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Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor
Hawai'i State Legislature
Honolulu, Hawai'i 96813

Re: SB 2730
Relating to False Claims to the State

Hearing Date & Time: February 3, 2012
10:00 a.m.

Place: Conference Room 016
State Capitol
415 South Beretania Street

Mr. Chair and Members of the Committee:

I am Tom Grande, an attorney in private practice, testifying in favor of this measure.

Over the past thirteen years, I have litigated false claims act cases in Hawai'i and on the mainland, in both state and federal courts. In 2000, I worked closely with then Senator Coleen Hanabusa to draft the first Hawai'i False Claims Act.

As the Committee is aware, this statute brings Hawai'i into conformance with the federal false claims act. This is beneficial not only to ensure the continued flow of monies into the state for work on federal cases, but also ensures that federal and other state case law may be followed by our courts in interpreting our statute.

As the Committee is also aware, under the federal requirements, the state must enact the same minimum protections afforded by the federal statute, but may also impose greater protections.

I have several suggested revisions:

1) H.R.S. § 46-171 *et seq.*, the County False Claims Act, was passed in 2001 and tracts the language of the state False Claims Act. It allows counties to sue in state court for false claims submitted to the counties. The County False Claims Act should also be amended to track the changes made by SB 2730.

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2) Since the passage of the Hawai'i False Claims Act in 2000, the federal government has amended Section 7623 of the Internal Revenue Code to allow for false claims actions to be pursued for tax fraud. At least one state, New York, has amended its state false claims act to specifically allow for tax fraud actions to be pursued. (New York State False Claims Act, N.Y. State Fin. Law § 188).

I strongly recommend that the Committee follow the New York statute by amending the bill to delete section 661-21(f)¹, which precludes actions brought for tax fraud. This limitation does not make any sense in light of the current federal statutes and it affords a further opportunity for the state to recover monies for tax fraud.

3) I suggest that current section 661-21(a) be amended to clarify that the statute allows for the recovery of consequential damages. Consequential damages are those that flow indirectly from an injury and have been held by some courts not to be recoverable under the federal false claims act.

For example, if a contractor knowingly delivers substandard automobile parts to the State, which causes engine failure, the contractor would be liable for the cost of parts, but not for the engine replacement.

As amended that section would read:

“shall be liable to the State for a civil penalty of not less than [~~\$5,000~~] \$5,500 and not more than [~~\$10,000,~~] \$11,000, plus three times the amount of all damages, including consequential damages, that the State sustains due to the act of that person.”

This amendment also tracks an amendment passed by the New York legislature.

4) As currently drafted, Section 5 of the bill states

SECTION 5. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before the effective date of this Act.

I suggest that section 5 be deleted in its entirety. As drafted it could be misinterpreted to apply to contracts that were negotiated before its effective date, but for which false claims were

¹ “HRS § 661-21(f) This section shall not apply to claims, records, or statements for which procedures and remedies are otherwise specifically provided for under chapter 231 [Administration of Taxes].”

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submitted after its effective date. This provision was not contained in Act 126 (2000), which was the original False Claims Act statute.

5) I would suggest that the liberal construction provision contained in Act 126 (2000) be put in place of current Section 5 as follows:

SECTION 5. The provisions of this Act are not exclusive and are in addition to any other applicable law or remedy. This Act shall be liberally construed and applied to promote the public interest.

Omission of this liberal construction provision may lead courts to conclude that the legislature did not intend to apply the same interpretative standards to the False Claims Act amendments as those that are applied to the original statute.

Thank you very much. I would be happy to make myself available to the Committee to provide any further information that may help the Committee in its consideration of this very important measure.