

LATE

Hawaii Escrow Association
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March 26, 2013

The Honorable Representative Sylvia Luke, Chair
The Honorable Representative Scott Y. Nishimoto, Vice Chair
The Honorable Representative Aaron Ling Johanson, Vice Chair
Members of the House Committee on Finance

415 South Beretania Street
Honolulu, Hawaii 96813
Hawaii State Capitol Room 308

RE: SB 1067 SD2 HD1 Relating to Escrow Depository 2013
OPPOSITION IN PART
Notice of Hearing 4:45 p.m. – Wednesday, March 27, 2013
Conference Room 308

Dear Honorable Chairperson Ms. Luke, Honorable Vice-Chairperson Mr. Nishimoto,
Honorable Vice-Chairperson Mr. Johanson and Members of the Finance Committee:

Thank you for allowing the Hawaii Escrow Association (the “Association”) to testify on SB 1067 SD2 HD1 related to the Escrow Depository Statute (Hawaii Revised Statutes Chapter 449). The Association represents the following licensed escrow depositories in the State of Hawaii, with branches on all major islands:

- Fidelity National Title & Escrow of Hawaii, Inc.
- First American Title Company, Inc.
- First Hawaii Title Corporation
- Guardian Escrow Services, Inc. (dba Premier Escrow)
- Hawaii Escrow & Title, Inc.
- Old Republic Title & Escrow of Hawaii
- Title Guaranty Escrow Services, Inc.

WHY THE ASSOCIATION IS OPPOSING PORTIONS OF THE BILL

1. Administrative Penalty

The Association does not agree to remove the requirement that the violation be “willful” for a penalty to be imposed without some requirement that the violation be intentional.

Escrow companies serve as neutral third parties to the buyers and sellers in real estate transactions and act on instructions from the parties. We serve as fiduciary duties to both parties. In any given transactions we also communicate with the parties' real estate agents and lenders, deal with creditors, associations, property managers, termite companies, attorneys and multitude of other third parties in any given escrow transactions. During this entire process, mistakes can be made and have been made by all escrow depositories, and usually these are generally corrected by the escrow depositories and parties before they escalate to another level. Honest errors should not be a basis for a penalty against escrow companies.

The Hawaii Supreme Court has already determined that "[t]he general rule is that an escrow depository occupies a fiduciary relationship with the parties to the escrow agreement or instructions and must comply strictly with the provisions of such agreement or instructions." *DeMello v. Home Escrow, Inc.*, 4 Haw.App. 41, 47(ICA 1983). The consumers already have a remedy under Hawaii law against escrow depositories when they make errors, including not strictly complying with the provisions of the escrow agreement or instructions.

The Association has already agreed to with DFI's proposal to add eight (8) new powers under Section 449-A Powers of commissioner subsections (1) through (8) as proposed in SB 1067 SD2 HD1. In addition, the DFI Commissioner already has the power to suspend or revoke or suspend license under the existing Section 449-17 for 12 enumerated issues. The DFI Commissioner already has sufficient powers at this point to protect consumers regarding any issues and at any level. By removing the term willfully, the proposed bill provides the DFI Commissioner with an overbroad and far-reaching power to penalize escrow depositories at the DFI Commissioner's discretion.

We believe that it is reasonable to either keep the term "willfully violate" in subsection (a), or in the alternative, amend subsection (d) so that it is applicable to "this chapter."

2. Elder Section Needs To Be More Clearly Defined

Section 3 ("Administrative penalty") Paragraph (d) provides that any violation that is "directed toward, targets, or injures an elder may be subject to an additional civil penalty not in excess of \$10,000 for each violation . . ." We have several issues with this section. First, the term "elder" needs to be defined. Second, this section needs to include language to reflect that the violation was "willfully" or "intentionally" carried out.

The reason we are requesting to include "willfully" or "intentionally" is because, as previously mentioned, escrow companies do not choose the customers; but rather, the buyers and sellers choose us. Escrow companies serve as neutral 3rd parties to the transaction and take instructions from the parties to the transactions, so it would be unreasonable if an escrow company was fined for additional amounts under this section simply because the customer happened to be an "elder."

Escrow companies should not be the "elder police". We should not be penalized twice just because the customer is an elder. There should be intentional wrongdoing on the part of the escrow company to apply this additional penalty. HRS Section 480-13.5 already provides additional protection for elders. Moreover, Section 480-13.5 specifically points to whether an action was a "willful disregard of the rights of the elder" and whether the escrow company "knew or should have known that the person's conduct was directed toward or targeted an elder" as factors in implementing a penalty under 480-13.5.

The Association has given 100% cooperation and has substantially ratified all of the DFI's requests for increases in fees across the board and additions of powers of the commissioner in an effort to move the intended bill forward. We also appreciate the DFI Commissioner's cooperation and efforts to work together as an industry.

Please see below the Association's proposed revisions in track changes and highlight.

We appreciate the Chairs and the Committee for allowing our testimony. Thank you for your consideration.

Sincerely,

HAWAII ESCROW ASSOCIATION

/s/ William Tanaka

The Associations' proposed revisions to SB 1067 SD2 HD1:

SECTION 3. Section 449-4, Hawaii Revised Statutes, is amended to read as follows:

"§449-4 Administrative penalty. (a) Any person who willfully [~~willfully~~] violates any of the provisions of this chapter, shall be subject to an administrative fine of a maximum of \$5,000 for each violation. The commissioner may impose an administrative fine on a licensee or person subject to this chapter if the commissioner finds on the record after notice and opportunity for hearing that the licensee or person subject to this chapter has violated or failed to comply with any requirement of this chapter or any rule prescribed by the commissioner under this chapter or order issued under the authority of this chapter.

(b) Each violation under this chapter or failure to comply with any directive or order of the commissioner shall be a separate and distinct violation.

(c) Notwithstanding section 480-13.5, any violation of this chapter that is willfully or intentionally directed toward, targets, or injures an elder, subject to the requirements and factors set forth under section 480-13.5, may be subject to an additional civil penalty not in excess of \$10,000 for each violation in addition to any other fines or penalties assessed for the violation.

(d) No licensee shall be subject to this penalty for a violation of this chapter [~~section 449-16(b) or (e)~~] if the violation was not intentional or resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid that error. Examples of bona fide errors include, but are not limited to, clerical miscalculations, computer malfunction, printing errors, and computer programming errors."