

HB2175, HD2



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

March 20, 2012

The Honorable Clayton Hee, Chair
The Honorable Maile S. L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor
Hawaii State Capitol, Room 407
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **Testimony on HB No. 2175, H.D. 2, Relating to Ethics**

Hearing: March 20, 2012, 10:15 a.m.
State Capitol, Conference Room 016

Written Testimony From: Hawaii State Ethics Commission

The Honorable Clayton Hee, Chair; The Honorable Maile S. L. Shimabukuro, Vice Chair; and Honorable Members of the Senate Committee on Judiciary and Labor:

Thank you for the opportunity to testify on House Bill 2175, H.D. 2, Relating to Ethics. House Bill 2175, H.D. 2, section 1, reflects that the bill's purpose is to exclude members of task forces from the provisions of the State Ethics Code. The bill amends the definition of "employee" in the State Ethics Code to exclude members of task forces. It adds a provision to the definition section of the State Ethics Code to define a "task force" as a group convened to study a specific issue for a specific, defined period of time and to then offer a report, recommendation, or advice.

Last year, the State Ethics Commission offered advice to members of the Mortgage Foreclose Task Force, a group created during the 2010 legislative session by Act 162, about the application of the conflicts of interest law to their ability to lobby the legislature on behalf of a private business, for pay, on legislation proposed by the Task Force. This advice issued was consistent with and based upon the Commission's past precedent. In years past, members of various task forces have received similar advice from the Commission.

Specifically, the Commission advised that the State Ethics Code prohibits a member of the task force from being paid to represent a non-governmental organization, such as a business, a trade organization, or another group, on matters

in which the task force participated or would participate. For example, if the task force recommended legislation, then a member of the task force could not receive compensation to lobby on behalf of a private organization on that legislation. The applicable portion of the conflicts of interest law is intended to prevent “influence peddling.”¹

The Commission also advised that the State Ethics Code did not preclude or prohibit: (1) a member of the task force from testifying on behalf of the task force; (2) any organization or business from lobbying on any matter, including the legislation recommended by the task force, as long as the person lobbying on behalf of the organization was not a member of the task force; (3) a member of the task force from lobbying on other matters, unrelated to the legislation recommended by the task force; or (4) generally, a member of the task force from lobbying on any matter, including the legislation recommended by the task force, once the task force dissolved or the person was no longer a member of the task force.² The Commission advised only that, in certain limited situations, the State Ethics Code prohibits a member of a task force from being paid to lobby on behalf of an organization on legislation proposed by the task force.

The State Ethics Code applies to all state employees. “Employee” is broadly defined by the statute to include all nominated, appointed, or elected officers or employees of the State, including members of state boards, commissions, and committees.³ In light of both the underlying purpose of the ethics laws, i.e., to foster public confidence in government, and the statutory mandate that the laws be “liberally construed” to achieve that purpose, the State Ethics Commission currently interprets the term “employee” to include volunteer members of legislatively created task forces and working groups. Accordingly, these individuals are subject to the State Ethics Code, including the conflicts of interest law, the provisions protecting against the misuse of position, and the law prohibiting acceptance of gifts under circumstances in which it can be reasonably inferred that the gift is offered to influence or reward official action.

¹ Haw. Rev. Stat. section 84-14(d) reads, in part:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee[.]

² The post employment restrictions of the State Ethics Code, Haw. Rev. Stat. section 84-18, do apply to members of task forces. However, the post employment law would not apply to members of task forces who served for less than 181 days.

³ Haw. Rev. Stat. section 84-3.

The State Ethics Commission continues to believe that members of task forces, like members of other State created boards, commissions, or committees, should be subject to the State Ethics Code. The Committee should be aware that, by amending the definition of “Employee” to exclude members of “task forces,” member of those groups will be exempt from all the provisions of the State Ethics Code, and not just the conflicts of interests provisions. Specifically, the provisions of the State Ethics Code that prohibit misuse of position⁴ or acceptance of gifts under circumstances in which it can be reasonably inferred that the gift is offered to influence or reward official action will not apply.⁵ Thus, there would be no prohibition against a member of a task force accepting lavish dinners and expensive gifts, even trips and event tickets, from those with interests in the outcome of the task force’s deliberations. And, because task force members will be exempt from the State Ethics Code, they would not be required to report or otherwise disclose the dinners and gifts that they received.

More specifically, for example, under the bill, members of the Charter School task force, which was convened to review and develop a new charter school governance structure, could be wined and dined and offered extravagant gifts by a company attempting to mold the governance structure for its financial gain. The Commission believes that there is no good reason to exempt members of task forces from the State Ethics Code.

That said, if the Legislature believes that it is in the public interest to exempt members of task forces from the State Ethics Code, then State Ethics Commission respectfully takes no position on the bill’s intent. In earlier versions of this measure, the Commission was concerned that the bill failed to adequately define the term “task force” and so would unintentionally exempt members of numerous other types of boards and commissions from the State Ethics Code. House Draft 2 appears to address that concern by offering a more refined and appropriate definition of “task force.” House Draft 2 also amends earlier language to clarify that the definition of “employee” does not include task force members unless they would be considered a state employee for reasons other than their membership on a task force. This addresses the Commission’s earlier concern that the previous language of the bill could be interpreted as exempting from the Ethics Code any state employee who also happened to serve on a task force.

Again, although the Commission believes that it is bad policy to exempt members of State created groups from the State Ethics Code, the Commission takes no position on this bill. The Commission is testifying to offer comment on the language of the bill. The Commission believes that House Draft 2 of House Bill 2175 adequately addressed the Commission’s concerns about the language that existed in early drafts of this bill.

⁴ Haw. Rev. Stat. §84-13.

⁵ Haw. Rev. Stat. §84-11.

Senate Committee on Judiciary and Labor
March 20, 2012
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Thank you for the Committee's consideration of the Ethics Commission's
testimony on House Bill No. 2175, H.D. 2.
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MAILING ADDRESS

PO. Box 617
Honolulu
Hawai'i 96822

March 18, 2012

TO: Chair Clayton Hee, Vice-Chair Maile Shimabukuro
Members of the Senate Committee on the Judiciary and Labor

FROM: Americans for Democratic Action/Hawaii
Barbara Polk, Legislative Chair

SUBJECT: OPPOSITION TO HB 2175 HD2 RELATING TO ETHICS

Americans for Democratic Action/Hawaii cannot support this bill. By excluding members of task forces, working groups and others similar groups from the definition of "employee" in the Ethics Code, you would be saying that it is acceptable for those members to:

- accept or solicit gifts that are intended to influence their recommendations,
- disclose confidential information to the public or use it for personal gain,
- seek favors for themselves or others,
- seek or accept a contract with a state agency without going through the bid process.

We would suggest that the legislators ask those organizations and individuals testifying in favor of this bill why they would want to be exempt from these provisions of the Ethics laws.

If the legislature is to receive good advice from task forces it establishes, surely you would want the members not to be subject to bribery. Likewise, to ensure public trust in the operations of government, it is important that members of task forces not use their service on a task force to enrich themselves, their families or their employers.

We understand that the bill came about because of a concern that two members of a task force could not lobby on behalf of their companies on matters relating to the task force's recommendations. But we also understand that the legislature was not denied the benefit of the input from those stakeholders, since their organizations named other individuals to represent them. Indeed, it is entirely appropriate that each stakeholder decide whether an employee or consultant is best deployed on a task force or as a lobbyist.

If the legislature finds that it must allow task force members to lobby on issues before the task force, we encourage you to amend the law to deal only with that issue.



1654 South King Street
Honolulu, Hawaii 96826-2097
Telephone: (808) 941.0556
Fax: (808) 945.0019
Web site: www.hcul.org
Email: info@hcul.org



Testimony to the Senate Committee on Judiciary and Labor
March 20, 2012

Testimony in Support of HB 2175 HD2, Relating to Ethics

To: The Honorable Clayton Hee, Chair
The Honorable Maile Shimabukuro, Vice-Chair
Members of the Committee

My name is Stefanie Sakamoto, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 81 Hawaii credit unions, representing approximately 811,000 credit union members across the state.

We are in support of HB 2175 HD2, Relating to Ethics, which would clarify that appointed members of task forces convened by the legislature would not be considered “employees” of the state. As the legislature is aware, an ethics problem arose with respect to the Mortgage Foreclosure Task Force in 2011, of which HCUL was a member. We appreciate the efforts of the legislature to avoid similar problems in the future, so that we may continue to participate in such task forces and/or working groups if asked.

Thank you for the opportunity to testify.



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**Senate Committee on Judiciary and Labor
Chair Sen. Clayton Hee, Vice Chair Sen. Maile Shimabukuro**

**Tuesday 3/20/12 at 10:15 AM in Room 016
HB 2175 HD2— RELATING TO ETHICS**

TESTIMONY

JoAnn Maruoka, Legislative Committee Member, League of Women Voters of Hawaii

Chair Hee, Vice Chair Shimabukuro, and Committee Members:

The League of Women Voters of Hawaii cannot support HB 2175 HD2 as written. The Standing Committee Report notes that provisions were inserted “to allow and encourage persons with knowledge and expertise necessary to the State to serve as members of temporary groups convened to study an issue, make recommendations, or offer advice to state officers, even where these persons have a professional or financial connection to the subject.” However, we believe the bill has the unintended consequence of exempting task force members from ALL of the Ethics Code provisions, including the gifts and fair treatment provisions.

While we understand the need for and certainly encourage participation by citizens in such task forces and working groups, we strongly urge you not to give what is essentially a blanket exemption to the state Ethics Code to those who provide the legislature with advice and especially who formulate recommendations on possible legislation. As we have testified on the original bill and HD1, we are gravely concerned about the inherent risks of actual, or at the least the perception of, conflict of interest, including undue influence. We want all those who participate in the formulation of public policy, laws and rules to be held to a high standard.

The purpose in having a Code of Ethics is to prevent corruption in government. Every step forward in protecting against corruption helps improve public confidence in government. For government to work people must have faith in the integrity of its elected officials and the culture of honesty. We urge you to hold the bill in committee.

Thank you for the opportunity to submit testimony.

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

March 20, 2012

Senator Clayton Hee, Chair
and members of the Senate Committee on Judiciary and Labor
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 2175, H.D. 2 (Ethics)**
Hearing Date/Time: Tuesday, March 20, 2012, 10:15 a.m.

I am Marvin S. C. Dang. I **strongly support** this Bill.

The purposes of this Bill are to: (a) exempt all persons, except those who would otherwise be considered state employees, serving on a task force established by the Legislature, Governor, or state officer from the State's Code of Ethics, and (b) define "employee" and "task force".

1. **Other related bills introduced this Session.**

Today is the fifth committee hearing during this Legislative Session on bills covering the subject of this Bill. This Bill had two hearings in the House before it passed the House on March 6, 2012 and was referred to your Committee.

There were hearings on two other similar bills this Session:

a. S.B. 2240 (State Code of Ethics) was heard by your Committee on January 27, 2012. Although it passed, it was not reported out of your Committee.

b. H.B. 2455, H.D. 1 (State Code of Ethics) had a hearing in the House before it crossed over to the Senate on February 21, 2012 and was referred to your Committee.

Three other Senate bills (S.B. 2183, S.B. 2560, and S.B. 2717) and one other House bill (H.B. 1864) were introduced this Session on the same subject.

2. **Background.**

I am a member of the Mortgage Foreclosure Task Force representing the Hawaii Financial Services Association. I currently serve as Vice Chair of the Task Force. However, this testimony is written in my individual capacity as one of the Mortgage Foreclosure Task Force members. I am not writing as the Vice Chair nor am I writing on behalf of any of the other Task Force members.

The Mortgage Foreclosure Task Force was created by the legislature by Act 162 (effective on June 3, 2010) to "undertake a study to develop both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in [Hawaii]." The Task Force was directed to submit reports of its findings and recommendations, including any proposed legislation, to the 2011 and 2012 legislatures. The term of the Task Force encompasses 3 calendar years with 2 legislative sessions sandwiched in between. The Task Force began meeting in July, 2010 and it continues in existence until June 30, 2012.

Ten months after the Mortgage Foreclosure Task Force started meeting, the Hawaii State Ethics Commission sent a Memorandum dated May 26, 2011 to the members of the Task Force. The Memorandum stated, among other things,

“The State Ethics Code prohibits a member of the Task Force from being compensated to represent non-governmental organizations, such as businesses, both for-profit and not for-profit, trade organizations, or other groups, on matters in which the Task Force participated or will participate.

“... We strongly advise members of the Task Force against testifying, in the future, as paid representatives of non-governmental organizations on matters in which the Task Force participated or will participate.”

On July 18, 2011, I sent a letter to the Ethics Commission stating:

“I disagree with the conclusions in your Memorandum. A copy of your Memorandum is attached for your reference. I contend that your Memorandum is overly broad and inconsistent with applicable statutes. Accordingly, I am respectfully requesting that you reconsider and retract your Memorandum.” (Emphasis included.)

Also in my letter to the Ethics Commission, I stated:

“For you to make that interpretation, you needed to have determined that a “task force”, such as the Mortgage Foreclosure Task Force, is a board, commission or committee under the definition of “employee” in HRS §84-3. ...

“As you may know, a “task force” is different from a board or commission, and it is not a committee (such as a committee that is part of a department). The Mortgage Foreclosure Task Force has a limited duration: it was created by Act 162 on June 3, 2010 and it sunsets on June 30, 2012. It was established by the Legislature to conduct an analysis of all factors affecting mortgage foreclosures and to recommend appropriate legislation. It is required to submit reports of its findings and recommendations to the Legislature. The Task Force is solely advisory. It does not have regulatory powers. It does not make policy. Its members are not appointed by the Governor nor are they confirmed by the Senate. The Task Force is within the Department of Commerce & Consumer Affairs for administrative purposes.” (Emphasis added.)

The Ethics Commission did not retract its May 26, 2011 Memorandum.

Unfortunately as a result of the Memorandum of May 26, 2011, 2 members of the Mortgage Foreclosure Task Force resigned before the Task Force’s August 2, 2011 meeting.

On February 2, 2012, the Ethics Commission sent me a letter about its position on this matter. The position of the Ethics Commission continues to be overly broad and inconsistent with applicable statutes including HRS §84-14(d).

I should point out that for 3 years from 2005 through 2007, I was a member and Vice Chair

of the legislatively-created Hawaii Identity Theft Task Force (formerly the Anti-Phishing Task Force). The issue raised by the Ethics Commission in its Memorandum last year was never raised by the Ethics Commission about the Identity Theft Task Force or the Anti-Phishing Task Force.

3. **Reason to support this Bill.**

I strongly support this Bill because it would ensure that advisory task forces created by the Legislature, similar to the Mortgage Foreclosure Task Force, are able to include people who have an interest, knowledge, or expertise in the particular issue. People shouldn't be precluded from providing their input as task force members merely because they will later be testifying or advocating on these issues for compensation.

4. **Proposed revisions to this Bill.**

I recommend that your Committee consider two revisions to this Bill.

A. My first recommendation is to add the following:

SECTION __. Section 84-2, Hawaii Revised Statutes, is amended to read as follows:

“§84-2 Applicability. This chapter shall apply to every nominated, appointed, or elected officer, employee, and candidate to elected office of the State and for election to the constitutional convention, but excluding justices, [and] judges[;], and members of a task force who but for their service with the task force would not be considered an employee of the State; provided that in the case of elected delegates and employees of the constitutional convention, this chapter shall apply only to the enforcement and administration of the code of ethics adopted by the constitutional convention.”

This revision would be consistent with the purpose of this Bill and with the provision in Section 2 of this Bill on page 3, lines 7 through 9, which amends the definition of “employee”.

B. My second recommendation is to modify Section 4 of this Bill:

SECTION 4. This Act shall take effect upon its approval[.], and shall apply retroactively to January 1, 2007.

The Ethics Commission in its February 2, 2012 letter to me stated “if the Legislature’s intent is to exempt you and the other members of the Mortgage Foreclosure Task Force from the State Ethics Code, the Legislature should consider including language in the bill to make the amendment retroactive to a specific date.” I believe that the suggestion of the Ethics Commission to have a retroactive effective date of this Bill is worthy of consideration by your Committee.

I should note that the effective date of Act 162, which created the Mortgage Foreclosure Task Force, is June 3, 2010. However, the January 1, 2007 date in my proposed revision was used by the House in H.B. 2455, H.D. 1 which crossed over to the Senate.

Thank you for considering my testimony.



MARVIN S.C. DANG