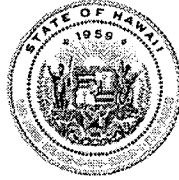


SB 2607



LINDA LINGLE
GOVERNOR
JAMES R. AIONA, JR.
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
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LAWRENCE M. REIFURTH
DIRECTOR
RONALD BOYER
DEPUTY DIRECTOR

PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
REGULATED INDUSTRIES COMPLAINTS OFFICE

TO THE SENATE COMMITTEE ON
TOURISM

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION, 2010

TUESDAY, FEBRUARY 2, 2010
2:45 P.M.

TESTIMONY ON SENATE BILL NO. 2607
RELATING TO ACTIVITY DESKS

TO THE HONORABLE CLARENCE K. NISHIHARA, CHAIR,
AND TO THE HONORABLE BRICKWOOD GALUTERIA, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs' Regulated Industries Complaints Office ("RICO") appreciates the opportunity to testify on Senate Bill No. 2607, Relating To Activity Desks. My name is Jo Ann Uchida, RICO's Complaints and Enforcement Officer. RICO supports Sections 1 and 2 of the bill, proposes amendments to Section 3 of the bill, and takes no position on the remainder of the bill.

Senate Bill No. 2607 amends Chapter 468M, Hawaii Revised Statutes, to 1) establish record keeping requirements for client trust accounts; 2) require

registration numbers on all advertising materials; 3) preclude an activity desk from booking or placing a reservation for activities until full payment for the activity is received or direct payment is arranged; 4) clarify that all sums paid to an activity desk for activities furnished by an activity provider shall be held in trust for the benefit of the person making the payment and the activity provider; and 5) repeal the authority to substitute a bond or letter of credit for a client trust account.

RICO supports Sections 1 and 2 of the bill, and suggests amendments to Section 3 of the bill that relate to Haw. Rev. Stat. sections 468M-9(a) and (b). RICO takes no position on the remainder of the bill that repeals the authority to substitute a bond or letter of credit for a client trust account.

The language in Section 1 of the bill will assist RICO in conducting a thorough investigation of possible violations in an expeditious manner and will provide guidance to registrants as to how long records must be maintained.

The language in Section 2 of the bill will ensure that the activity desk does not book reservations with providers until it receives full payment or where direct payment is made to the activity provider at the time of the activity. The current law does not address this situation.

The language in Section 3 on page 3 lines 17-20 of the bill clarifies the role of the activity desk, the activity provider, and the customer with regard to monies held in the client trust account. The last sentence on page 3 lines 20-22, however, is inconsistent with the prior language and RICO proposes that the sentence be revised as follows:

Testimony on Senate Bill No. 2607
February 2, 2010
Page 3

The activity desk shall be considered the trustee of the funds paid into the client trust account, less any commission.

RICO has had cases in which client trust funds are used for improper purposes and this language will reinforce the responsibility of the activity desk as trustee of the trust funds.

With regard to Section 3 of the bill at page 4, line 3, RICO suggests that the phrase "and the activity provider" be added to the end of the sentence so that this sentence is reconciled with the prior section.

Thank you for this opportunity to testify on Senate Bill No. 2607. I will be happy to answer any questions that the members of the Committee may have.



Activities & Attractions Association of Hawaii
PO Box 598, Makawao, Hawaii 96768
(808)871-7947 Main (808)877-3104 Fax

**Testimony of Toni Marie Davis
Executive Director Activities & Attractions Association of Hawaii**

Before the Committee on Tourism

RE: Support for SB2607 Relating to Activity Desks

Dear Chairman Nishihara & members of the committee;

Mahalo for this opportunity to testify, my name is Toni Marie Davis. For the last 12 years it has been my honor to serve the activity & attraction industry of Hawaii through my position as the Executive Director of the Activities & Attractions Association of Hawaii.

SB2607 Modifies HRS468, the purpose of this statute is to protect the consumer's money and "value" of their ticket by protecting the Activity Provider's money while also eliminating deceptive sales tactics. This Bill also provides better proactive tools for the DCCA to enforce the law currently on the books. Our goal is a healthy productive symbiotic industry for all involved.

HRS468M requires businesses be licensed & registered if selling Activities. As part of this statute, consumer & Activity Provider funds follow a detailed custodianship, e.g.: 100% of funds paid by a consumer for an activity must be deposited to a specific bank account in the state, labeled trust. There are restrictions on withdrawals (limit <15%) and requirements addressing timely payments to providers (within 30 days date of invoice) along with payment of interest, if any, made on provider's funds while held in trust. This statute also prohibits the covering, concealing or obscuring of Activity Providers' contact information on brochures. Other sections of this law involve the selling of activities by OPC outside public contacts for timeshare properties. (See diagram at end of this testimony).

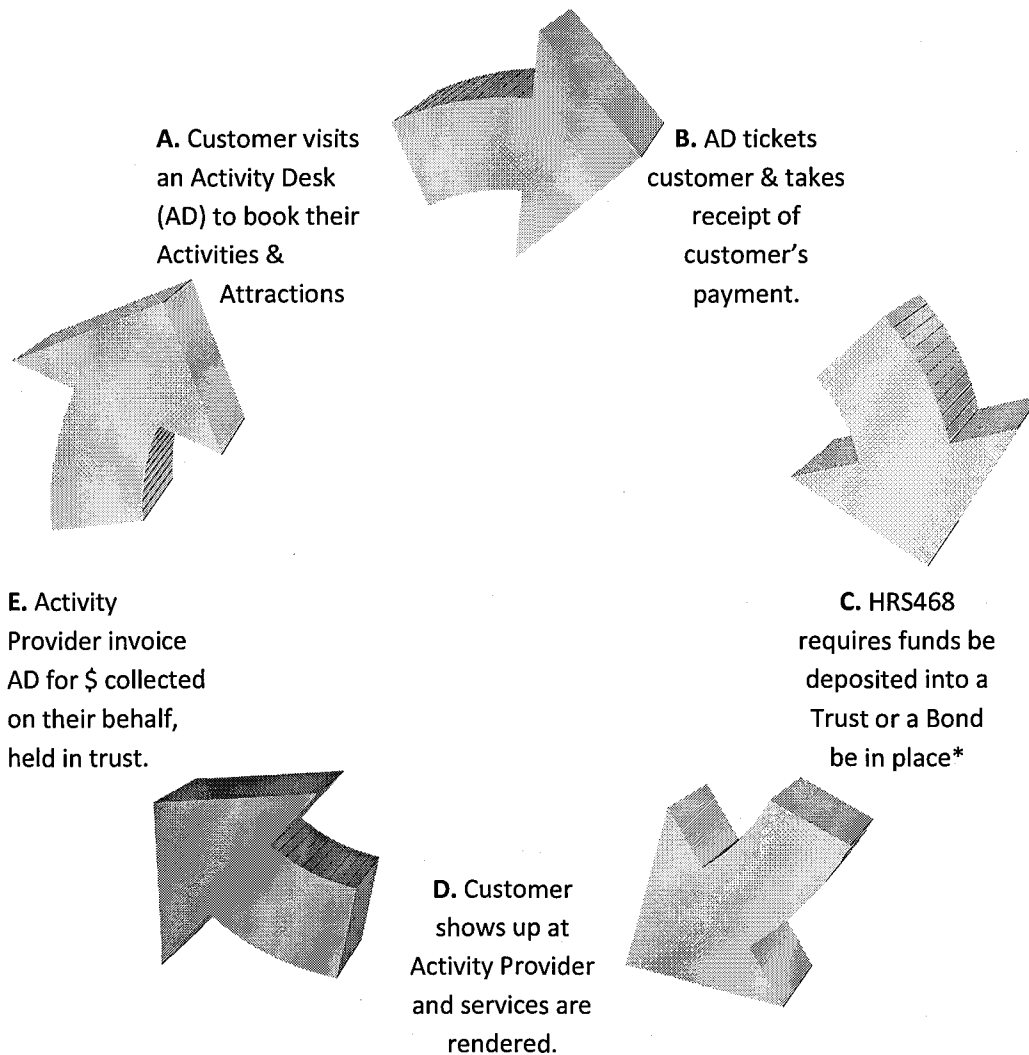
SB2607 modifies HRS468 specifically by creating a new section on recordkeeping, requires disclosure of the desk's registration # on stickers, prohibits desk from booking without collection of \$ from Customer, clarifies language related to Trust account providing expedited audit ability to the DCCA and eliminates the bond as an option to a trust. Much of the language with the exception of the elimination of the bond was crafted by the DCCA.

Our industry over the years has witness the closure & bankruptcy of many activity desks representing nearly 100 million dollars in lost revenue. The first was in 1993, WAVE shut its door with millions owed. HRS468M was created as a result. Millions again were lost when American Hawaii Cruises filed bankruptcy in 2001, 2002 Activity Outlet tried to stiff Maui operators when they relocated to the Big Island, thanks to this law, Maui operators were paid only later to have the owner flee owning 100s of thousands to Big Island businesses, 2006 Coconut Activities, 2007 Hawaii Travel Network closed their doors owning millions, 2008 Activity Stop, 2009 Happy Vacations and just this last summer of LTC with over 1/2 million.



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With the current economy and these Activity Desks basing much of who they promote on how much money they make – this has got to stop. Here is a diagram to help you understanding the cycle of money – start at A.



*Current bond limitation maximize amount to \$100K, insufficient in most cases.

**If the Activity Desk is an Outside Public Contact for Timeshare no funds are collected from the customer often this is gifted.



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SB2607 Modifies HRS468M as follows:

- Creates new record keeping process to simplify proactive enforcement
- eliminates the Bond simplifies proactive enforcement and the opportunity for insufficient coverage for the Activity Providers
- Adds Activity Desk registration to stickers when placed on Activity Provider brochures
- Prohibits booking an activity without collecting and depositing funds into the trust account

Mahalo Again for this opportunity to testify,

Toni Marie Davis/Executive Director

~~"[§468M-3] (6) Booking or placing a reservation for activities without depositing full payment of activity within 3 days to client trust account or the reservation specifically provides for direct payment to the activity provider or is covered by performance bond.~~

~~"[§468M-9] d) At the time of registration, the activity desk shall file with the department the account number and the name of the financial institution at which the trust account is held ~~[or submit a bond [or letter of credit as provided in section 468M-10].~~ The activity desk shall notify the department of any change in the account number or location within one business day of the change.~~

~~"[§468M-11] **Violations; fraud.** Any violations by an activity desk of any law relating to client trust accounts ~~[or the bond or letter of credit pursuant to section 468M-10]~~ shall constitute a prima facie showing of fraud on the part of the activity desk and may not be dischargeable as a debt to a consumer or an activity provider in any bankruptcy proceeding."~~

~~"[§468M-10] **Performance bond [and irrevocable letter of credit] as alternative to client trust account required of activity desks; coverage amount and computation; annual report and option; adjustments; coverage upon transfer.** (a) If a client trust account is not established and maintained as required under section 468M-9, no activity desk shall be permitted to operate in the State unless the activity desk:~~

- ~~(1) Posts a bond which is a performance or financial guaranty type bond naming the director as the obligee and which may be canceled only if the activity desk gives sixty days prior written notice to the surety or if the surety gives thirty days prior written notice to the director of cancellation of the bond; or~~
- ~~(2) Obtains an irrevocable letter of credit which is a guarantee of payment for a term of one year naming the director as beneficiary, with a provision for automatic extension for additional annual periods, and which may be canceled only if the activity desk gives prior written notice by certified mail to the director and to the issuer at least ninety days before the letter's expiration date or the date on which the activity desk intends the letter to cease being effective or the issuer gives prior written notice by certified mail to the director at least sixty days before the expiration date.~~

~~(b) The bond or letter of credit shall be issued by a surety or federally insured lending institution authorized to do business in the State to indemnify any consumer who may suffer loss as a result of nonperformance by an activity desk.~~

~~[(c) An activity desk shall not provide the required coverage through multiple bonds or irrevocable letters of credit but shall provide either a single bond or a single irrevocable letter of credit. An activity desk may substitute the bond with an irrevocable letter of credit. An activity desk may substitute the bond with an irrevocable letter of credit and vice versa pursuant to subsection (h), but shall not provide one in addition to the other to reach the required aggregate amount of coverage. If an activity desk has more than one branch desk location, the bond or irrevocable letter of credit shall cover all locations and computations on the coverage amount shall be based on the total net sales revenues of all branch locations.]~~

~~[(d) Upon cancellation or expiration of the bond or letter of credit, the surety or insurer shall remain liable for any claims against the bond or letter of credit for a period of six months; provided that:]~~

~~[(1) The debts were incurred while the bond or letter of credit was in effect; and]~~

~~[(2) The director notifies the surety or insurer, as the case may be, of any claims within ninety days of discovery of any claims.]~~

~~(e) The surety or insurer is not required to release any moneys or collateral to the activity desk during the six months after cancellation of the [bond or expiration of the letter of credit.]~~

~~(f) The amount of coverage shall be equal to the average monthly net sales revenues of the activity desk as determined for the twelve month period ending on the last sales period ending date of the fifth month prior to the anniversary date of the bond or the irrevocable letter of credit; provided that the amount of coverage of the bond less than \$50,000 [and shall not be more than \$100,000] . Any activity desk providing a bond or irrevocable letter of credit for the first time during the period beginning on September 1, 1992, and ending on March 31, 1993, shall base its initial coverage amount on the twelve-~~

~~month period ending on June 30, 1992. If an activity desk does not have a full twelve month period on which to base the amount, the amount shall not be less than the average monthly net sales revenues as determined for the months available; provided that this amount shall not be less than \$75,000, notwithstanding the minimum amount of \$50,000 for regularly computed coverage.~~

~~(g) No later than four months before the anniversary date of coverage, each activity desk shall submit a notarized annual report to the department verifying the monthly net sales revenue figures for the twelve month period upon which the amount of the bond [or irrevocable letter of credit is based.] However, each activity desk shall have the option not to submit the annual report if the activity desk provides a bond or an irrevocable letter of credit for the maximum amount of \$100,000.~~

~~(h) Each activity desk shall review the desk's coverage at least once each year and shall increase or decrease the amount of the coverage as necessary according to the computation method in subsection (f) at the time coverage is renewed on the anniversary date or on other dates if coverage is reinstated or replaced; provided that any downward adjustment in coverage shall not result in coverage below \$50,000.~~

~~A bond shall be accepted as replacement for another bond or an irrevocable letter of credit and an irrevocable letter of credit shall be accepted as replacement for another irrevocable letter of credit or a bond if:~~

- ~~(1) The effective date of a replacement bond is prior to or on the cancellation date of the bond being replaced;~~
- ~~(2) Where a letter of credit is about to expire, the effective date of the replacement bond is prior to or on the same date as the date of expiration of the irrevocable letter of credit and the replacement bond is received by the director before that expiration date;~~
- ~~(3) The replacement irrevocable letter of credit is received by the director at least fifteen days prior to the expiration date of the irrevocable letter of credit being replaced; or~~

(4) The replacement irrevocable letter of credit is received by the director on or before the cancellation date of the bond.

(i) An activity desk whose bond [or letter of credit] has been cancelled or has expired may continue to operate the activity desk provided the desk establishes the client trust account at least two months prior to the cancellation or expiration of the bond [or letter of credit], and shall not be allowed to replace the client trust account with a bond [or letter of credit] for at least one year.

(j) Failure to have in effect a client trust account, or current bond [or letter of credit] shall result in automatic forfeiture of the registration. An activity desk whose registration is forfeited shall apply as a new applicant for registration."]

SAFARI

AVIATION INC.

January 30, 2010

Phone 808/246-0136
Fax 808/246-0670
Toll Free 800/326-3356
P.O. Box 1941
Lihue, Kauai
Hawaii 96766

**Testimony of Preston S. Myers
President of Safari Aviation, Inc.**

Before the Committee on Tourism

RE: Support for SB2607 Relating to Activity Desks

Dear Chairman Nishihara & members of the committee;;

My name is Preston S. Myers and I own Safari Aviation, Inc on the island of Kauai and Hawaii. Our company has been in business for twenty two (22) years providing visitors with helicopter tours and air charters. We currently employ twenty five (25) employees and SUPPORT SB2607. We feel that this bill will positively protect our company's funds collected by Activity Desks. This law will also improve the DCCA's ability to proactively enforce HRS468M.

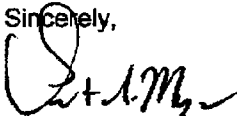
Not only we in the industry have lost approximately \$100 million of revenue in the last 20 years but the State of Hawaii has also lost approximately \$4 Million in excise tax revenue and millions more in lost income tax revenue in the same time frame.

Part of the issue is that the visitor or consumer is not even aware that and activity desk is a middle person that is in the business of profit for providing this service. The visitor thinks the service is free or at most, a minimal amount of fees. The visitor does not realize that they are paying in some cases, in excessive of 35 to 45% in commission fees! The visitor or consumer is completely unaware of the financial interest of these institutions.

I would also like to see added language to this bill that gives the visitor full disclosure as to the amount of commissions that these entities are receiving from hotels and activities so that they can make real intelligent decisions while on vacation.

I was also one of the original companies that were instrumental in the passage of HRS468M through personal visits to the legislature. Thank you for any considerations the committee may entertain.

Sincerely,



Preston S. Myers



Four Winds II ♦ Maui Magic

February 1, 2010

**Testimony of Mary Jane Caldwell
Vice President of Maui Classic Charters**

Before the Committee on Tourism

RE: Support for SB2607 Relating to Activity Desks

Dear Chairman Nishihara & members of the committee;

My name is Mary Jane Caldwell and I am the Vice President of Maui Classic Charters, Inc. located on the island of Maui. Our company has been in business for over 25 years providing visitors with snorkel trips to Molokini. We currently employ 27 employees and SUPPORT HB2417. We feel that this bill will positively protect our company's funds collected by Activity Desks. This law will also improve the DCCA's ability to proactively enforce HRS468M.

Over the past many years, lack of enforcement and the ability for DCCA to be proactive has represented over a \$37,000 loss to our company and to our state in tax revenue.

Mahalo for this opportunity to testify,

Mary Jane Caldwell

Vice President

Tuesday, 2 February, 2010 in room 229 at 1445

The Senate Committee on Tourism

In Question of the Advisability of SB 2607 Relating to Activity Desks

Chair Nishihara and Respected Members of the Committee,

My name is Reg white. I am vice president, project development, for Paradise Cruise, Ltd. PCL is a 52 year old company operating in the passenger excursion, eco tour, and dinner cruise business here on Oahu and from Lahaina on Maui as well as ground transportation on Oahu as SuperStar Hawaii Transit. We carry approximately 550,000 passengers each year on the water activities and just under 1 million passengers over the ground to various activities on Oahu. About 75% of these passengers are booked from an activity desk or a tour operating company here in Hawaii. Over the past 36 years that I have been associated with this industry, the only time we have been at all protected when a company closed it's doors was when they had a bond in place to protect the unpaid balances from their operations. We have found that when a company was going out of business and had no bond, but was supposedly in compliance with this act by reporting their operations and keeping a client trust account, always, just before the doors were closed for the last time, they drew down the trust account to pay their daily operating expenses and then closed the doors on all creditors owed for services rendered. This law does not require an activity desk to have a bond, it only makes it an alternative. We then, the activity supplier, have the opportunity to weigh the risk involved and chose to accept the word of a business with only a trust account, or we can require a bond if they wish to have a credit line with us and sell our products against that line.

I truly question the direction this bill is taking. I feel we are making our industry that provides the services to our visitors less safe from deceptive financial practices on the part of those very few less than honest and upright activity providers with which our industry is occasionally afflicted.

Thank you,

Reg White
vp, project development
Paradise Cruise, Ltd.
1540 S. King St.
Honolulu, HI 96826-1919
(808) 222-9794
RawcoHI@cs.com

Re: SB2607

We believe that this bill will harm the very industry it is trying to protect and is unnecessary if the existing laws which require activity desks to properly maintain a client trust account were vigorously enforced. The objective should be to assure that activity providers are properly paid for their services without hampering the very process that normally works.

Requiring activity desks to collect customer payments prior to making reservations with activity providers is contrary to the nature of the activity industry. It is common for tourist to make changes to their itinerary prior to the activity provider's cancellation policy and therefore unreasonable to expect them to be willing to pre-pay for reservations they are entitled to cancel. Most activity providers have a 24 or 48 hour cancellation policy.

Put some teeth into HRS468M to provide for criminal prosecution and jail time of activity desk owners or officers who fail to maintain a client trust account and/or pay activity providers in accordance with the existing laws. Do not introduce new laws that will damage an already fragile industry.

Kumar Manuel
Activity Link Systems, LLC

Chairman Nishihara
Committee on Tourism

LATE

Tuesday, February 2, 2010

Toni Marie Davis/Activities & Attractions Assoc. of Hawaii
(808)871-7947 ext. 803 or 1800-398-9698 ext. 803

Presentation in Support SB2607

This Bill modifies HRS468M

- Creates new record keeping process (Enable Proactive enforcement)
- Eliminates the Bond (Simplifies proactive enforcement & insufficient financial coverage)
- Adds Activity Desk registration to stickers when placed on Activity Provider brochures (Improves Enforcement)
- Prohibits booking an activity without collecting money (Corrects a fault found in the law as a result of an incident this summer)*

****Amendments:***

- ***allow 3 days for Activity Desks to deposit funds***
- ***Do not remove the bond rather increase minimum to \$250K***

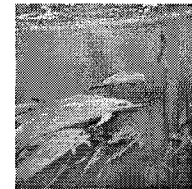
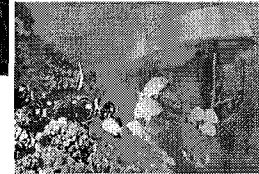


The Activities & Attractions Industry

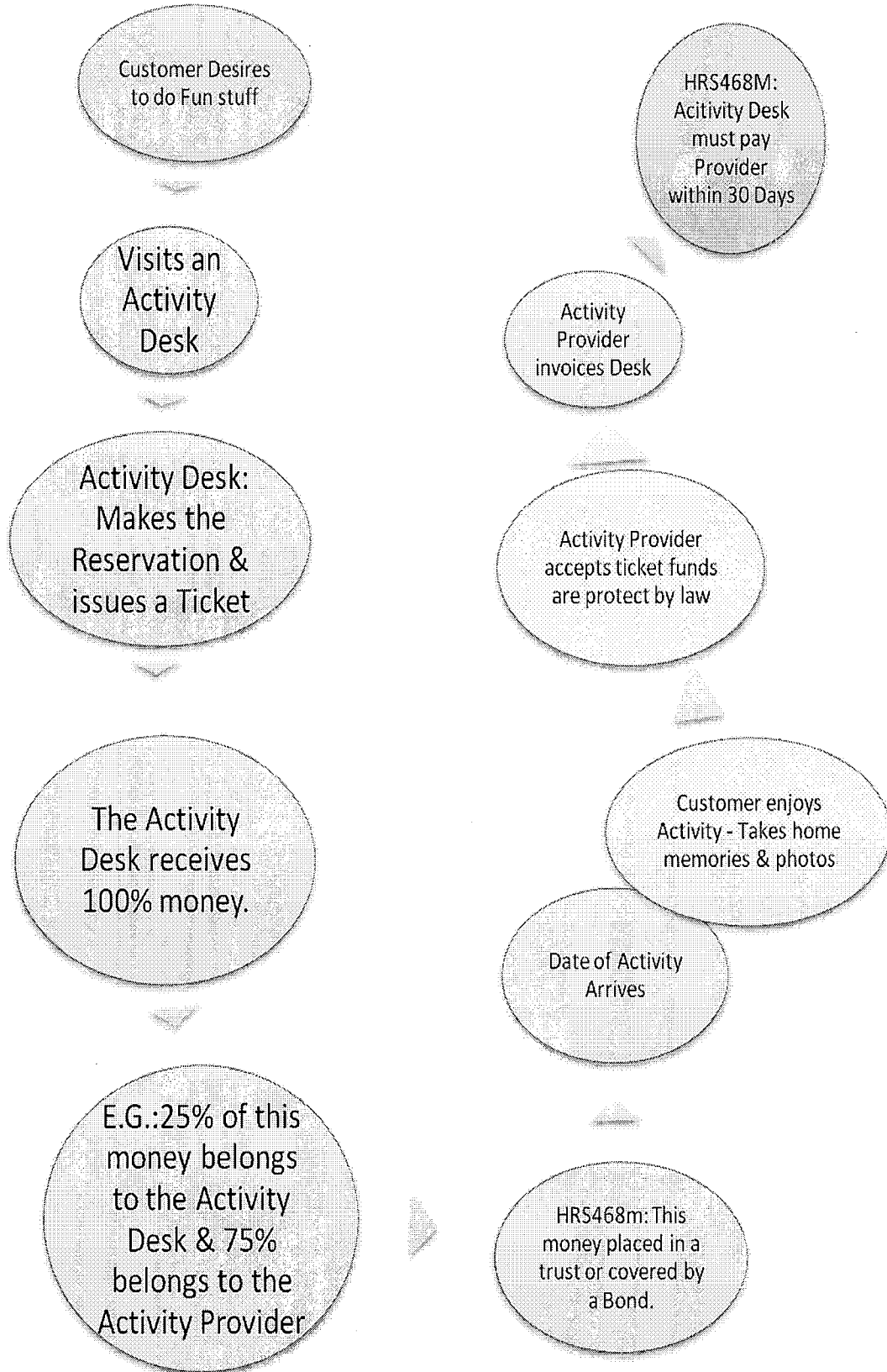
All the fun stuff to do in Hawaii that makes

Memories

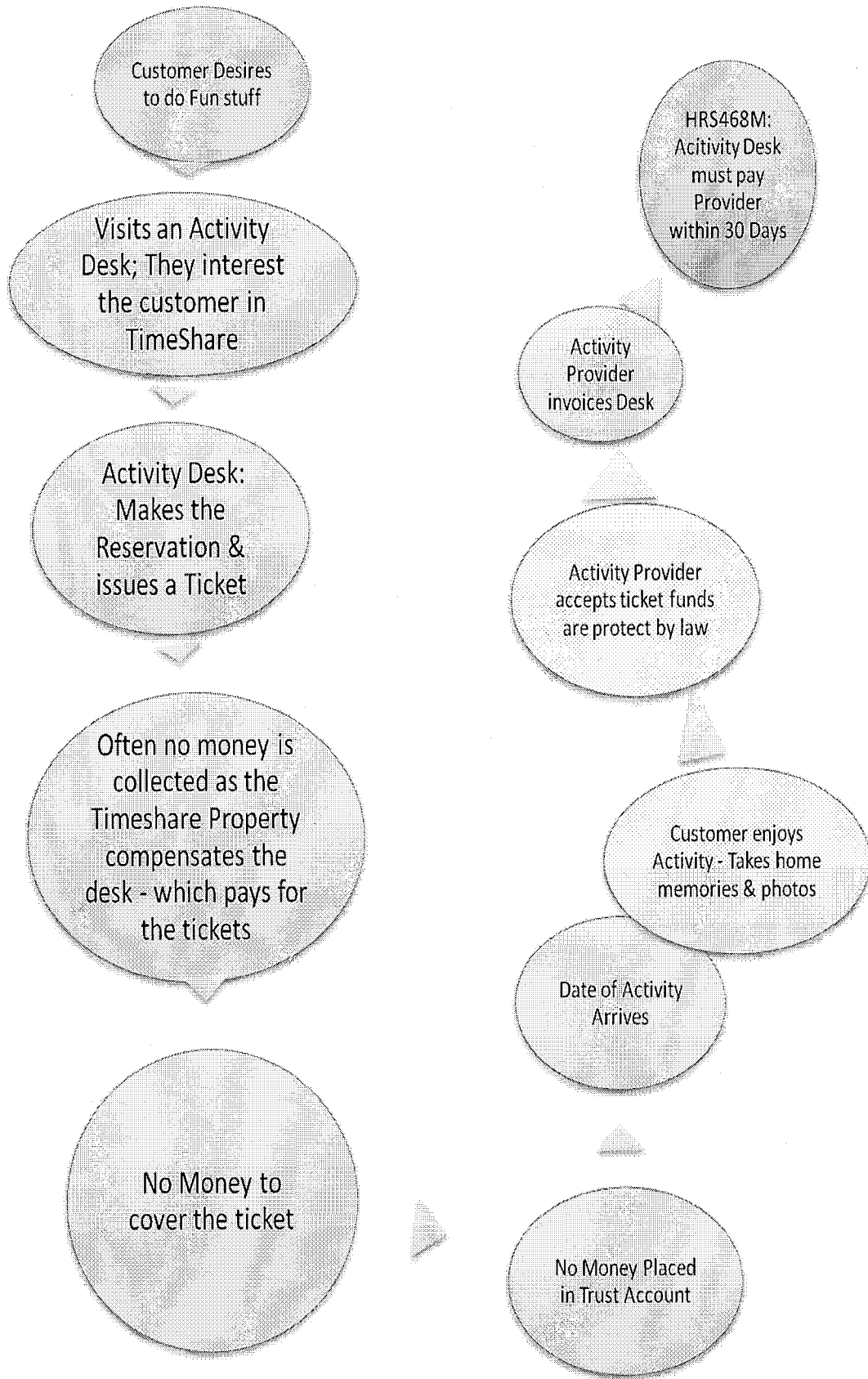
- Luau
- Snorkel Trips
- Hiking
- Surfing
- Land Tours
- Attractions
- Theater & Shows
- Helicopter Tours
- Kayaking
- Golf
- Zip lining
 - Stand up Paddle Board
 - Etc...



Non Timeshare Activity Sale Flow



Timeshare Activity Sale Flow



History of Losses:

1993 WAVE: \$Millions Stolen

Act on the Books

1999 This Act became LAW HRS468M

2001 American Hawaii Cruises: \$Millions Stolen

2002 Activity Outlet (successfully enforced HRS468m)

Later 2003 Activity Outlet: over \$100Ks Stolen

2006 Coconut Activities: \$\$ Stolen

2007 Hawaii Travel Network: Millions Stolen

2008 Activity Stop: \$\$ Stolen

2009 Happy Vacations: \$\$ Stolen

2009 Lahaina Ticket Company: \$500,000.00 +

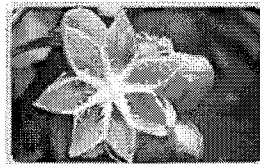
Support SB2607

Which modifies HRS468M by

- Creates new record keeping process (Enable Proactive enforcement)
- Eliminates the Bond (Simplifies proactive enforcement & insufficient coverage)
- Adds Activity Desk registration to stickers when placed on Activity Provider brochures (Enforcement)
- Prohibits booking an activity without collecting and depositing funds into the trust account (Corrects a fault)*

****Amendments:***

- *allow 3 days for Activity Desks to deposit funds*
- *Do not remove the bond rather increase minimum to \$250K*



MAHALO!

Toni Marie Davis/Executive Director