HB2132
HD1 SD1

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TO THE SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

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WRITTEN COMMENTS ONLY ON HOUSE BILL NO. 2132, H.D. 1, S.D. 1 -- RELATING TO MORTGAGE FORECLOSURES.

TO THE HONORABLE BRIAN T. TANIGUCHI, CHAIR, AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to comment on House Bill No. 2132, H.D. 1, S.D. 1, Relating to Mortgage Foreclosures. My name is Stephen Levins, and I am the Executive Director of the Department's Office of Consumer Protection ("OCP").

The Office of Consumer Protection (OCP) has major concerns with some of the amendments contained in S.D. 1. In particular, the OCP does not believe that the proposals relating to credit counseling, the right to obtain mortgage documents and the public sale provision will offer any meaningful assistance to homeowners subject to

foreclosure.

Credit Counseling

First, the Department is unclear why the term "foreclosure counseling" has been changed to the much more generic term of "credit counseling". Since the notice of foreclosure will be sent to those facing foreclosure it only makes sense for the concept to be characterized as "foreclosure counseling", especially since HUD itself regularly employs this kind of terminology. If homeowners are worried about foreclosure they should be directed to foreclosure counselors, not credit counselors.

Second, the Department does not believe that there is any cogent reason for restricting eligibility for the credit counseling notification provision to owner-occupants of mortgaged property. Providing preferential treatment to so called owner-occupants will only lead to unnecessary confusion and will invariably lead to claims of unfairness invoking due process and equal protection concerns. Discriminating against an owner who doesn't live on the mortgaged property could lead to a situation where parents, holding title to Ohana housing, end up without any statutory rights to request their mortgage documents, because their children, instead of them, live in the home that is being foreclosed on. If the legislature is going to provide this right to some homeowners it should do so to all.

Right to Obtain Mortgage Documents

The Department does not believe that the provision relating to a homeowner's right to obtain documents is proper or fair. This provision inexplicably limits the right to obtain a promissory note and mortgage documents only to someone who is a consumer and an owner-occupant of a mortgaged property and who makes a request via certified or registered mail. Restricting the ability to obtain the documents to owner-occupants sets up unreasonable barriers that will deny a significant percentage of homeowners of their right to receive this critical information. Compounding the problem is the additional requirement that the person also be a "consumer". Imposing this additional requirement serves no purpose other than to allow the mortgagee an opportunity to deny documents to homeowners whom it does not believe fit their criteria. Lastly, the mailing requirement is unreasonable. If the purpose underlying this provision is to make sure that an owner subject to foreclosure is able to secure access to their promissory note, the imposition of additional obstacles, such as, requiring that the request come via certified or registered mail, will only undermine it.

70% Sale Provision

The OCP also does not believe that the 70% public sale provision is appropriate, since it has been widely discredited by courts around the country. Most courts which have examined this issue have rejected the 70% rule in favor of a less formulaic, totality

of the circumstances approach. See, *Matter of Besing*, 981 F.2d 1488 (5th Cir. 1993). In utilizing this approach, the factors most widely considered are the disparity between the value and what was received, the good faith of the parties, and whether the transaction was at arm's length.

The proponent(s) of this provision appear to have borrowed the 70% figure from an old mainland bankruptcy case. Besides the fact that the standard is no longer followed it is highly irregular to impose the case law of another jurisdiction with no connection to Hawaii or our citizens, especially since the real estate market of that jurisdiction is markedly different. Instead of establishing a specific number which may invite abuse and manipulation it would appear to be fairer to all affected parties to adopt a standard that would allow each sale to be analyzed on its own merits. The foreclosure market determines the standard for the value of a foreclosure sale; not a mechanical 70% extrapolation from an appraiser's approximation of fair market value. If a foreclosure market in an area is very strong and regularly brings 90% of fair market value, it would be unfair to presume that 70% of fair market value is a reasonable value. Similarly, if a foreclosure market in an area is very weak and regularly brings only 50% of fair market value, it would be unfair to presume that 70% of fair market value is a reasonable value.

While the original intent of this Bill was laudatory, it appears that most of the recent amendments have undermined the Bill's original purpose and rather than

providing assistance to distressed homeowners these amendments may very well compound their frustration.

Thank you for this opportunity to provide these comments on House Bill No. 2132, H.D. 1, S.D. 1.