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TO THE SENATE COMMITTEE ON WAYS AND MEANS

TWENTY-SIXTH LEGISLATURE
Regular Session of 2012

Thursday, February 23, 2012
9 a.m.

WRITTEN TESTIMONY ONLY

**TESTIMONY ON SENATE BILL NO. 2704, S.D. 1 – RELATING TO THE
DEPARTMENT OF THE ATTORNEY GENERAL.**

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

My name is Keali'i Lopez, Director of the Department of Commerce and Consumer Affairs ("DCCA). I am providing comments on behalf of DCCA regarding our concerns on Senate Bill No. 2704, S.D.1.

This bill amends sections 28-16 and 661-22, Hawaii Revised Statutes, to enable the Department of the Attorney General to retain and deposit fifteen per cent of any recovery from any civil action or settlement of a civil claim initiated or prosecuted by the Attorney General. These trust funds are to be used for staffing, expenses, equipment and training. The bill was amended in the prior committee to exclude actions involving departments able to procure their own legal services as provided for by section 28-8.3. The bill as drafted, however, continues to create uncertainty as to (1) the status of those actions in which the Department of the Attorney General may have had a role in representing the DCCA; and (2) the status of non-general fund recoveries such as recoveries that are normally paid to DCCA's Compliance Resolution Fund. As such, DCCA requests that the bill be amended on page 3 line 12 to provide an additional carveout as follows:

(b) This section shall not apply to recoveries for the: . . .

(6) Prosecution of claims within the jurisdiction of the department of commerce and consumer affairs.

While DCCA supports the Attorney General's need to have resources necessary to support the legal services it provides, the bill as drafted (1) creates ambiguity as to the types of actions or claims that would be captured by this section, (2) appears to extend into recoveries that are within the province of DCCA and for which the Department of the Attorney General already receives compensation; and (3) has the potential to negatively impact DCCA's funding structure.

DCCA notes that the Office of Consumer Protection (OCP), to the extent it serves as the consumer counsel for the state (487-5, Haw. Rev. Stat.), may be particularly impacted by this bill. Since its creation, OCP has operated independent of the Department of the Attorney General and OCP's entire operation is singularly focused on protecting Hawaii's consumers from unfair or deceptive acts or practices. While it has concurrent jurisdiction with the Department of the Attorney General in a number of consumer protection laws, OCP has generally been the sole agency representing the state and the state's consumers in unfair or deceptive act or practice litigation and in consumer-related multi-state settlements. DCCA is concerned that this traditional, statutorily prescribed division of authority may shift if there is a monetary incentive to do so.

To the extent this bill indirectly authorizes the Attorney General to assume sole responsibility going forward to initiate, prosecute and settle civil consumer protection matters, particularly multi-state actions, it will in effect de-fund the OCP. The great majority of monies collected by OCP are from multi-state investigations and settlements. Those funds permit OCP to take on a great variety of other consumer protection cases for which no monies are received by OCP, but for which civil proceedings are required to obtain injunctions against ongoing violations or to provide restitution to victimized consumers. Such a bill would be inconsistent with the legislature's stated intent to create a strong, independent consumer protection agency with authority to protect Hawaii's consumers.

In addition, to the extent the Department of the Attorney General represents particular divisions in their enforcement actions, highly specialized staff at divisions such as the Division of Financial Institutions ('DFI') frequently handles its own investigations and settlement discussions. Where the assistance of the Department of the Attorney General is needed, DFI is billed and pays for those services on a fee per hour basis.

The Division of Financial Institutions (DFI) generally initiates its own investigations that may lead to settlements with other regulators across the states. These investigations are not initiated by or prosecuted by the attorney general's office. If the multi-state settlement is successful, the state designated as the "lead state" will

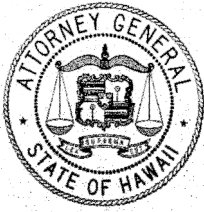
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draft the settlement agreement and coordinate the final settlement terms with the multi-states and the licensee.

DFI engages other states in investigations where licensees may be licensed in more than one state. Sometimes these investigations are initiated by our state, sometimes from other states. With the resources available, the use of the multi-state regulators has saved DFI some time and has helped uncover other potential violations as we coordinate investigations with other states. DFI initiates the investigation for our licensee, investigates any cases, and determines whether there is a violation of law, if there is a violation of law, what the penalties under our state laws require, and coordinate with other states regarding the settlement agreement. Therefore, DFI believes any settlement awards should be retained by the division who initiated the investigation and negotiated the settlement.

DCCA acknowledges that general funded agencies that provide support to other state departments need reliable sources of revenue. This bill, however, does so in a manner that may have unintended and serious consequences to DCCA. DCCA has had discussions with the Department of the Attorney General about its concerns and will be continuing those discussions to effectively address the needs and concerns of both Departments. To this end the DCCA supports moving S.B. 2704 S.D.1 forward with its requested amendments.

I will be happy to answer questions the committee may have. Thank you for this opportunity to testify.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

S.B. 2704, SD1 RELATING TO THE DEPARTMENT OF THE ATTORNEY GENERAL.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Thursday, February 23, 2012 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN COMMENTS ONLY. For more information, call Michael Vincent, Supervising Deputy Attorney General at 586-1494.

Chair Ige and Members of the Committee:

The Department of the Attorney General (The "Department") strongly supports this bill.

The purpose of this bill is to provide the Department with the resources it needs to be proactive in prosecuting claims on behalf of the State. This bill amends section 28-16, Hawaii Revised Statutes (HRS), to provide that the proceeds from any civil action or settlement of a civil claim initiated or prosecuted by the Department, including recoveries from false claims actions under section 661-21, HRS, shall be deposited into the existing Litigation Deposits Trust Fund. The fund shall retain fifteen percent of the recovery for its investigation and litigation costs, participation in multi-state or federal-state actions, training, equipment purchases, and other operating costs. The fund has a ceiling of \$1,000,000. It is intended that the fund be used to fight fraud, increase revenues, and collect moneys owed to the State.

The funds requested by this bill would provide the resources necessary for the Department to pursue state claims as they may arise. Currently, the Department's litigation fund is used primarily to defend actions, as the Department must litigate those cases. Any major plaintiff's action usually requires a supplemental request for funds or the retention of a special deputy who would handle the litigation on a contingent fee basis. This hurdle in obtaining the necessary funding to prosecute a case delays its initiation since, without funding, it is impossible to hire the requisite staff to investigate and pursue the case.

This bill enables the Department to secure the necessary staffing, experts, and training without having to wait for additional funds to be appropriated. Rather, it uses trust funds set aside for the public good. By pursuing more state claims, the Department can develop expertise

in these areas and increase revenues for the State while reducing fees paid to special deputy attorneys general in plaintiff cases.

The cases prosecuted with this funding would not overlap with the cases currently handled by the Tobacco Enforcement Special Fund, the Antitrust Trust Fund, or the Medicaid Investigations Recovery Fund. The Tobacco Enforcement Special Fund is used for the specific purposes of enforcing the Master Settlement Agreement and enforcing tobacco programs. The Antitrust Trust Fund is primarily used to fund participation in multi-state antitrust initiatives. The Medicaid Investigations Recovery Fund is used to prosecute Medicaid fraud.

This fund would also be used to pursue false claims filed with the State, collection cases initiated on behalf of the State, government fraud, and enforcement actions. Several states have already authorized special funds to handle these cases.

For instance, California (15-33% depending on whether it intervenes or pursues its own claims), the District of Columbia (up to 25%), Florida (reasonable amount set by the court), Tennessee (up to 33%), and Nevada (15-33%) have false claims funds in which the proceeds of an action or settlement are used to support its ongoing investigation and prosecution of false claims.

Cases involving false claims and government fraud tend to involve hundreds of documents and require the services of not only attorneys, but also investigators, accountants, experts, and secretarial and clerical staff. The false claims statute that was enacted in May 2000 did not provide a means for the Department to fund false claims litigation. Although the statute mandates that the Department shall investigate any violation under the false claims statute and shall be given the right of declination in any qui tam action, without funding, the Department must pull staff from other assignments to review false claims allegations. Recognizing that the government often lacks the resources to prosecute false claims actions, the Legislature allowed qui tam actions wherein a private party may prosecute a false claim case if the Department declines. The rewards to the private party range from twenty-five percent to thirty percent plus expenses and reasonable attorneys' fees and costs. The California Attorney General has used its false claims fund to annually file several multimillion dollar false claims actions and to employ fifteen attorneys, fifteen accountants and statisticians, and support staff in San Francisco and Sacramento.

Pulling staff from other responsibilities to compile, analyze, and review false claims cases means that staff's usual caseload is then delayed. Having available funds would enable the Department to become more flexible and enable it to hire temporary staff to handle new cases and reduce the staff when the caseload decreases.

The public and the State would benefit from giving the Department the resources to fight fraud, increase revenues, and collect money that belongs to the taxpayers.

We respectfully request that you pass this bill.