SB 1378

NEIL ABERCROMBIE
Governor

RUSSELL S. KOKUBUN
Chairperson, Board of Agriculture

JAMES J. NAKATANI
Deputy to the Chairperson

State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 South King Street
Honolulu, Hawaii 96814-2512

TESTIMONY OF RUSSELL KOKUBUN
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE SENATE COMMITTEE AGRICULTURE AND
COMMERCE AND CONSUMER PROTECTION
TUESDAY, FEBRUARY 15, 2011
2:45 P.M.
CONFERENCE ROOM 229

SENATE BILL NO. 1378
RELATING TO HONEY

Chairperson Nishihara and Baker and Members of the Committee:

Thank you for this opportunity to provide testimony on Senate Bill 1378 relating to honey. This bill seeks to require grocers to list the country of origin of all honey sold. The Department of Agriculture cannot support the proposed bill at this time and provides comments.

First, due to reduction-in-forces, the Department is no longer staffed to provide label development support or retail label inspection or enforcement support as required by the bill. Further, the department has no means to test or otherwise determine whether or not foreign honey has been blended with domestic honey.

Secondly, the Department of Agriculture believes that country of origin labeling (COOL) is important for both our producers and consumers but prefers that it be handled at the federal level rather than by enacting a state law.

The U.S. Department of Agriculture's Agricultural Marketing Service has adopted as final, effective 3 February, a July 2009 interim final rule concerning labeling requirements for packed honey. This rule (1) establishes new regulations requiring country of origin labeling for packed honey bearing any official USDA mark or statement (i.e., any official certificate of quality, grade mark or statement, sampling mark or statement, or any combination of USDA certificates, marks or statements) and (2) adds

a new cause for debarment from inspection and certification service for honey if country of origin labeling requirements are not met for packages of honey containing official USDA grade marks or statements. The country of origin, preceded by the words "Product of" or other words of similar meaning, must appear legibly and permanently in close proximity (such as on the same side(s) or surface(s) to the USDA certificate, mark or statement) and at least in a comparable size. The USDA provisions will provide the protections sought by this bill.

Thank you for the opportunity to testify on this measure.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011

ON THE FOLLOWING MEASURE:
S.B. NO. 1378, RELATING TO HONEY.

BEFORE THE:

SENATE COMMITTEES ON AGRICULTURE AND ON COMMERCE AND CONSUMER PROTECTION

DATE: Tuesday, February 15, 2011 **TIME:** 2:45 p.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): David M. Louie, Attorney General, or
Margaret S. Ahn, Deputy Attorney General

Chairs Nishihara and Baker and Members of the Committees:

The Department of the Attorney General opposes this measure because it raises serious constitutional concerns under the United States Constitution's Commerce Clause.

This bill imposes a country of origin labeling requirement for foreign honey and bee pollen. Proposed section 148-B(b) mandates that any package of honey and bee pollen, including any package containing foreign honey blended with domestic honey, produced in any country other than the United States and offered for retail sale in Hawaii, be labeled with the country of origin. It further mandates that such labeling be done prior to delivery into Hawaii. Proposed section 148-B(c) also requires that if any foreign honey is unlabeled and the retail vendor cannot determine its country of origin, the honey shall be removed from sale.

This bill raises the issue of whether such regulation of the labeling of foreign honey impermissibly discriminates against foreign or interstate commerce.

The United States Constitution's Commerce Clause states that Congress shall have the power to regulate commerce with

foreign nations and among the several states. The dormant or negative aspect of the Commerce Clause limits the power of the states to regulate both foreign and interstate commerce.

For example, state laws requiring country of origin labeling on retail packages of foreign meat have been struck down based on the finding that such state laws violate the Commerce Clause. *See, eg.*, Ness Produce Co. v. Short, 263 F. Supp. 586 (D.C. Or. 1966), *aff'd*, 385 U.S. 537, 87 S. Ct. 742, 17 L. Ed. 2d 591 (1967) (holding that Oregon's country of origin meat labeling law unreasonably discriminated against imported meat in violation of the Commerce Clause); Tupman Thurlow Co. v. Moss, 252 F. Supp. 641 (M.D. Tenn. 1966) (holding that Tennessee's foreign origin meat labeling law violated the Commerce Clause); Armour & Co. v. State of Nebraska, 270 F. Supp. 941 (D.C. Neb. 1967) (holding that Nebraska's country of origin meat labeling law violated the Commerce Clause); International Packers Limited v. Hughes, 271 F. Supp. 430 (S.D. Iowa 1967) (holding that Iowa's country of origin meat labeling law violated the Commerce Clause).

In determining whether a state law violates the Commerce Clause, courts will examine (1) whether the law burdens interstate commerce, (2) whether it advances the State's police power to protect the life, liberty, health, or property of its citizens, and (3) whether its burden on interstate commerce is unduly or unreasonable in relation to the state interest it is designed to advance. The courts in Ness, 263 F. Supp. at 589, and International Packers Limited, 271 F. Supp. at 434, concluded that the country of origin labeling requirements imposed a burden on interstate commerce, and the laws did not advance a legitimate state interest. Neither state showed that imported meat was not fit for human consumption or resulted in

harm to the consuming public, and the courts noted that even if such harm had been established, the state's labeling laws related only to the origin of the meat, and not to the quality of the meat.

Similarly, this bill's country of origin labeling requirement relates only to the place of origin of the foreign honey and not to the quality of the honey, even though the bill's purpose purports to address adulterated sweeteners. A court may find that this bill does not advance a legitimate state interest, or that any putative benefits are outweighed by its burden on foreign or interstate commerce. Moreover, if the purpose of this bill is to avoid sweeteners mislabeled as honey, the Food, Drug, and Cosmetic Act in chapter 328, Hawaii Revised Statutes, already prohibits the misleading labeling of food sold under the name of another food, and requires the labeling of artificial flavoring and coloring.

We respectfully recommend that this bill be held by the Committees.