LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: (808) 586-2850
Fax Number: (808) 586-2856
www.hawaii.gov/dcca

LAWRENCE M. REIFURTH
DIRECTOR

RONALD BOYER
DEPUTY DIRECTOR

PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

TWENTY-FIFTH STATE LEGISLATURE
Regular Session 2010

Wednesday, February 17, 2010
2:00 p.m.

TESTIMONY ON HOUSE BILL NO. 2289 H.D. 1 -- RELATING TO GIFT CERTIFICATES.

TO THE HONORABLE ROBERT N. HERKES, CHAIR, AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify on House Bill No. 2289, H.D. 1 Relating to Gift Certificates. My name is Stephen Levins, Executive Director of the Office of Consumer Protection. The Department opposes this measure to the extent that it allows for the assessment of an activation or issuance fee for the purchase of a gift certificate but supports that portion of the Bill which extends the expiration date from two to five years so long as the same expiration term is applied to all gift cards.

House Bill No. 2289, H.D. 1 seeks to legalize a practice that was prohibited by the Hawaii State Legislature less than five years ago, charging fees associated with the

purchase of gift certificates.

The recent amendment to Hawaii's Gift Certificate law only went into effect in July 2005. Pursuant to its terms, no one may charge a consumer a service fee. The law was amended, in large part, because the Legislature was concerned with consumers being saddled with the fees associated with the purchase of gift cards. In the relatively short period of time that has elapsed since the law went into effect, nothing has changed which would warrant the reinstatement of these fees.

Under this proposal a consumer who purchases a $50 gift card may be charged an activation or issuance fee of up to $7.50. During the past Christmas season, thousands of dollars in gift certificates were purchased without fees, directly benefiting Hawaii consumers. Unless compelling reasons are presented for amending the law, yet again, it should not be changed.

Another amendment proposed by House Bill No. 2289, H.D. 1 is to extend the expiration period of gift certificates from two to five years for all gift certificates except for those "issued only in paper form". Since recent passage of the federal Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Card Act") will impose this requirement in August 2010 on gift card issuers whose gift card utilizes an "electronic promise", the Department believes that adoption of a five year expiration date for all gift cards issued in Hawaii is appropriate. In view of this the Department is opposed to creating a separate expiration period for paper certificates since it will invariably lead to

unnecessary confusion. The fact that one merchant chooses to issue their gift certificate in paper form instead of plastic should not be dispositive, especially since the Card Act of 2009 would also make a paper certificate subject to its provisions if it constituted "an electronic promise".

Thank you for this opportunity to testify on House Bill No. 2289, H.D. 1. I will be happy to answer any questions that the committee members may have.

LAW OFFICES
OF
MARVIN S. C. DANG
A Limited Liability Law Company

MARVIN S. C. DANG
JASON M. OLIVER
SUMMER OKADA
PAUL T. HOLTROP
RENEE M. FURUTA

MAILING ADDRESS:
P.O. BOX 4109
HONOLULU, HAWAII 96812-4109

TELEPHONE: (808) 521-8521
FAX: (808) 521-8522
E-MAIL: dangm@aloha.net
INTERNET: www.marvindanglaw.com

February 17, 2010

Rep. Robert N. Herkes
and members of the House Committee on Consumer Protection & Commerce
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 2289, HD 1 (Gift Certificates)**
Hearing Date/Time: Wednesday, February 17, 2010, 2:00 P.M.

I am the attorney for **Visa Inc.** ("VISA"). VISA operates the world's largest retail electronic payments network providing processing services and payment product platforms. This includes consumer credit, debit, prepaid and commercial payments. VISA facilitates global commerce through the transfer of value and information among financial institutions, merchants, consumers, businesses, and government entities.

VISA supports the definition of "gift certificate" and "certificate" in the HD 1 of this Bill.

The purposes of this Bill are to: extend the minimum expiration period for gift certificates other than paper certificates from two to five years; limit issuance fees to 15% of the face value of the certificate or $7.50; amend the definition of "gift certificate"; and define "service fee" to exclude issuance fees.

The federal Credit Card Accountability Responsibility and Disclosure Act of 2009 ("Credit CARD Act") focuses primarily on credit cards. However, Title IV of the Credit CARD Act separately deals with general use prepaid cards, gift certificates, and store gift cards. Title IV limits their fees (dormancy, inactivity and service fees) and their expiration dates. Specifically excluded from Title IV are prepaid cards such as "reloadable" cards that are not marketed or labeled as gift cards or gift certificates. (There are other exclusions in Title IV.)

Reloadable prepaid cards are loaded or reloaded in a variety of ways. The monies could be the cardholder's wages which were deposited by the employer. The monies could be government benefits or for healthcare expenses. Or, the monies could be from the cardholder's relatives (such as parents) or friends. Reloadable cards are sometimes used by people who are "unbanked" (without bank accounts) or "underbanked". These reloadable cards are considered "general use" because they can be used by the cardholders to buy goods and services from multiple, unaffiliated merchants or retailers (rather than from a single merchant or from an affiliated group of merchants). These reloadable cards could be used by the cardholders to obtain cash through automated teller machines (ATMs).

Intending to be consistent with the Credit CARD Act, this Bill amends the Hawaii definition of "gift certificate" and "certificate" in HRS Sec. 481B-13 (relating to gift certificates). Under the amendment, a "gift certificate" or a "certificate" does not include a "card, certificate, or other medium" that is one of five specified types. One type of exemption is a "card, certificate or other medium that is ... reloadable and not marketed or labeled as a gift card, gift certificate, or certificate." (See page 5, line 7.)

If reloadable cards are not marketed or labeled as gift cards or gift certificates, they should be excluded from coverage under Hawaii's gift certificate law. This is why we support the definition of "gift certificate"and "certificate" in the HD1 version of this Bill..

Thank you for considering our testimony.

Marvin S.C. Dang
MARVIN S.C. DANG
Attorney for Visa Inc.

(MSCD/VISA)

LEGISLATIVE INFORMATION SERVICES OF HAWAII, INC.
1188 Bishop St., Suite 608, Honolulu, HI 96813
Phone (808)533-6750 - Fax (808)356-0133 - Dick Botti Direct (808) 479-7966 Email: lishawaii@aol.com

Wednesday, February 17, 2010 @ 2p.m. in CR 325

To: House Committee on Consumer Protection
Rep. Robert N. Herkes, Chair
Rep. Glenn Wakai, Vice Chair

By: Richard C. Botti, President

Re: HB 2289 HD1 RELATING TO GIFT CERTIFICATES

Chairs & Committee Members:

We support the small business exemption for paper certificates, as without this exemption, small business would be involved in a bookkeeping nightmare, placing many in violation of the abandoned property laws.

> The expiration date shall be not less than [~] five years after the date of issuance[~]; provided that the expiration date of certificates issued only in paper form shall be not less than two years after the date of issuance. If the gift certificate does not have an expiration date, it shall be valid in perpetuity.

The Abandoned Property law would require small business to notify the State and pay the State the value of the certificate considered abandoned. This is not realistic for small business.

> **[§523A-3] Presumptions of abandonment.** (a) Property is presumed abandoned if it is unclaimed by the apparent owner during the time set forth below for the particular property:
> (7) Gift certificate not exempt under section 523A-3.5, five years after December 31 of the year in which the certificate was sold, but if redeemable in merchandise only, the amount abandoned shall be deemed to be one hundred per cent of the certificate's face value;

Representative Robert Herkes, Chair
Representative Glenn Wakai, Vice Chair
Committee on Consumer Protection & Commerce

HEARING Wednesday, February 17, 2010
2:00 pm
Conference Room 325
State Capitol, Honolulu, Hawaii 96813

RE: HB2289, HD1, Relating to Gift Certificates

Chair Herkes, Vice Chair Wakai, and Members of the Committee:

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

RMH understands the intent of HB2289, HD1, which extends the minimum expiration period for gift certificates other than paper certificates from two to five years, limits issuance fees to 15% of face value of the certificate or $7.50, amends the definition of "gift certificate," and defines "service fee" to exclude issuance fees.

We remain steadfast in our opposition to the imposition of any and all fees associated with gift cards / gift certificates.

However, considering that fees are permitted under the provisions of the Credit Card Act of 2009, and that in the best interests of Hawaii's consumers it is prudent to harmonize Hawaii law with the federal statute, we recognize the position of the financial industry with regard to charging one-time issuance fees as defined in HB2289, HD1. Such fees are obvious and transparent to the consumer, who then has the option to pay these fees or elect to purchase a gift card/gift certificate for which no fees are imposed. As is inherent with competition, the market will determine the ultimate fate of these fees.

We do support the increased definition of the various electronic stored-value cards in the marketplace; these clarifications are in the best interest of the consumer who will then be able to make the best-informed choices.

Thank you for your consideration and for the opportunity to testify on HB2289, HD1.

Carol Pregill

Carol Pregill, President

RETAIL MERCHANTS OF HAWAII
1240 Ala Moana Boulevard, Suite 215
Honolulu, HI 96814
ph: 808-592-4200 / fax: 808-592-4202

Hawaii Bankers Association

TEL:
808-524-5161
FAX:
808-521-4120
ADDRESS:
1000 Bishop Street, Suite 301B
Honolulu, HI 96813-4203

Presentation to the House Committee on Consumer Protection & Commerce

Wednesday, February 17, 2010, at 2:00 p.m., Conf. Room 325

Testimony for HB 2289, HD 1 Relating to Gift Certificates

TO: The Honorable Robert N. Herkes, Chair
The Honorable Glenn Wakai, Vice Chair
Members of the House Committee on Consumer Protection & Commerce

My name is Neal K. Okabayashi of First Hawaiian Bank and I testify on behalf of the Hawaii Bankers Association.

Hawaii's gift card law has a definition of gift card that is not synchronized with federal law and federal banking regulatory guidance and as a result, Hawaii's expansive definition of gift cards reaches every innovative use of prepaid cards. Prepaid cards are called stored value cards by the FDIC, and Hawaii's broad definition effectively prevents Hawaii state banks from issuing prepaid cards that are not gift cards.

In 2008, the FDIC wrote that "Stored value cards now commonly serve as the delivery mechanism for vital funds such as employees payroll and government payments such as benefits and tax refunds. Network branded reloadable stored value cards also serve as an alternative mechanism for holders to access funds held in a bank for their benefit."

I will call "stored value cards" "prepaid cards" for convenience.

Unfortunately, while the legislative intent was to govern gift cards, the definition of a gift certificate became so broad that with the passage of time and innovation, it now encompasses prepaid cards that are not gift cards. In fact, gift cards is just a type of prepaid card, and is 1 of 12 categories of prepaid cards. In total, there are 33 market segments for prepaid cards and only 2 segments comes from the world of gift cards.

Because a gift card is a type of prepaid card, it is difficult to fashion a precise definition of gift cards that does not include other forms of prepaid cards. Thus, we suggest that Hawaii follow the federal law defining gift cards (adopted as part of the Credit Card Act

of 2009) where prepaid cards is defined broadly, and by way of exclusion, the definition narrows to only include what are gift cards. Thus, HD 1, follows that format to define gift certificates and the language of exclusion adopts almost verbatim the federal language. The advantage of using the federal language is that we will have the benefit of federal banking regulatory rules and commentary, as well as cases interpreting the federal definition.

Because Hawaii's gift card law does not apply to federally chartered banks and savings associations, state chartered banks are placed at a competitive disadvantage because Hawaii's restrictive laws apply only to state banks. Thus, Wal-Mart, through its association with a federal savings bank, can sell in Hawaii, cards which are truly gift cards as well as prepaid cards which are not gift cards but are defined as such under Hawaii law. Walmart sells these cards at its MoneyCenter which leads to the anomaly that Walmart can sell what a local bank cannot.

Federally chartered financial institutions will still have a competitive advantage over local state chartered banks because the federal banks will not be subject to Hawaii's gift card law but at the least, if Hawaii's definition of gift cards can be amended to apply only to gift cards, the playing field on non-gift prepaid cards will be leveled.

Changing the law will also open the window for local state banks to explore banking the unbanked. The common way of banking the unbanked is through the use of prepaid cards, as Walmart is doing. However, Hawaii chartered banks cannot even entertain the thought of attempting to bank the unbanked card under the present law.

Accordingly, we request this Committee pass HB 2289, HD 1. I would be happy to answer any questions you may have.

Testimony on

HB NO. 2289 HD1 -
RELATING TO GIFT CERTIFICATES

Before the

House Committee on Consumer Protection & Commerce
Wednesday, February 17, 2010, 2:00 p.m., Conference Room 325

By

Matthew M. Matsunaga, Esq.
Schlack Ito Lockwood Piper & Elkind

Please accept this testimony in **strong support** of HB 2289 HD1, which would adopt certain key provisions of the Credit Card Accountability, Responsibility, and Disclosure Act of 2009 (the "CARD Act"), which was signed into law by President Obama on May 22, 2009. Specifically, HB 2289 HD1 would (1) define "gift certificate" consistent with the CARD Act, (2) extend the minimum expiration period for gift certificates (plastic gift cards and prepaid electronic cards, but not paper certificates) from two to five years and (3) clarify the definition of "service fee" consistent with the CARD Act (but limit activation or issuance fees to the lesser of 15% of the face value or $7.50) under Hawaii's gift certificate law (HRS Section 481B-13).

Spending on gift cards nationally approximated $25 billion in 2008, and the 24th Annual Holiday Survey conducted by Deloitte indicated that gift cards will be the No. 1 present for the sixth consecutive year in 2009, with 64 percent of consumers saying they'll give or receive them. The CARD Act is an attempt by Congress to provide consumers (1) more time to use gift cards before they lose value and (2) better disclosure on fees and expiration dates. The CARD Act does not apply to traditional paper gift certificates, but generally would apply to plastic cards and other payment codes or devices, including standard gift cards as well as so-called "open-loop" prepaid cards, such as those commonly issued by banks and usable over Visa, MasterCard,

American Express, Discover or similar payment networks. The CARD Act does not preempt stricter state laws and takes effect August 22, 2010. The Federal Reserve Board is directed to issue regulations by February 22, 2010 (regarding amount of dormancy fees, inactivity charges or fees, or service fees that may be assessed, etc.). A summary of the proposed rules is attached for your reference.

Hawaii's gift certificate law provides that a certificate issuer shall not charge a service fee. "Service fee" is not defined, but is characterized as including a dormancy or inactivity fee. To interpret "service fee" as including issuance/purchase fees is an unreasonable interpretation for the following reasons: (1) There is no legislative history to support this interpretation, (2) Common sense dictates that the cost of "servicing" something is entirely different from "purchasing" something, (3) No other state's statute defines "service fee" as including issuance/purchase fees (Michigan is the only state where I found a definition of "service fee" and it specifically excluded issuance fees), (4) Congress specifically defined "service fee" as EXCLUDING issuance/purchase fees in the CARD Act, and (5) Consumers clearly understand the difference between a periodic "service fee" (which sometimes unexpectedly lowers the value of a gift certificate to a holder) and an up-front issuance/purchase fee (which is clearly disclosed, understood and paid for by the purchaser). Further, under the Simon Malls (New Hampshire) decision, due to federal law preemption, national banks and federal savings associations are able to sell gift cards in Hawaii (and charge service fees) without being subject to Hawaii's gift card laws, while our state chartered banks are unable to charge such fees. I've been told that prepaid cards issued by national banks are being sold in Hawaii (e.g., at Office Depot and Safeway) with service fees attached. Also, according to a 2009 Gift Card study, Barnes & Noble, Costco, eBay and Target charge an up-front shipping fee (which is the same to a purchaser as an issuance fee) for on-line purchases.

Up-front issuance fees are needed to cover the costs incurred by the issuer of open-loop prepaid cards, such as production, shipping and marketing of the cards and also to cover a small margin for the merchant that sells the card. For American

Express, these costs usually amount to $2.95 to $3.95 per card. American Express issues the only open-loop card that has no post purchase service fees.

Rather than insist upon an unreasonable interpretation of "service fee," consumers would be better served by full disclosure and healthy competition. Hawaii consumers are just as intelligent as consumers in the other states that allow issuance fees and should be trusted to make the best decision for their pocketbooks.

Thank you for this opportunity to testify.

Highlights of Proposed Gift Cards Rule

The proposal would amend Regulation E to implement the gift card provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act). The proposal would set forth new protections for consumers that purchase or use certain prepaid products, primarily gift cards.

□ **Products covered**. The proposal applies to gift certificates, store gift cards, and general use prepaid cards, as those terms are defined in the Credit CARD Act.

o Covered products include retail gift cards, which can be used to buy goods or services at a single merchant or affiliated group of merchants, and network branded gift cards, which are redeemable at any merchant that accepts the card brand.

o Consistent with the statute, the proposed rule would not apply to other types of prepaid cards, including reloadable prepaid cards that are not marketed or labeled as a gift card or gift certificate, and prepaid cards received through a loyalty, award or promotional program.

□ **Restrictions on dormancy, inactivity, or service fees**. The proposed rule prohibits a person from imposing a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card.

o Dormancy, inactivity, and service fees may only be assessed for a certificate or card if: (1) there has been at least one year of inactivity on the certificate or card; (2) no more than one such fee is charged per month; and (3) the consumer is given clear and conspicuous disclosures about the fees.

o Fees subject to the proposed restrictions would include monthly maintenance or service fees, balance inquiry fees, and transaction-based fees, such as reload fees and point-of-sale fees.

□ **Restrictions on expiration dates**. The proposed rule prohibits the sale or issuance of a gift certificate, store gift card, or general-use prepaid card that has an expiration date of less than five years after the date a certificate or card is issued or the date funds are last loaded.

o The expiration date restrictions would apply to a consumer's funds, and not to the certificate or card itself. The proposal includes provisions intended to help ensure consumers have at least five years to use a certificate or card from the date of purchase.

o The proposed rule prohibits the imposition of any fees for replacement of an expired card or certificate if the underlying funds remain valid.