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

TO THE HOUSE COMMITTEE ON  
CONSUMER PROTECTION & COMMERCE

AND

TO THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-SIXTH STATE LEGISLATURE  
REGULAR SESSION, 2012

WEDNESDAY, FEBRUARY 22, 2012  
2:00 P.M.

TESTIMONY ON HOUSE BILL NO. 2768  
RELATING TO REAL ESTATE BROKERS AND SALESPERSONS

TO THE HONORABLE ROBERT N. HERKES, CHAIR,  
TO THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR  
AND TO THE HONORABLE RYAN I. YAMANE, VICE CHAIR,  
AND TO THE HONORABLE KARL RHOADS, VICE CHAIR,  
AND MEMBERS OF THE COMMITTEES:

The Regulated Industries Complaints Office ("RICO") of the Department of Commerce and Consumer Affairs appreciates the opportunity to testify on House Bill No. 2768, Relating To Real Estate Brokers and Salespersons. My name is Daria Loy-Goto, RICO's Acting Complaints and Enforcement Officer. RICO opposes this bill.

House Bill No. 2768 amends §467-14, Hawaii Revised Statutes, to require that misrepresentations, false promises, and failure to ascertain and disclose material facts by real estate brokers and salespersons are grounds for disciplinary action only if such actions occur negligently or intentionally.

RICO opposes House Bill No. 2768 for the following reasons:

First, House Bill No. 2768 is inconsistent with national professional standards that govern real estate brokers and salespersons. Under the Code of Ethics for the National Association of Realtors, realtors must avoid misrepresentation without qualification. This bill would bring the standards of practice for Hawaii licensees below those currently established by the National Association of Realtors.

Second, the bill would restrict the ability of the Real Estate Commission ("Commission") to respond to conduct that may place consumers at risk. Under current law, RICO investigates complaints alleging misrepresentations, false promises, or failure to ascertain and disclose material facts by a real estate licensee, whether the actions were intentional or unintentional. Correspondingly, the impact to a consumer who is harmed by a licensee's misconduct is the same whether the misconduct was intentional or unintentional.

House Bill No. 2768 would preclude RICO from investigating and prosecuting all allegations of misrepresentation and concentrate only on those instances where misrepresentations, false promises, and failure to ascertain or disclose material facts are alleged to have occurred negligently or intentionally. As the enforcement

arm for the Commission, RICO should be able to investigate all consumer complaints involving misrepresentation, regardless of the state of mind of the licensee, and the Commission should have the authority to review all instances of alleged misconduct and take appropriate action without qualification. Consumers who are harmed by a licensee's misrepresentation deserve no less oversight from the governing body.

Third, from an enforcement perspective, House Bill No. 2768 would make violations more difficult to prosecute. Investigations would need to include specific evidentiary proof of negligence or intent and any resulting prosecution would need to focus on satisfying these elements, all of which would delay any redress to consumers. RICO believes that a licensee's state of mind when making the misrepresentation or false promise is more appropriately related to the issue of sanctions imposed by the Commission for the unlawful conduct. For example, a real estate licensee who has intentionally misrepresented information may be subject to more serious sanctions by the Commission.

Real estate transactions involve one of the biggest financial investments most people experience in their lifetimes. RICO believes public policy weighs in favor of protecting consumers in this area and that reliance on the Commission to address alleged violations is appropriate.

RICO notes that the Senate Committee on Commerce and Consumer Protection heard the companion measure, Senate Bill No. 3002, and passed out a

Testimony on House Bill No. 2768  
February 22, 2012  
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Senate Draft 1 containing language submitted by the industry. RICO does not support the language in the Senate Draft 1.

Thank you for this opportunity to testify on House Bill No. 2768. I will be happy to answer any questions that the members of the Committees may have.

**PRESENTATION OF THE  
REAL ESTATE COMMISSION**

TO THE HOUSE COMMITTEE ON  
CONSUMER PROTECTION AND COMMERCE

AND

TO THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-SIXTH LEGISLATURE  
Regular Session of 2012

Wednesday, February 22, 2012  
2:00 p.m.

**TESTIMONY ON HOUSE BILL NO. 2768 - RELATING TO REAL ESTATE  
BROKERS AND SALESPERSONS.**

TO THE HONORABLE ROBERT N. HERKES, CHAIR,  
TO THE HONORABLE GILBERT S. C. KEITH-AGARAN, CHAIR,  
AND MEMBERS OF THE COMMITTEES:

My name is Carol Ball and I am the Chairperson of the Hawaii Real Estate Commission ("Commission"). The Commission appreciates the opportunity to present testimony on House Bill No. 2768, Relating to Real Estate Brokers and Salesperson, and opposes this measure for the following reasons.

By adding a state of mind requirement, House Bill No. 2768 creates higher standards the Commission must establish before taking disciplinary action for the following provisions in Chapter 467-14, Hawaii Revised Statutes ("HRS"):

- making any misrepresentation concerning any real estate transaction;
- making any false promises concerning any real estate transaction of a character likely to mislead another; and

- failing to ascertain and disclose all material facts so that the licensee may fulfill the licensee's obligation to avoid errors.

The purchase of a home in Hawaii is largely considered the biggest investment a consumer will make during their lifetime. The legislature recognized the magnitude of this purchase and formed the Hawaii Real Estate Commission to protect the consumer through the regulation of real estate licensees. As stated in Section 467-4, HRS, the legislatively created purpose of the Commission "is the protection of the general public in its real estate transactions."

The legislature mandated further protections for the consumer by prohibiting misrepresentation, false promises, and failing to ascertain and disclose all material facts by a real estate broker or salesperson. It foresaw that the aforementioned acts could easily occur in the sale of home or any type of real estate transaction and therefore enacted the prohibitions **without** a state of mind requirement.

If these proposed states of mind requirements are enacted, they would erode the longstanding preventative safeguards the legislature determined were necessary in protecting the consumer.

For the aforementioned reasons, the Commission opposes House Bill No. 2768. Thank you for the opportunity to testify.

**Testimony for HB2768 on 2/22/2012 2:00:00 PM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Tuesday, February 21, 2012 1:41 PM  
**To:** CPCtestimony  
**Cc:** kschultz@ahfi.com  
**Attachments:** Prudential Testimony on HB~1.pdf (94 KB)

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Testimony for CPC/JUD 2/22/2012 2:00:00 PM HB2768

Conference room: 325  
Testifier position: Support  
Testifier will be present: Yes  
Submitted by: Kristin Schultz  
Organization: Prudential Locations LLC  
E-mail: kschultz@ahfi.com  
Submitted on: 2/21/2012

Comments:  
Brian Benton will be testifying.



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HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE  
and  
HOUSE COMMITTEE ON JUDICIARY  
**TESTIMONY IN SUPPORT OF**  
**HB 2768 RELATING TO REAL ESTATE BROKERS AND SALESPERSONS**

Testimony of  
Prudential Locations LLC  
Wednesday, February 22, 2012, 2:00 p.m.  
House Conference Room 325

Chair Robert N. Herkes and members of the Committee and  
Chair Gilbert S. C. Keith-Agaran and members of the Committee:

Prudential Locations LLC (“Prudential Locations”) **strongly supports** HB 2768. Prudential Locations is a multi-faceted real estate company that started in 1969. Over the last forty years, Prudential Locations has established itself as a leader in the real estate industry, with over 250 real estate brokers and salespersons. We have been in business for over 40 years, handled over a 100,000 transactions, and, throughout that time, had a nearly perfect record with DCCA.

Currently, real estate brokers and salespersons unfairly face **strict liability** for any errors or omissions in connection with real estate transactions. This means they can be charged with wrongdoing even if they are diligent, honest, and capable; even if they are the unwitting and innocent victims of mistakes or misrepresentations by their clients; even if they do nothing wrong at all! The reality under this standard is harsh—the Real Estate Commission can revoke or suspend a real estate broker’s or salesperson’s license or fine a real estate broker or salesperson regardless of fault.

No one would think of disciplining doctors, dentists, lawyers, or government officials when they have not been negligent or guilty of reckless or intentional wrongdoing. And, nearly all licensed professionals in Hawai’i face discipline under some fault-based standard (e.g., Motor Vehicle Licensing, Motor Vehicle Repairs, Chiropractic, Contractors, Dental Hygienists, Dentistry, Hearing Aid Dealers and Fitters, Secure and Fair Enforcement for Mortgage Licensing Act, Notaries Public, Pest Control Operators, Physical Therapy Practice Act, Pilotage, Podiatrists, Psychologists, Solicitation of Funds from the Public, Travel Agencies (Charter Tour Operators), and Alarm Business).



However, real estate brokers and salespersons face strict liability. Under the law as currently written and as currently being enforced by the DCCA, a broker can be disciplined for "making" a statement that is found after the fact to be false even if she acted reasonably and ethically in:

- Relaying information from a reputable inspector about the condition of the roof, electrical and plumbing systems, or other non-obvious characteristics of the property;
- Sharing information obtained from a seller—and believed to be accurate—about the amounts owed for maintenance fees and utilities;
- Reporting information obtained from a contractor with a good reputation about past renovations done to the home;
- Passing on the seller's disclosure (done pursuant to the Disclosure Law) that is found to be inaccurate because the seller was ignorant or lying in ways not known to—or discoverable by—the broker; and
- Reporting information from a lawyer about a pending legal dispute

In short, if a broker, acting with perfect diligence and honesty, "makes" a misrepresentation due to misinformation innocently received from a seller, a termite inspector, a contractor, a lawyer, or a title company, he/she is at risk of being punished by RICO and DCCA.

Why? It makes no sense. It is not fair.

We are not suggesting—in any way—that licensees should not be punished if they are negligent, reckless, or guilty of intentional wrongdoing. They should—without question. But, no one should be at risk of losing their license when they have been honest, diligent, and competent.

The proposed changes to Haw. Rev. Stat. § 467-14 would clearly define the legal standard to be applied by the Real Estate Commission and DCCA in imposing penalties against real estate brokers and agents—a standard that is consistent with other licensing regimes. The proposed changes do not impose unreasonable burdens on the Commission in taking disciplinary action or reduce the powers of the Commission; rather, the proposed changes simply create a fair standard of behavior for real estate brokers and agents.

Let me give you an example of how unfair the present system is. Recently, a licensee with an unblemished record, who has been working in the industry for more than 25 years was cited by the Regulated Industry Complaint Office for misrepresenting that utilities were included in maintenance fees for a condo unit. How did it happen? The seller said the utilities

were included and reported that in her mandatory disclosure. The broker had no reason to believe otherwise. The buyer and her agent were urged to confirm the information, which they

were told was believed to be accurate, but not guaranteed. Unfortunately—unbeknownst to the broker—the seller had given bad information.

Nevertheless, RICO charged this broker (but not the agent who handled the sale) with wrongdoing and demanded she be sanctioned. In fact, it demanded that the broker, who was relying on her subordinates and only indirectly supervising the sale, should lose her license and be found guilty of failing to maintain a reputation for honesty (again, despite decades of blemish-free work)—without **any** proof that she was negligent, careless, reckless, or dishonest. That is not protecting consumers; it is unreasonable.

We are not seeking to change the course of those proceedings. This amendment should have only prospective application, and it is needed to fairly balance the rights of consumers and licensees who act honestly and diligently on their behalf.

Prudential Locations recognizes the importance of licensing penalties in order to protect the general public in real estate transactions. HB 2768 does not—in any way—undermine this goal. And, HB 2768 certainly does not eliminate penalties against real estate brokers and salespersons. HB 2768 merely establishes an appropriate standard of liability for specific types of misconduct.

Thank you for the opportunity to testify on this matter.



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February 22, 2012

**The Honorable Robert N. Herkes, Chair**  
House Committee on Consumer Protection & Commerce  
**The Honorable Gilbert S.C. Keith-Agaran, Chair**  
House Committee on Judiciary  
State Capitol, Room 325  
Honolulu, Hawaii 96813

**RE: H.B. 2768, Relating To Real Estate Brokers and Salespersons**

**HEARING: Wednesday, February 22, 2012, at 2:00 p.m.**

Aloha Chair Herkes, Chair Keith-Agaran, and Members of the Joint Committees:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawaii Association of REALTORS® (“HAR”), the voice of real estate in Hawaii, and its 8,500 members. HAR **strongly supports** H.B. 2768, which clarifies the language regarding the licensing penalties of real estate brokers and salespersons and also clarifies that the Real Estate Commission may revoke, suspend, or fine any person holding a real estate license, registration or certificate for negligently or intentionally making misrepresentations or false promises concerning any real estate transaction or negligently or intentionally failing to ascertain and disclose material facts.

HAR believes that this measure will help to clarify the revocation, suspension and fine provisions for real estate broker or salespersons by providing a clear legal standard. For a real estate broker or salesperson, this would mean that a licensee would be found to violate the law if they failed to exercise the reasonable care that a real estate broker or salesperson would exercise in similar circumstances. Imposing this standard would not mean that the Real Estate Commission and/or the Regulated Industries Complaints Office’s power to enforce violations would disappear. It would merely enact a reasonable standard by which the Commission must act, rather than the current strict liability standard that currently exists in the law for any violation, no matter how inconsequential. HAR believes that it is helpful to the profession as a whole to set a clear standard to govern whether a licensing violation has occurred.

HAR further notes that we would also support the amendments made to the companion bill, S.B. 3002, S.D. 1. The Senate Committee on Commerce and Consumer Protection made amendments in the S.D.1 to narrow the focus to specific conduct (representations made by third parties and contained in public records), while still preserving the Real Estate Commission’s ability to investigate and take disciplinary action in order to protect consumers.

For the foregoing reasons, HAR respectfully requests your favorable passage of this measure.

Mahalo for the opportunity to testify.

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