

**SB 3002, SD 1**



NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR

STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

335 MERCHANT STREET, ROOM 310  
P.O. Box 541  
HONOLULU, HAWAII 96809  
Phone Number: 586-2850  
Fax Number: 586-2856  
www.hawaii.gov/dcca

KEALI'I S. LOPEZ  
DIRECTOR

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

TO THE SENATE COMMITTEE ON  
JUDICIARY AND LABOR

TWENTY-SIXTH STATE LEGISLATURE  
REGULAR SESSION, 2012

FRIDAY, FEBRUARY 24, 2012  
11:30 A.M.

TESTIMONY ON SENATE BILL NO. 3002 S.D.1  
RELATING TO REAL ESTATE BROKERS AND SALESPERSONS

TO THE HONORABLE CLAYTON HEE, CHAIR,  
AND TO THE HONORABLE MAILE S.L. SHIMABUKURO, VICE CHAIR,  
AND MEMBERS OF THE COMMITTEE:

The Regulated Industries Complaints Office ("RICO") of the Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify on Senate Bill No. 3002 S.D.1, Relating To Real Estate Brokers and Salespersons. My name is Daria Loy-Goto, Acting Complaints and Enforcement Officer for RICO. RICO opposes this bill.

Senate Bill No. 3002 S.D.1 amends §467-14, Hawaii Revised Statutes ("HRS"), to provide that a real estate broker or salesperson is not liable for: 1) misrepresentations based upon a good faith reliance on information provided by

third-parties or contained in public records; or 2) failure to ascertain and disclose all material facts concerning a property based upon a good faith reliance on a disclosure statement prepared pursuant to §508D-9, HRS.

RICO notes that the House companion measure, House Bill No. 2768, was heard by the joint Committees on Judiciary and Consumer Protection and Commerce on February 22, 2012. The Committees deferred the measure.

Senate Bill No. 3002 S.D.1 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.

Real estate licensees are professionals and not simply hired to pass along and input information as provided by others. They have a professional obligation to "check things out." This bill would remove the affirmative duty of licensees to dig, ascertain, and actively consider information to assure that what they represent is not false or misleading or inaccurate.

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 the current law, which places reliance on the Real Estate Commission to address alleged violations, is appropriate.

Testimony on Senate Bill No. 3002 S.D.1  
February 24, 2012  
Page 3

Thank you for this opportunity to testify on Senate Bill No. 3002 S.D.1. I will be happy to answer any questions that the members of the Committee may have.

February 24, 2012

**The Honorable Clayton Hee, Chair**  
Senate Committee on Judiciary and Labor  
State Capitol, Room 016  
Honolulu, Hawaii 96813

**RE: S.B. 3002, S.D.1, Relating To Real Estate Brokers and Salespersons**

**HEARING: Friday, February 24, 2012, at 11:30 a.m.**

Aloha Chair Hee, Vice Chair Shimabukuro, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR **strongly supports** S.B. 3002, S.D.1, which amends provisions relating to licensing and penalties, that real estate brokers and salespersons shall not be held liable for misrepresentation based upon good faith reliance, and shall not be held liable for failure to ascertain and disclose all material facts concerning a property if there was a good faith reliance on a prepared disclosure statement.

HAR believes that this measure will help to clarify the revocation, suspension and fine provisions for real estate broker or salespersons by providing a clearer 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 its support for the amendments made in S.B. 3002, S.D. 1 by the Senate Committee on Commerce and Consumer Protection. These amendments narrow the focus of the bill to specific conduct (representations made by third parties and contained in public records), while still preserving the 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.

**PRESENTATION OF THE  
REAL ESTATE COMMISSION**

TO THE SENATE COMMITTEE ON  
JUDICIARY AND LABOR

TWENTY-SIXTH LEGISLATURE  
Regular Session of 2012

Friday, February 24, 2012  
11:30 a.m.

**TESTIMONY ON SENATE BILL NO. 3002, S.D. 1, RELATING TO REAL  
ESTATE BROKERS AND SALESPERSONS.**

TO THE HONORABLE CLAYTON HEE, CHAIR,  
AND MEMBERS OF THE COMMITTEE:

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 Senate Bill No. 3002, S.D. 1, Relating to Real Estate Brokers and Salespersons, and opposes this measure for the following reasons.

Senate Bill No. 3002, S.D. 1, shifts liability to the uneducated consumer and away from a real estate licensee for the following current provisions in Chapter 467-14, Hawaii Revised Statutes ("HRS"):

- Making any misrepresentation concerning any real estate transaction; 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 provided the unsuspecting

consumer all the protections the legislature could afford to provide them.

Therefore, in 1977 the legislature established the Hawaii Regulatory Licensing Reform Act under Chapter 26H, HRS, and the major policy of the Act states, “the purpose of regulation **shall** be the protection of the public welfare and **not** that of the regulated profession or vocation.” (emphasis added).

The legislature further created additional protections for the public when it established the Commission. The legislature defined the Commission’s purpose in Section 467-4, HRS, as “the protection of the general public in its real estate transactions.”

In its effort to protect the public, the legislature made the aforementioned prohibited acts illegal and mandated the Commission investigate whether or not the licensee violated those acts, not how they were committed.

The first proposed amendment is not only vague and ambiguous, but it protects the licensee and raises the following questions detrimental to the consumer:

- Is a third-party individual allowed to be a scam artist? An unlicensed person? An incompetent provider of information? Next door neighbor? Tourist who has never been to Hawaii? My eight-year old niece? What are public records? Outdated public records? False and, or fraudulent?

Testimony on Senate Bill No. 3002, S.D. 1  
Friday, February 24, 2012  
Page 3

The second amendment is unnecessary and serves no purpose, but creates potential unintended consequences. Section 508D-9, HRS, currently provides that “a buyer has no cause of action against a seller or a seller’s agent for, arising out of, or relating to the providing of a disclosure statement when the disclosure statement is prepared in good faith and with due care.”

For the aforementioned reasons, the Commission opposes Senate Bill No. 3002, S.D. 1. Thank you for the opportunity to testify.



SENATE COMMITTEE ON JUDICIARY AND LABOR  
**TESTIMONY IN SUPPORT OF**  
**SB 3002, SD1 RELATING TO REAL ESTATE BROKERS AND SALESPERSONS**

Testimony of  
Prudential Locations LLC  
Friday, February 24, 2012, 11:30 a.m.  
Senate Conference Room 016

Chair Clayton Hee and members of the Committee:

Prudential Locations LLC ("Prudential Locations") **strongly supports** SB 3002, SD 1. 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 ("the 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 Department of Commerce and Consumer Affairs ("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 the Regulated Industry Complaint Office ("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.

Let us 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 RICO 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.

At the request of the Senate Committee on Commerce and Consumer Protection, the Hawaii Association of Realtors submitted proposed amendments to SB 3002 to narrow the focus to two areas—(1) information provided by third parties or provided in public records; and (2) information provided in the seller's mandatory disclosure statement. We agree with the amendments.

The current proposed changes to Haw. Rev. Stat. § 467-14 would clearly define the legal standard to be applied by the 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.

We are not seeking to change the course of prior proceedings before RICO and the Commission. 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. SB 3002, SD 1 does not—in any way—undermine this goal. And, SB 3002, SD 1 certainly does not eliminate penalties against real estate brokers and salespersons. SB 3002, SD 1 merely establishes an appropriate standard of liability for specific types of misconduct.

Thank you for the opportunity to testify on this matter.