales made to any retailer, of any product, mixture, or preparation containing any detectable quantity of pseudoephedrine, its salts, optical isomers, or salts of optical isomers, as the only active ingredient or in combination with other active ingredients. The

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Department shall provide a common reporting form that contains at least the following information about the product, mixture, or preparation:

- (1) Generic or other name;
- (2) Quantity sold;
- (3) Date of sale;
- (4) Name and address of the wholesaler; and
- (5) Name and address of the retailer.

(f) The department shall establish and maintain an electronic purchase log of the information forwarded to the administrator pursuant to subsection (a).

The administrator may allow state, county, and federal law enforcement and regulatory agencies access to electronic purchase log data for the purpose of:

- (1) Identifying persons who make multiple purchases at various establishments to accumulate pseudoephedrine in quantities above the authorized threshold designated under this section;
- (2) Identifying pharmacies and retailers violating the provisions of this section;
- (3) Ascertaining the location of a clandestine methamphetamine manufacturing operation; and
- (4) Use as evidence in any criminal prosecution arising from paragraphs (1), (2) and (3).

(g) Intentional or knowing failure of a retailer or pharmacy to transmit any information as required by this section shall be a misdemeanor and shall result in the immediate suspension of that retailer's ability to sell any product, mixture, or preparation containing any detectable quantity of pseudoephedrine, its salts, optical isomers, or salts of optical isomers, as the only active ingredient or in combination with other active ingredients until authorized by the Administrator."

Thank you for the opportunity to testify on this matter.

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VIA FAX: 586-9456

Committee: Committee on Judiciary
Hearing Date/Time: Thursday, March 20, 2008, 2:25 p.m.
Place: Room 325
Re: Testimony of the ACLU of Hawaii in Opposition to S.B. 2373, SD 1, HD1, Relating to Pseudoephedrine Sales

Dear Chair Waters and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to S.B. 2373, SD1, HD1.

This bill will result in a vast and unnecessary departure from our cherished constitutional right to privacy by allowing for warrantless searches of people's private medical information – simply because they purchased cold & allergy medications.

Simply put, S.B. 2373's implementation of a government tracking device for pseudoephedrine purchasers violates the civil rights of Hawaii's citizens. Individuals do not lose their rights to privacy, due process, or Fourth Amendment protections simply because they purchase legal over-the-counter and prescription cold and allergy medications that contain pseudoephedrine (Nyquil, Contact, Sudafed, Allerest, Tavist-D, Dimetapp, Theraflu, Tylenol Cold & Flu, Aleve Cold & Sinus, Claritin D and Robitussin, to name a few).

This bill violates purchasers' rights to privacy and due process because it forces purchasers to give out their private information and place themselves on a list of what essentially constitutes a list of criminal suspects in order to purchase these legal medications. Individuals with prescriptions also have their doctor-patient rights violated when law enforcement agencies are provided with access to their records.

Medical privacy is further compromised by this bill by the requirement that the pharmacy or retailer record the information on an Excel worksheet and email it to the narcotics enforcement division once a month. This system poses immense security and privacy concerns, in that it is almost impossible to guarantee the protection of these emails and the personal information included in them.

American Civil Liberties Union of Hawaii
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Hon. Rep. Waters, Chair, JUD Committee
and Members Thereof
March 20, 2008
Page 2 of 2

Furthermore, this bill presents grave Fourth Amendment violations when it gives law enforcement agencies access to these innocent purchasers' private information without a warrant or subpoena. There is simply no good reason to allow for this when law enforcement is perfectly capable of upholding the law and using the tools they already have to investigate wrongdoing.

The ACLU of Hawaii urges this Committee to decline to pass this unnecessary bill in favor of supporting the fundamental government principle that Hawaii's residents are innocent until proven guilty.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

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March 19, 2008

TO: Representative Tommy Waters
Chair, House Judiciary Committee
Hawaii State Capitol, Room 302
Via Email: JUDtestimony@Capitol.hawaii.gov

FROM: Noah Reandeau

RE: S.B. 2373 – Pseudoephedrine Sales

Dear Chair Waters and members of the House Judiciary Committee

I understand that you are considering S.B. 2373, relating to electronic logs. This is an extremely important piece of legislation and my firm is working with 12 other states, where similar legislation has been introduced on this very issue. It is my understanding that several privacy concerns were raised with regard to S.B. 2373 in the House Health Committee, so I wanted to take the opportunity to explain the fallacy of these concerns. Below are a list of the issues that have been raised regarding S.B. 2373 with specific and factual responses to counter these misleading claims.

Concern: “**This bill violates purchasers’ rights to privacy and due process because it forces purchasers to give out their private information and place themselves on a list of criminal suspects in order to purchase these legal medications.**”

Response: Purchasers of pseudoephedrine and other meth precursors are already required by both state and federal law to give out their personal information to purchase these products. Section 329-75, Hawaii Revised Statutes, already states that “Any person purchasing or otherwise acquiring any product, mixture, or preparation shall: (A) Produce proper identification containing the photograph, printed name, and signature of the individual obtaining the controlled substance; and (B) Sign a written log, receipt, or other program or mechanism.” This is existing Hawaii state law. Additionally, the federal Combat Meth Epidemic Act that was included in Title 7 of the reauthorization of the Patriot Act that that was enacted in 2006 clearly states the following, which is existing federal law:

“(iii) The seller maintains, in accordance with criteria issued by the Attorney General, a written or electronic list of such sales that identifies the products by name, the quantity sold, the names and addresses of purchasers, and the dates and times of the sales (which list is referred to in this subsection as the ‘logbook’), except that such requirement does not apply to any purchase by an individual of a single sales

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package if that package contains not more than 60 milligrams of pseudoephedrine.

“(iv) In the case of a sale to which the requirement of clause (iii) applies, the seller does not sell such a product unless—

“(I) the prospective purchaser—

“(aa) presents an identification card that provides a photograph and is issued by a State or the Federal Government, or a document that, with respect to identification, is considered acceptable for purposes of sections 274a.2(b)(1)(v)(A) and 274a.2(b)(1)(v)(B) of title 8, Code of Federal Regulations (as in effect on or after the date of the enactment of the Combat Methamphetamine Epidemic Act of 2005); and

“(bb) signs the logbook and enters in the logbook his or her name, address, and the date and time of the sale; and

“(II) the seller—

“(aa) determines that the name entered in the logbook corresponds to the name provided on such identification and that the date and time entered are correct; and

“(bb) enters in the logbook the name of the product and the quantity sold.

(Cut from PUBLIC LAW 109-177—MAR. 9, 2006, 120 STAT. 258-259)

Additionally, electronic logs have significant advantages over written logs with regard to privacy issues and are actually more secure. For example:

- With paper logs, retailers are rarely set up to have one record on a page. This has the potential to give the next person in line access to everything else on the page that was bought before them.
- Pharmacy log access – with paper logs, you do not know who has accessed them, and if stolen, it is easy to get a person’s address and information. Electronic logs keep the data centrally housed and encrypted. There is not a written log at the retail location that can be stolen.
- Law enforcement access – with paper logs, if law enforcement requests copies, the log is photo copied and carried out. There is no standard operating procedure for how to store the copies, how to dispose of them, and who has access. In an electronic log, you can implement credentials to log in, and you will only have rights to see what you have credentials to see.
- Law enforcement auditing – in an electronic log, every report, every query, and every time the log is accessed can be tracked in an audit table. This is also a deterrent to abuse of the system as well as a way to tell if the log has ever been used inappropriately.

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Concern: **“this bill presents grave Fourth Amendment violations when it gives law enforcement agencies access to these purchasers’ records without a warrant or subpoena.”**

Response: Once again, existing federal law already gives law enforcement access to purchasers’ records. The federal Combat Meth Epidemic Act that was included in Title 7 of the reauthorization of the Patriot Act thought through these privacy protections when it included the following language:

“(C) PRIVACY PROTECTIONS.—In order to protect the privacy of individuals who purchase scheduled listed chemical products, the Attorney General shall by regulation establish restrictions on disclosure of information in logbooks under subparagraph (A)(iii). Such regulations shall—
“(i) provide for the disclosure of the information as appropriate to the Attorney General and to State and local law enforcement agencies; and
“(ii) prohibit accessing, using, or sharing information in the logbooks for any purpose other than to ensure compliance with this title or to facilitate a product recall to protect public health and safety.
(Cut from PUBLIC LAW 109–177—MAR. 9, 2006, 120 STAT. 260)

The Truth about S.B. 2373:

Existing state and federal laws were designed to protect the public by requiring purchasers of meth precursors to sign logbooks, which could be used by law enforcement to determine if excessive amounts of meth precursors were being purchased by certain individuals to make harmful methamphetamines. Unfortunately, law enforcement around the country has found that reviewing written logbooks requires a tremendous amount of time, as the information has to be entered into a database and compared across pharmacies. S.B. 2373 would address this problem by requiring logbooks to be kept in an electronic format. Arkansas, Kentucky, West Virginia, and Oklahoma have already taken this next step and 12 other states have introduced legislation on this topic so far in 2008. As Hawaii’s own Department of Public Safety correctly pointed out in its testimony on the bill, the intent of S.B. 2373 is simply to “close the reporting loophole” in state law. We hope that the Hawaii legislature will take this opportunity to make a small amendment to state law, which could have a huge impact on law enforcement’s ability to crack down on methamphetamine production and protect the innocent public.

Thank you for your time and consideration. Should you have any questions, please do not hesitate to contact me.

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HAWAII FOOD INDUSTRY ASSOCIATION

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Phone (808) 533-1292 - Fax (808) 599-2606 - Email LISHawaii@aol.com



DATE: Thursday, March 20, 2008

TIME: 2:25 PM

TO: House Judiciary Committee
Rep. Tommy Waters, Chair/ Rep. Blake Oshiro, Vice Chair

BY: Hawaii Food Industry Association
Lauren Zirbel, Government Relations or Richard Botti, President

RE: SB 2373, SD1, HD 1 Relating to Pseudoephedrine Sales

Chairs & Committee Members:

We are ready to accept the requirements provided in SB 2373, SD1, HD1 that will require retailers to maintain an electronic Excel worksheet on software provided by the narcotics enforcement division. Further, we will utilize our resources to help educate retailers offering pseudoephedrine products to consumers, along with the requirements set forth in this measure.

The measure is a reasonable compromise to allow both retailers and consumers access to nonprescription allergy and cold medicines that work, while creating a barrier to those that wish to purchase the product for illicit purposes.

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SB 2373 RELATING TO PSEUDOEPHEDRINE SALES (SD1, HD1).

Requires electronic logs of pseudoephedrine sales to be made via an Excel worksheet provided by the department of public safety narcotics enforcement division and maintained for two years in a form searchable by law enforcement. (SD1, HD1)

COMMITTEE ON JUDICIARY

Rep. Tommy Waters, Chair
Rep. Blake K. Oshiro, Vice Chair

Thursday, March 20, 2008

TIME:

2:25 p.m.

PLACE:

Conference Room 325

State Capitol

415 South Beretania Street

Hawaii Substance Abuse Coalition

GOOD MORNING CHAIR WATERS, VICE CHAIR OSHIRO AND DISTINGUISHED COMMITTEE MEMBERS:

My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide hui of more than twenty non-profit treatment and prevention agencies.

The Hawaii Substance Abuse Coalition supports SB 2373 and other law enforcement efforts to curb the spread of methamphetamine abuse and recommends treatment for individuals suffering from addiction.

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Hawaii District Office: 2270 Hoonee Place, Honolulu, Hawaii 96819

Representative Tommy Waters, Chair
House Committee on Judiciary

Thursday, March 20, 2008; 2:25 PM
Conference Room 325

RE: SB 2373 SD1 HD1 - RELATING TO PSEUDOEPHEDRINE SALES

Chair Waters, Vice-Chair Oshiro, and members of the Committee:

My name is Todd Inafuku, Manager of the Longs Drug Stores Hawaii Professional Service Center. Longs Drug Stores (Longs) supports the intent of SB 2373 SD1 HD1, which requires electronic logs of pseudoephedrine sales to be made via an Excel worksheet provided by the Department of Public Safety Narcotics Enforcement Division and maintained for two years in a form searchable by law enforcement. Longs appreciates that this measure was drafted to discourage diversion of pseudoephedrine and related products for use in the manufacture of methamphetamine.

Longs fully supports the Combat Methamphetamine Epidemic Act (CMEA), Federal legislation that places significant restrictions on pseudoephedrine and related products. Even before the CMEA required that pseudoephedrine and related products be kept behind the pharmacy counter or in a locked cabinet, Longs voluntarily restricted the placement of these products. The CMEA, co-authored by California's Senior Senator Diane Feinstein, was signed into law in early 2006 and pursuant to the Act's requirements, any individual who purchases a pseudoephedrine or ephedrine containing product must present a valid identification and sign a logbook.

The amendment proposed in SB 2373 SD1 HD1 which requires pharmacies and retailers that sell pseudoephedrine or related products to provide the Department of Public Safety (DPS) Narcotics Enforcement Division with a monthly electronic report identifying all individuals who purchased these items the previous month, is extremely burdensome. Individuals purchasing pseudoephedrine and related products are already required to sign a logbook pursuant to the CMEA. The requirement that pharmacy or retail employees transfer and convert this information into an electronic format established by DPS will result in a significant expenditure of time and resources for pharmacies and retailers and could impact customer service standards. Furthermore, unless dispensed pursuant to a prescription, pharmacies and retailers unable provide the requested information to DPS in an electronic format would be prohibited from selling pseudoephedrine and related products.

Longs respectfully recommends that the Legislature consider adopting a statute similar to one instituted in Oregon which classifies all pseudoephedrine and related products as controlled substances. Such a classification limits the sale of these products to a prescription and, in Hawaii,

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would allow electronic reporting to occur through the current Department of Public Safety reporting system for controlled substance prescriptions.

In conclusion, rather than imposing additional and extremely burdensome reporting requirements on pharmacies and retailers, Long suggests that the Legislature classify pseudoephedrine and related products as "CIV" controlled substances. This classification would provide the Department of Public Safety with the reports it deems necessary and significantly reduce the illegal purchase of pseudoephedrine and related products.

Thank you for the opportunity to comment on SB 2373 SD1 HD1.

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Representative Tommy Waters, Chair
Representative Blake Oshiro, Vice Chair
Committee on Judiciary

State Capitol, Honolulu, Hawaii 96813

HEARING Thursday, March 20, 2008
 2:25 pm
 Conference Room 325

RE: SB 2373, SD2, HD1, Relating to Pseudoephedrine Sales

Chair Waters, Vice Chair Oshiro, 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 understands the intent of SB2373, SD2, HD1, which as amended requires retailers to maintain electronic logs of pseudoephedrine sales via Excel spreadsheets, and forward to the proper authorities.

However, our objection lies with the nature and quantity of personal information deemed essential. Not only is the date of the transaction, the name, address, and date of birth of the person required, but the type of identification provided, the agency issuing the identification, and any unique number associated with the identification must also be documented.

In a national environment where businesses are encouraged by financial institutions and mandated by government entities to reduce collecting and storing customers' personal identification information, this measure runs at counter purposes to these security directives. Given statutes already in place: §487N, HRS, Security Breach of Personal Information and §487R, HRS, Destruction of Personal Information Records, Senate Bill 2373, SD2, will needlessly expose retailers to potential liability. A merchant in possession of personal information (as defined in the above noted statutes, means "an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted: social security number; driver's license number or Hawaii ID card number") must carefully guard this information from unauthorized parties. If there is any breach of security all of the obligations that the laws impose would apply to the merchant.

We respectfully request your consideration of our concerns with these critical provisions. Thank you for the opportunity to comment on this measure.

A handwritten signature in cursive script, appearing to read 'Carol Prejzler'.

President

RETAIL MERCHANTS OF HAWAII
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