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L A T E

PRESENTATION OF THE  
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON WAYS AND MEANS

TWENTY-SIXTH LEGISLATURE  
REGULAR SESSION OF 2011

Wednesday, March 30, 2011  
9:30 a.m.

WRITTEN COMMENTS

TESTIMONY ON HOUSE BILL NO. 1411, H.D. 2, S.D. 1,  
RELATING TO MORTGAGE FORECLOSURES.

TO THE HONORABLE DAVID Y. IGE, CHAIR, AND MEMBERS OF THE COMMITTEE

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to provide comments regarding House Bill No. 1411, H.D. 2, S.D. 1, Relating to Mortgage Foreclosures. My name is Stephen Levins, and I am the Executive Director of the Office of Consumer Protection ("OCP"), representing the Department.

House Bill No. 1411, H.D. 2, S.D. 1, as amended by the Senate Committee on Commerce and Consumer Protection, seeks to significantly amend Hawaii's current

home foreclosure laws by among other things: amending Hawaii's new non-judicial foreclosure law as contained in part II of chapter 667 of the Hawaii Revised Statutes; adopting several recommendations of the Mortgage Foreclosure Task Force; implementing a comprehensive foreclosure mediation program; and providing for enhanced regulation of mortgage servicers.

### **Amending Hawaii's New Non-Judicial Foreclosure Law**

The Department believes that the Committee should defer consideration of amendments to part II of chapter 667 of the Hawaii Revised Statutes, since the Mortgage Foreclosure Task Force intends to perform a comprehensive review of its contents during the next year. Although the Mortgage Foreclosure Task Force discussed the possibility of amending the "new law" during several of its meetings, it ultimately determined that in view of the complexity of the issues associated with its possible revision, it did not want to analyze it in a piecemeal fashion, and deemed it necessary to defer a thorough review until the 2011 calendar year. See, pages 13-14 of the Preliminary Report of the Mortgage Foreclosure Task Force. In this regard, the chairperson of the Task Force intends to request that the Task Force thoroughly examine all issues associated with part II.

With respect to the current draft of H.D. 1421, the Department is particularly concerned with amendments that the Committee made to the "new law" since it will lead to extremely damaging unintended consequences for borrowers. These involve the reinstatement of sections 34 and 35 of chapter 667 which the House had previously

repealed and the elimination of the signature requirement in section 32.

For the past 13 years, the signature requirement contained in section 32 has essentially functioned as a bulwark against the use of the new non-judicial foreclosure law. This provision, often referred to as a "poison pill," was apparently inserted in the law at the last minute in 1998, because of someone's concern that sections 34 and 35 would have dire consequences for borrowers.

The major problem with sections 34 and 35 is that no appeal can be taken by the borrower unless it is commenced within 30 days from the filing of the mortgagee's affidavit. This is particularly problematic in light of recent events, in which numerous lenders have engaged in a myriad of improprieties, including filing hundreds of thousands of false affidavits throughout the country. In this context, the language of section 34 is particularly troubling. In pertinent part, it states, "the statements in the recorded affidavit shall be conclusive evidence as to the facts stated therein for any purpose..." If these provisions remain unrepealed, any lender who is able to conceal fraud or gross improprieties associated with the foreclosure process for 31 days after the filing of the affidavit, would have absolute immunity from any claims that the homeowner would have. For instance, if a homeowner went to a lawyer 5 weeks after the foreclosure was paid, and they discovered that the contents of the lender's affidavit were fraudulent, absolutely nothing could be done.

It is important to note that repeal of these provisions will only preserve the homeowners' rights against the mortgagee/lender and will not adversely affect any

subsequent transfer of the foreclosed property. For instance, if a lender who wrongfully foreclosed ends up selling the property at auction to an innocent third party, the innocent party would most probably retain possession as a bona fide purchaser for value. What the original homeowner would have is the right to pursue a claim against the lender for wrongful foreclosure. All that repeal of these sections would do is to preserve the right of a mortgagor to sue their lender for improprieties associated with the foreclosure. It would not do any more nor any less. If the claim for damages is legitimate, it would proceed. If it is not, it would be dismissed.

In view of the foregoing, the signature requirement should only be amended if sections 34 and 35 are repealed in their entirety.

#### **Adoption of Task Force Recommendations**

House Bill No. 1411, H.D. 2, has adopted the recommendations of the Mortgage Foreclosure Task Force established by Act 162, Session Laws of Hawaii 2010. The Department is in support of these recommendations, which were provided to the Hawaii legislature on December 28, 2010 through the Preliminary Report of the Mortgage Foreclosure Task Force. They contain significant improvements to the current non-judicial foreclosure law in Hawaii. They provide for superior notice to homeowners of an impending foreclosure, offer them the ability to convert a non-judicial foreclosure to a judicial foreclosure, and allow them to escape a deficiency judgment in a non-judicial foreclosure.

### **Foreclosure Mediation**

The Department is in support of the intent of the mediation provisions of House Bill 1411, H.D. 2, S.D. 1.

Across our nation, mediation has rapidly grown in popularity as a means to avoid foreclosure. Jurisdictions throughout the United States have implemented various forms of mediation in response to the foreclosure crisis. These include programs operating under the auspices of the judiciary in Nevada, New Jersey, Ohio, Florida, Connecticut, Indiana, Maine, New York, and Vermont, as well as programs established independent of the judiciary in the states of California, Oregon, Maryland, and Michigan. Despite some procedural differences, all of these programs have several features in common. They are designed to bridge the communication gap between loan servicers and homeowners, a gap that has often been cited as the major obstacle to effective loss mitigation. They do this by requiring active participation by a representative of the servicers with full authority to consider all loss mitigation options.

House Bill No. 1411, H.D. 2, S.D. 1, establishes in Hawaii a mediation program as a means to avoid unnecessary foreclosures. The program, in a large part, is based on one currently in use in Nevada, one of the most successful models currently operating in the United States. House Bill No. 1411, H.D. 2, S. D.1 salient features are the same as those in Nevada. They include: having the judiciary as the administrator of the program; suspending all pending foreclosure proceedings against the borrower until the mediation is completed; requiring that participants be fully prepared for the

mediation proceeding; and mandating that the lender's representative have full authority to come to an agreement or have immediate access to someone who does.

In view of the high success rate of the program in Nevada, the Department is in strong support of the operation of a similar program in Hawaii.

In this regard, the Department and the Judiciary have collaborated on the creation of a program which deviates slightly from the Nevada program while retaining the essential elements which has made it such a success.

#### **Regulation of Mortgage Loan Servicers**

The Office of Consumer Protection defers to the expertise of the Division of Financial Institutions regarding the Department's position concerning mortgage loan servicers.

Thank you for providing me with the opportunity to testify on House Bill No. 1411, H.D. 2, S.D. 1. I will be happy to answer any questions that the Committee members may have.



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INTERIM DIRECTOR

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DEPUTY DIRECTOR

**L A T E**

TO THE  
SENATE COMMITTEE ON  
WAYS AND MEANS

THE TWENTY-SIXTH STATE LEGISLATURE  
REGULAR SESSION OF 2011

Wednesday, March 30, 2011  
9:30 a.m.

WRITTEN COMMENTS ON H.B. NO. 1411, H.D.2, S.D.1 RELATING TO MORTGAGE  
FORECLOSURES

THE HONORABLE DAVID Y. IGE, CHAIR,  
AND MEMBERS OF THE COMMITTEE:

My name is Iris Ikeda Catalani, Commissioner of Financial Institutions ("Commissioner"), and I appreciate the opportunity to submit written comments on behalf of the Division of Financial Institutions ("Division") of the Department of Commerce and Consumer Affairs ("Department") on House Bill No. 1411, H.D.2, S.D.1. The Division wishes to offer comments on Sections 13 and 14 of the measure relating to proposed amendments to Chapter 454M, Hawaii Revised Statutes ("HRS").

Section 13 of the measure would amend HRS Section 454M-2(b) to require that no person be permitted to engage in mortgage servicing in the State unless the person has a physical presence in the State pursuant to HRS Section 454M-5(a)(5), which is a new paragraph proposed under Section 14 of the measure.

The Division of Financial Institutions believes that there are several practical problems with Sections 13 and 14 as presently drafted.

1. Whereas Section 13 refers to "no person" without any qualifications, exceptions or exemptions, the new language proposed in Section 14 would nevertheless appear to apply only to certain persons who engage in mortgage servicing in the State, namely "a mortgage servicer licensed or acting under this chapter" as provided in the first sentence of HRS Section 454M-5(a).

Consequently, we suggest the following amendment to Section 14 amending subsection (a)(5) to read as follows:

"Maintain an office in the State that is staffed by at least one agent or employee for the purposes of addressing consumer inquiries or complaints and accepting service of process; provided that the mortgage servicer's business constitutes at least a twenty percent share of **that portion of the total mortgage loan service market in the State that was controlled by mortgage servicers licensed under this chapter** within the previous calendar year." (additions in bold)



DFI should be able to determine that number from the loan data disclosed by our licensees in their annual reports.

2. Even with the language amendment, we do not have, and are uncertain that any agency has, data to quantify the total mortgage loan service market in the State. The Division of Financial Institutions ("DFI") does not have this information because we do not license and regulate a large portion of that market, including the nationwide insured depository institutions regulated by the federal banking agencies. Because of the preemption issues, large federally-regulated financial institutions that operate nationwide choose not to be subject to state banking laws, particularly since each state many have unique banking laws that change from time to time., Consequently, we believe, and respectfully submit, that there is presently no way for either DFI or any mortgage servicer to determine what the twenty percent threshold number would be in any given calendar year, effectively making the proposed physical presence requirement in the measure unenforceable.
3. The current mortgage servicer law provides that DFI collects the following information:
  - a. The applicant's method of doing business,
  - b. Whether the servicer's officers, directors, employees, managers, agents, partners, or members has ever been issued or been the subject of an injunction or administrative order pertaining to any

aspect of the lending business, has ever been convicted of a misdemeanor involving the lending industry or any aspect of the lending business, or has ever been convicted of any felony,

- c. The number of mortgage loans being serviced,
- d. The number of serviced loans in default,
- e. Information on loss mitigation activities, and
- f. Information on foreclosures commenced in the state

We note that the law currently provides that in the event of delinquency or default, the servicer shall act in good faith to inform the borrower of the facts concerning the loan and shall negotiate with the borrower to attempt a resolution or workout relating to the delinquency.

4. Finally, we are aware that the measure currently reflects a delayed effective date. Should the above-mentioned difficulties somehow be satisfactorily addressed, and should this measure ultimately be enacted with an effective date of July 1, 2011, we submit that this would not appear to afford adequate time to the affected mortgage servicers to establish a physical presence in the State as of July 1, 2011. Further, such an outcome would afford no opportunity for DFI to determine the size of the mortgage loan service market in the State in the previous calendar year (2010) and to disseminate this information to the industry in sufficient time to enable affected mortgage servicers to decide whether or not to establish an office in the State or elect

not to renew their license and instead make the necessary arrangements to transfer their Hawaii servicing portfolio to other qualified mortgage servicers without disruption to affected Hawaii borrowers. We point out that mortgage servicers licensed under Chapter 454M, HRS, are presently required to renew their license annually as of July 1. We therefore respectfully ask that the matter of the effective date of the measure also be taken into consideration in light of the new regulatory requirements that would be put in place pursuant to Section 14. We suggest a one year extension of the effective date for Section 14 to allow DFI to inform licensees about this new requirement and to afford time for DFI to determine whether it can find the information required to make the necessary calculation of market share.

Thank you for the opportunity to submit written comments.



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M. Nalani Fujimori Kaina, Esq.  
Executive Director

**The Honorable David Y. Ige, Chair**  
**The Honorable Michelle Kidani, Vice Chair**  
**Senate Committee on Commerce and Consumer Protection**

**L A T E**

**Hearing :      Wednesday, March 30, 2011, 9:30 a.m.**  
**State Capitol, Conference Room 211**

**IN SUPPORT OF HB 1411 HD 2 SD 1**

**Chair and Members of the Committee:**

My name is Ryker Wada, representing the Legal Aid Society of Hawai'i ("LASH"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled, and other low and moderate income families who are consumers and families facing default and foreclosure on their homes. We are testifying in support of HB 1411 HD2 SD1 as it may strengthen protections for consumers in the State of Hawaii.

I supervise a housing counseling program in the Consumer Unit at the Legal Aid Society of Hawaii. The Homeownership Counseling Project provides advice to individuals and families about homeownership issues. Specifically the project provides information on how to prepare yourself before purchasing a home, what to do if you are in danger of losing your home through foreclosure and issues relating to predatory mortgage lending.

The purpose of this bill is to implement the recommendations of the Mortgage Foreclosure Task Force, of which The Legal Aid Society of Hawaii was a member.

HB 1411 HD2 SD1 would provide homeowners with the ability to convert a non-judicial foreclosure to a judicial foreclosure, allow them to avoid a deficiency judgment in a non-judicial foreclosure, provide better notice to homeowners of an upcoming foreclosure and clarify title issues and timelines for foreclosed homes. Effectively this bill would provide further protections for families in Hawaii how are having difficulty with the default, foreclosure and loan modification process.

With regards to the recommendations of the Task Force adopted by HB 1411 HD2 SD1, LASH fully supports these changes, which provide clarification of the current law, further

protections for homeowners, including the ability to convert a fast moving non-judicial foreclosure to a more moderate judicial foreclosure.

HB 1411 HD2 SD1 would also require that a foreclosing mortgagee engage in alternative dispute resolution process before going forward with a foreclosure, in order to prevent avoidable foreclosures in the State. Ideally this would create a much needed means of communication between distressed homeowners and loan servicers, by requiring good faith, supervised participation by a representative of the servicer who has the authority to approve appropriate loss mitigation options. Effectively this bill would provide further protections for families in Hawaii how are having difficulty with the default, foreclosure and loan modification process.

With regard to a moratorium, LASH does not take a position, but offers comments. While a moratorium may assist those homeowners who are currently in foreclosure with more time to attain a favorable result, there has been no cost/benefit analysis to determine what other effects this moratorium may have.

The Legal Aid Society of Hawaii supports this bill, and its efforts to protect the consumers in the State of Hawaii.

**Conclusion:**

We appreciate these committees' recognition of the need to protect consumers in the State of Hawaii. HB 1411 HD2 SD1 attempts to strengthen protections for consumers by implementing the recommendations of the Mortgage Foreclosure Task Force and requiring mortgage lenders to engage in mediation before instituting foreclosure proceedings. We support HB 1411 HD2 SD1 its attempts to protect homeowners in the State of Hawaii. Thank you for the opportunity to testify.

**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Tuesday, March 29, 2011 8:52 PM  
**To:** WAM Testimony  
**Cc:** oneald003@hawaii.rr.com  
**Subject:** Testimony for HB1411 on 3/30/2011 9:30:00 AM

Testimony for WAM 3/30/2011 9:30:00 AM HB1411

L A T E

Conference room: 211  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: David O'Neal  
Organization: Individual  
Address:  
Phone:  
E-mail: [oneald003@hawaii.rr.com](mailto:oneald003@hawaii.rr.com)  
Submitted on: 3/29/2011

Comments:

I oppose this bill for the following reasons:

Section 2. 667-G. Makes completing a non-judicial foreclosure an unfair and deceptive trade practice when the owner is running the lender around in circles (e.g., short sales, loan modification, etc.).

667-H. Prevents junior lienholders from foreclosing while the owner is running the lender around in circles.

667-I. More unfair and deceptive trade practice liability.

Section 5. 667-3. Specifies that foreclosure of a superior lien extinguishes a junior lien. That is generally uncontroversial. There is, however, presently a lien in 514B-146 that survives foreclosure by a lender (for up to six months maintenance fees.) Associations shouldn't lose that "Act 10" lien.

Section 21. 667-22(e). Requires personal service of the foreclosure notice (in like manner as a civil complaint). It should contain an exemption for associations.

Section 33. 667-41. Creates public information requirement. Should exempt associations.

Section 34. Provides for a three-month moratorium on foreclosures. Should not apply to associations.

I urge you to oppose this bill. Thank you for your time.

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Tuesday, March 29, 2011 7:26 PM  
**To:** WAM Testimony  
**Cc:** KimHarman@FACEHawaii.org  
**Subject:** Testimony for HB1411 on 3/30/2011 9:30:00 AM

Testimony for WAM 3/30/2011 9:30:00 AM HB1411

L A T E

Conference room: 211  
Testifier position: support  
Testifier will be present: No  
Submitted by: Kim Harman  
Organization: FACE Hawaii  
Address:  
Phone:  
E-mail: [KimHarman@FACEHawaii.org](mailto:KimHarman@FACEHawaii.org)  
Submitted on: 3/29/2011

**Comments:**

My name is Kim Harman and I am the Policy Director of Faith Action for Community Equity (FACE) and we are in full support of this mandatory mediation bill.

Please make sure that families will be able to participate in this mediation no matter where they are in the default or foreclosure process, and also that the mainland lenders and mortgage servicers will have to proof their legal standing to pursue each foreclosure before they can proceed with the mediation.

Thank you for the opportunity to testify.