SB 646

Measure Title:	RELATING TO ESCROW DEPOSITORIES.
Report Title:	Escrow Depositories; Nationwide Mortgage Licensing System Unique Identifier
Description:	Requires every person subject to section 454F-1.5 to include the person's unique identifier on every document submitted to an escrow depository in a real estate transaction; requires escrow depositories to report invalid unique identifiers to the commissioner of financial institutions.
Companion:	
Package:	None
Current Referral:	CPN

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

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TO THE
SENATE COMMITTEE ON
COMMERCE AND CONSUMER PROTECTION

THE TWENTY-SIXTH STATE LEGISLATURE
REGULAR SESSION OF 2011

Wednesday, February 23, 2011
8:30 a.m.

TESTIMONY ON S.B. NO. 646 RELATING TO ESCROW DEPOSITORIES

THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Iris Ikeda Catalani, Commissioner of Financial Institutions ("Commissioner"), testifying on behalf of the Department of Commerce and Consumer Affairs ("Department") in opposition to Senate Bill No. 646. The Department respectfully opposes this measure for the following several reasons:

1. Given the volume of real estate transactions handled annually by escrow depositories, we are concerned that it may prove unduly burdensome for escrow depositories to be required to verify and validate the unique identifier

of every mortgage loan originator ("MLO") involved in every real estate transaction processed by the escrow depository and to report to the Commissioner the name of every person who submits a document bearing a unique identifier that is not current and valid. Arguably, as well, the escrow depository industry should not be saddled with a responsibility that more properly should be assumed by the lender who accepts loan documents from the MLO for processing and an eventual credit decision. The lender, in our view, may be the more appropriate entity that should be tasked with the duty of verifying and validating the unique identifier on documents that are prepared or submitted to it by those MLOs who the lender either employs or engages as independent contractors. It is the lender, after all, who may bear the liability for noncompliance with applicable state and federal laws in this regard, and this fact would suggest that a lender will have sufficient incentive to perform this verification diligently.

2. The measure, as drafted, does not specify when, in the course of conducting an escrow transaction, the escrow depository is to perform this verification. The absence of clear guidelines in that regard could potentially present problems of accountability and liability should the MLO whose name appears on the loan documents no longer be affiliated with the lender or mortgage loan originator company ("MLOC") that is submitting the documents to escrow, at the time the transaction is ready to close. It is

unclear from the measure whether an escrow depository that elects to verify loan documents upon receipt would be accountable to anyone, and in any manner, if the MLO in question had left the employ of, or otherwise severed its affiliation with the MLOC by the date when the escrow transaction closed.

3. The measure does not indicate what, if anything, the Commissioner is required to do upon receipt of a report from an escrow depository of the name of a person who has submitted a document bearing a unique identifier that is not current or valid. While there may be the presumption that the Commissioner would be expected to investigate every such report, given the volume of escrow transactions conducted annually in Hawaii, that obligation, if indeed it is implicit in the measure, might quickly prove to overtax the limited manpower resources of the Division of Financial Institutions. The lack of clarification of the Commissioner's responsibilities upon receipt of such reports from licensed escrow depositories makes it difficult to determine whether the Division currently has adequate resources to properly address and take action in response to what could potentially prove to be a large number of such reports.

4. Similarly, while the measure states that an escrow depository shall not accept a document without the required unique identifier, it neither addresses nor explains what the escrow depository is required to do when loan documents do include a unique identifier but that unique identifier is

determined by the escrow depository to be one that is not current and valid. Beyond reporting this finding to the Commissioner, the measure is silent as to whether or not the escrow depository can permit the transaction to proceed to closing. As a result, the measure, as drafted, is likely to result in uncertainty and confusion on this issue.

5. Section 1 of the measure would extend the meaning of the term "escrow depository" to include persons normally exempt from Chapter 449, Hawaii Revised Statutes ("HRS") pursuant to Section 449-3, HRS. The legal validity of subjecting persons who have been expressly exempted from the statute to a particular provision of that statute appears highly problematic in our view, and may well invite litigation by interested parties to render such a requirement unenforceable, if enacted.

6. Finally, we would argue that the indisputable aim and purpose of this measure appears to be to police and enforce compliance with requirements that have been imposed on all mortgage loan originators under the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008, commonly known and referred to herein as the S.A.F.E. Act. We point out that under the S.A.F.E Act, the federal banking agencies have been delegated exclusive authority to ensure compliance with the requirement that mortgage loan originators who are employed by a depository institution, or by a subsidiary that is owned or controlled by that institution and is

regulated by a federal banking agency, register with, and maintain a unique identifier through the Nationwide Mortgage Licensing System and Registry. The S.A.F.E. Act has given that exclusive authority to the federal banking agencies not only with respect to federally chartered depository institutions, but with respect to state-chartered depository institutions as well. Consequently, the depository financial institutions that are presently exempted under Section 449-3, HRS, but which, under this measure, would nevertheless still be required to file reports with the Commissioner under certain circumstances, might well be entitled to assert that the reporting requirement in this measure as it relates to them is effectively preempted by federal law on the grounds that these institutions cannot be directed by a state to submit reports to any agency other than their primary federal banking regulator on matters that pertain directly to S.A.F.E. Act compliance.

For all of these reasons, the Division opposes Senate Bill No. 646, and respectfully asks that the measure be held.

Thank you for the opportunity to testify. I would be pleased to respond to any questions you may have.

Title Guaranty Escrow Services, Inc.

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February 16, 2011

The Honorable Rosalyn H. Baker, Chair
The Honorable Brian T. Taniguchi, Vice-Chair
Members of the Senate Committee on Commerce
and Consumer Protection
Hawaii State Capitol, Room 229
Honolulu, Hawaii 96813

Re: Senate Bill 646 Relating To Escrow Depositories
Hearing Date: February 23, 2011 at 8:30 a.m.

Dear Senators Baker and Taniguchi and Members of the Senate Committee on Commerce and Consumer Protection:

On behalf of Title Guaranty Escrow Services, Inc., we respectfully oppose Senate Bill 646.

The obligation to maintain a unique identifier number under HRS Chapter 454F lies and should lie with the mortgage loan originator. This bill would shift the obligation of verifying the correct identifier number and reporting any discrepancy to an escrow depository. This burden is expensive, impractical, and unfair.

A typical escrow transaction involves many different documents, some of which are submitted only on behalf of one party or the other. Many are submitted before a mortgage loan originator is identified. Section 1 of the Bill makes the escrow depository responsible for requiring that the loan originator's "unique identifier [be included] on all documents relating to the real estate transaction . . . " The section goes on to require escrow to reject documents that do not include this unique identifier. There are many escrow documents that have nothing to do with the loan originator; however, this provision would require the parties to include the number nevertheless. This requirement makes processing many escrow transactions impractical.

An escrow depository has a fiduciary duty to the parties to the escrow transaction, and escrow should not be required to jeopardize this duty by policing the regulations imposed on loan originators. Escrow should be entitled to rely on information furnished by the loan originator. When documents are submitted at the last minute, escrow may be forced to delay closing a transaction because of this regulation, and that would place escrow in an untenable and potentially conflicting position with respect to the

parties. The additional cost of performing this function would also have to be passed on to the consumer, making transactions more expensive.

Section 3 of the Bill requires escrow depositories to report unique identifiers in connection with the commissioner's audit of the escrow company. Escrow already bears the expense of these audits, and increasing the burden will increase the costs of the audit. These costs will, again, have to be passed on to the consumer. More fundamentally, it is unfair to place this additional record-keeping burden on escrow.

Current law provides for enforcement of Chapter 454F. Senate Bill 646, however, would make escrow depositories enforcement agents. That is not escrow's function. We respectfully oppose such a measure.

Thank you for your consideration.

Very truly yours,

Lorrin Hirano
Sr. Vice President & Legal Counsel

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TESTIMONY FOR SB-646

Committee Members:

I support this bill with the following changes:

1) Amendments to 449 (b) (Verification of Unique Identifier):
The language of this paragraph must be changed so that the escrow depository must verify State of Hawaii licensure of an Originator and Originator Company, and not just the "validity" of their unique identifier. Anyone can obtain a unique identifier through the Nationwide Mortgage Licensing System (NMLS) that is current and valid, without being "licensed" in Hawaii under HRS 454F. NMLS has a consumer website that provides real-time information of originators, and specifically if they are licensed in Hawaii. This website is where the escrow depositories will check the Hawaii licensure of all originators and originator companies.

This paragraph also does not impose a timeline in which the escrow depository must check and report non-licensed originators to the Division of Financial Institutions. The point in which an originator is initiating contacting an escrow company is always AFTER that originator has initiated a loan for a consumer. In such a case a non-licensed originator may have potentially already brought harm to a consumer. In order to protect a consumer from unlicensed originators, the escrow companies should be given a maximum of two business days to verify the originator's status and DFI should be notified by the escrow depository within 2 business days of all originators that fail to be listed on the NMLS Consumer Access website.

2) Although HRS-449 was amended last year that restricts recording residential mortgages in Hawaii to only escrow/title companies that are licensed in Hawaii, the Bureau of Conveyances currently has no ability to verify if a company submitting a mortgage meets that requirement.

There is a simple low cost solution to this loophole: I request that language be inserted into SB-646 that amends HRS-502 (the laws governing the Bureau of Conveyances) that would require the submitting company to provide a copy of their Certificate of Good Standing issued by the State of Hawaii, along with the mortgage being recorded. A copy of the certificate for the current calendar year would be sufficient. The certificate would not be recorded, but just submitted to the Bureau as is currently with the Transfer Tax Certificate.

Currently Quicken Loans, which is not licensed under HRS-454F, is originating mortgages in Hawaii, in direct violation of State law. More importantly, they are using a mainland escrow/title service to process their mortgage recordings at the Bureau. Since this mainland company is not licensed in Hawaii, they would most likely, like Quicken Loans, not follow State law if SB-646 were to be enacted as written. That is why I believe HRS-449 was amended last year to restrict residential mortgage recordings to Hawaii licensed entities. The use of the Certificate of Good Standing is simple proof that the entity requesting a mortgage for recordation is actually registered with the DCCA. The only way these companies could be issued a Certificate of Good Standing by the State of Hawaii is if those companies are registered to do business in Hawaii. If they chose to register with the State, the Division of Financial institutions would then have clear jurisdiction to govern their actions.

Sincerely,

Alan Zukerkorn
President