

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

Friday, February 3, 2012
10:00 a.m.

TESTIMONY ON S.B. NO. 2704
RELATING TO THE DEPARTMENT OF THE ATTORNEY GENERAL

THE HONORABLE CLAYTON HEE, CHAIR
AND MEMBER 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.

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.

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.

Hawaii Revised Statutes section 28-8.3(a) sets forth a long list of agencies and departments that are permitted to retain attorneys that are not part of the Department of the Attorney General. A number of DCCA divisions programs are included in this list, including but not limited to the insurance division, the division of consumer advocacy, and the department of commerce and consumer affairs for the prosecution of violations of chapters 480 and 485A. These programs retain staff attorneys who are authorized to represent the state. Recoveries by DCCA through its legal staff are a significant source of revenue for the department. DCCA is concerned that this bill as drafted will create an incentive for the Department of the Attorney General to assert jurisdiction in areas that have been traditionally handled by DCCA and will lead to ambiguity as to the impact of any involvement by the Department of the Attorney General in any DCCA prosecutions. As such, DCCA recommends that the reference in the existing statute to 28-8.3 be retained.

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 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 forward with reference in the existing statute to 28-8.3 being retained.

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