



HAWAII ESCROW ASSOCIATION

C/o 1100 Alakea Street, Suite 501

Honolulu, Hawaii 96813

TO: **Committee on Commerce and Consumer Protection**
Senator Rosalyn H. Baker, Chair
Senator David Y. Ige, Vice Chair

DATE: Monday, March 2, 2009
Conference Room 229
10:00 a.m.

TESTIFIER: Hawaii Escrow Association
Denise M. Kaehu, President

RE: **SB 887 RELATING TO ESCROW DEPOSITORIES**

Chair Baker, Vice Chair Ige and Committee Members,

The Escrow Association of Hawaii does not support **SB 877 RELATING TO ESCROW DEPOSITORIES** in its present form.

Our Association's membership consists of nine escrow companies currently registered to do business in the State of Hawaii. The escrow companies range from a one branch of operation to our largest company with nineteen branches statewide. Our companies are either locally owned and operated or owned and operated by mainland corporations. Our companies have operated in the islands since statehood was achieved until present times. Our industry is responsible for handling approximately 98% of all of the State of Hawaii's residential property sales, refinances, residential developments, commercial developments, income properties and vacant land sales. It is our members of the association that provide the necessary escrow services to consumers' world wide. The State of Hawaii is dependant on our services to help facilitate the transfer, financing and conveyancing of title to property throughout our State. Our industry works in conjunction with our title companies to generate 98% of the income that our Bureau of Conveyances generates for the State. We also assist in the collection of HARPTA taxes, FIRPTA taxes, Conveyance Tax, recording fees and on upon closing of the transaction the collecting of any Real Property Tax that is due to the State of Hawaii.

In light of the current economic environment and for other considerations explained below we respectfully ask for **SB 887** to include new language as defined below and also be amended as follows:

1. §449- Submission of security breach information-DELETE in it's entirety as it is already contained in 487N and in the Federal law.

2. §449 Temporary closures and relocations- ADD “disaster, epidemic, riot, fire, flood or such other reason as determined by”

3. §449-1.8 (d) Confidential portion of application or records- ADD “Any compliant that is deemed invalid or unjustifiable will not be included in the statistical data.” The Association feels that the public release of any consumer complaint, whether justifiable or not, could bring harm to the escrow industry. The department should be able to assist the consumer to resolve any issues they may have and help bring about a resolution to any complaint instead of publicizing a complaint that may be interpreted incorrectly by the general public. Our request for an addition to the statute as notated below will help avoid these types of situations.

4. §449-4 Administrative penalty-DO NOT DELETE “No licensee shall be subject to this penalty for a violation of section 449-16(b) or (c) if the violation was not intentional or resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid that error. Examples of bona fide errors include, but are not limited to, clerical, miscalculations, computer malfunction, printing errors, and computer programming errors.” The Association feels that this is important language to help clarify an “error”. It is not unreasonable to assume that the Escrow Depository is not deliberately trying to commit an error or intentionally commit a criminal act against the consumer.

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| 5. | §449-5.5 | Tangible Net Capital-Amend to \$100,000.00 |
| | §449-9 | Escrow Depository Bond-Amend to 100, 000.00 |
| | §449-11 | Fidelity bonds or fidelity insurance; deposit-
Amend to \$100,000.00 |
| | §449-12 | Errors and omission insurance; deposit.-Amend to \$250,000.00 |

The Association Legislative Committee did meet with Commission Griffith in October of 2008 and was asked by the Commissioner to submit a letter stating why the Escrow Depositories should not have their insurance/bond requirements raised to amounts other than noted above. In addition, due to the current economic situation in the Real Estate industry, which also includes the mortgage industry, incurring additional and increased costs to our industry is not viable at this time. Any additional increases at this time may cause the untimely closure of some of the smaller depositories, causing additional layoffs or permanent unemployment for our employees. We do understand the need for reasonable increases and have voluntarily agreed to increase the liability limits so that the State of Hawaii Escrow Depositories are up to date with the prevailing liability standards throughout the mainland states.

6. §449-1.9 –Disputes, Claims, Controversy- ADD new paragraph with language “ In the even of any dispute, claim or controversy arising out of the escrow transaction, which includes, but is not limited to, instructions to escrow by the parties and if the parties are unable to resolve their controversy, dispute and/or claim, then the parties agree in good faith, to attempt to settle such controversy, dispute and/or claim by non-binding mediation conducted under the commercial mediation rules of the American Arbitration Association and all disputes, claims and or controversies arising from the escrow transaction, which are not resolved by mediation shall be submitted to and decided by binding

arbitration before a single arbitrator acting under the commercial arbitration rules of the American Arbitration Association. Judgment upon an award rendered by the arbitrator may be entered in any court having the proper jurisdiction thereof."

The Association has asked for this clause to be inserted into the current Statute to protect the Escrow Depositories from undue and unnecessary litigation proceedings and their associated costs. Escrow is a "Neutral Party" to the transaction. We are not a party to the Purchase and Sale Agreement or any other related Agreement that may be deposited into escrow. Our role is to follow the instructions as laid forth in these agreements. We operate under the "mutually" agreed upon instructions of the parties to these agreements. If disputes should arise the most common for the disputes are when the "parties" to the Agreement are in "disagreement". We constantly are caught in the "middle" of these disputes and are named in court proceedings as additional defendants without just cause. We currently have no "stated rights or protection" from or any other recourse except to defend ourselves at great cost to our companies. Right or wrong we are unjustly dragged into their disputes or disagreements. As an example if we need to interplead disputed funds into court for final distribution to the parties, it will cost the company a minimum of \$3,000.00-\$5,000.00 just to answer the complaint and prepare the necessary documentation that will allow us to deposit the funds into court. There can be no escrow service fees deducted at this time and will not be paid until some unknown time in the future. In many cases we are asked to waive our fees in order to assist in settling the dispute. It is a win situation, at least, for one of the consumers and a complete loss of time and any revenue for the Industry.

At our October 2008 meeting with the Commissioner who agreed that our industry does get involved in unnecessary litigation suits and in our discussion we asked for and he agreed that the Attorney General's office could help provide the necessary language for this section. To date we have not received a response from the Attorney General's or Commissioner's office. We ask that the language supplied herein be reviewed as to its intended purpose and content.

7. §449- Escrow Definitions- **ADD** "Fiduciary Agent" An escrow company that will act as a neutral party in an escrow transaction into which the parties to the escrow will give custody to and deposit documents and funds for safe keeping."
8. §449-Escrow Definitions- **ADD** "Escrow" An escrow is created when funds and documents are deposited by one party for the delivery to another party upon completion of a particular event or condition.
9. §449-Escrow Definitions-**ADD** "Escrow Duties" An escrow company will provide a central location where necessary funds and documents are deposited, executed, controlled and disbursed only upon the performance or fulfillment of all conditions of the escrow instructions. Escrow will follow the mutual instructions given by the principals and parties to the transaction in a timely manner; handling the funds and/or documents in accordance with their instruction; pay all bills as authorized; respond to authorized requests from the principals; closing

the escrow only when all terms, documents and funds have been received in accordance with instruction; recordation (if applicable) and provide an accounting for same.”

We ask that the above definitions be included in the Escrow Depository Statue to help our related industries and consumers better understand and clarify our role and responsibilities in the transactions that we handle.

10. §449-10 –Education- ADD language “The Hawaii Escrow Association will work together with all of its member Escrow companies to provide educational material, updated legislation and any other industry pertinent information and/or materials to its members on a regular basis.
11. SB 887- ADD wherever necessary inclusion “Limited liability company, Limited liability partnership”

It is our Association’s strong recommendation that SB 877 be passed with amendments and the suggestions for new language so that we can better define our role as escrow, our responsibilities and duties as escrow, to protect the consumer, to educate our industry, to avoid unnecessary litigation and the costs associated with litigation and to clarify our current statue. The Statue should not only protect the consumer but also afford the Escrow Depositories the same protective rights afforded by statute. We are in total agreement that our Escrow Depository Statute is in need of updating via amendments and new information to bring it up to date with current industry standards. The members of the Hawaii Escrow Association have already expressed both orally and in writing to Commission Griffith our need to work together to amend the current statute so that our industry may continue to grow and prosper in the very new future.

Respectfully submitted,

HAWAII ESCROW ASSOCIATION

By: Denise Kaehu
Its President