

TESTIMONY OF HERMINA MORITA
CHAIR, PUBLIC UTILITIES COMMISSION
DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE
HOUSE COMMITTEE ON JUDICIARY

APRIL 2, 2013
2:00 p.m.

MEASURE: S.B. No. 66, S.D. 1, Proposed H.D. 2
TITLE: Relating to the Code of Ethics

Chair Rhoads and Members of the Committee:

DESCRIPTION:

The Proposed House Draft 2 version of this measure amends Section 84-13, Hawaii Revised Statutes (“HRS”), concerning public statements and official actions of task force members in the State. In addition, this measure proposes to extend to members of state boards and commissions, including members of the Public Utilities Commission (“Commission”), the requirement under HRS § 84-17(d) that financial disclosure statements made to the State Ethics Commission also be deemed public records and be made available for “public inspection and duplication.”

POSITION:

The Commission would like to offer the following comments with respect to the proposed amendments to HRS § 84-17(d) concerning public inspection and duplication of board and commission members’ currently-required financial disclosure statements.

COMMENTS:

The Commission supports the principle of open and transparent government. However, requiring some board and commission members to disclose their personal finances publicly may discourage the most qualified candidates from participating in these roles.

Specifically for the Commission, the Commission would like to suggest for the Committee's consideration that Commissioners, as full-time employees of the State who are required to comply with HRS § 84-14 for each official action taken, instead file with their current statutorily-required financial disclosure statements an affidavit affirming that he or she does not have a financial interest in any business regulated by the Commission. The suggested alternative may be a more focused and direct method of confirming the lack of potential financial conflicts for a Commissioner.

Thank you for the opportunity to testify on this measure.

HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law

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LATE

April 2, 2013

Rep. Karl Rhoads, Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **Senate Bill 66, S.D. 1, H.D. 1 (Code of Ethics)**
Hearing Date/Time: Tuesday, April 2, 2013 at 2:00 p.m.

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

The HFSA takes no position on the proposed House Draft 2, but offers an amendment to the proposed House Draft 2.

The purposes of this Bill in the Proposed H.D. 2 are to: (1) make the financial disclosure statements of members of state boards and commissions available for public inspection, and (2) clarify the fair treatment law by separating out certain limitations placed on task force members and makes clear that legislators are not prohibited from taking action in the exercise of the legislator's legislative functions.

A. Request that your Committee amend this Bill to add in the provisions of S.B. 893, S.D. 1 (Ethics) to amend HRS Sec. 84-14(d).

We respectfully ask that the substantive provisions of S.B. 893, S.D. 1 (Ethics) be added to S.B. 66. For your reference, a copy of S.B. 893, S.D. 1 is attached as Exhibit "1". The substantive provisions of S.B. 893, S.D. 1 would amend Hawaii Revised Statutes ("HRS") Sec. 84-14(d) of the Code of Ethics. The amendment would: (1) exempt members and designees or representatives of members of task forces that existed on or after June 3, 2010 from certain provisions of the Code of Ethics, and (2) specify a retroactive date of June 3, 2010 for the exemption.

I am also attaching copies of testimonies that had been submitted in favor of S.B. 893, S.D. 1 when it was heard by the House Committee on Legislative Management ("LMG") on March 21, 2013. See Exhibits "2" through "7". These testimonies are from the Hawaii Bankers Association, the Mortgage Bankers Association of Hawaii, John Morris, the Hawaii Council of Association of Apartment Owners, the Hawaii Credit Union League, and the Hawaii Financial Services Association.

I understand that Daniel Mollway, the former Executive Director of the State Ethics Commission, had also submitted testimony in favor of S.B. 893, S.D. 1. However, because Mr. Mollway's written testimony was on the Legislature website, I have not included it. (You can presumably obtain it from Mr. Mollway or from the House LMG Committee.)

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B. Background.

The Mortgage Foreclosure Task Force (“Task Force”) was created by the Legislature by Act 162 in 2010 to “undertake a study to develop both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in [Hawaii].” The Task Force was directed to submit reports of its findings and recommendations, including any proposed legislation, to the 2011 and 2012 Legislatures.

The Task Force began on June 3, 2010 and ended on June 30, 2012. Because the HFSA was one of the organizations required by Act 162 (2010) to be represented on the Task Force, I was its representative. I was a member and the Vice Chair of the Task Force. (This testimony is not written on behalf of the Task Force or on behalf of any of the other Task Force members.)

The Mortgage Foreclosure Task Force started meeting in July, 2010. Ten months later, Mr. Kondo, the Executive Director of the Hawaii State Ethics Commission, sent a Memorandum dated May 26, 2011 to the members of the Task Force. Mr. Kondo’s Memorandum stated:

“The State Ethics Code prohibits a member of the Task Force from being compensated to represent non-governmental organizations, such as businesses, both for-profit and not for-profit, trade organizations, or other groups, on matters in which the Task Force participated or will participate.

...

“ ... We strongly advise members of the Task Force against testifying, in the future, as paid representatives of non-governmental organizations on matters in which the Task Force participated or will participate.”

The relevant provision of the Ethics Code is HRS Sec. 84-14(d):

“No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.” (Emphasis added.)

On July 18, 2011, I sent a letter to the Ethics Commission in which I wrote:

“I disagree with the conclusions in your Memorandum. A copy of your Memorandum is attached for your reference. I contend that your Memorandum is overly broad and inconsistent with applicable statutes. Accordingly, I am respectfully requesting that you reconsider and retract your Memorandum.” (Emphasis included.)

Also in my letter to the Ethics Commission, I stated:

“For you to make that interpretation, you needed to have determined that a “task force”, such as the Mortgage Foreclosure Task Force, is a board, commission or committee under the definition of “employee” in HRS §84-3. ...

“As you may know, a “task force” is different from a board or commission, and it is not a committee (such as a committee that is part of a department). The Mortgage Foreclosure Task Force has a limited duration: it was created by Act 162 on June 3, 2010 and it sunsets on June 30, 2012. It was established by the Legislature to conduct an analysis of all factors affecting mortgage foreclosures and to recommend appropriate legislation. It is required to submit reports of its findings and recommendations to the Legislature. The Task Force is solely advisory. It does not have regulatory powers. It does not make policy. Its members are not appointed by the Governor nor are they confirmed by the Senate. The Task Force is within the Department of Commerce & Consumer Affairs for administrative purposes.” (Emphasis added.)

The Ethics Commission did not retract its Memorandum. Unfortunately, as a result of the Memorandum of May 26, 2011, two members of the Mortgage Foreclosure Task Force resigned before the Task Force’s August 2, 2011 meeting.

Last year, Act 208 was enacted to exempt members of state task forces from some of the restrictions and prohibitions of the State Ethics Code. The Legislature believed that this would encourage people with specialized knowledge and experience to serve on temporary task forces created by the legislative and executive branches. These people would be able to volunteer their time and expertise to serve the public by studying issues, making recommendations, and offering advice without fear of violating the conflicts of interest provisions in the Ethics Code.

However Act 208, which was effective on July 1, 2012, did not have a retroactive date and did not clarify that the exemption applied to task forces created before that date.

S.B. 893, S.D. 1 (Ethics) was introduced this year. It passed the Senate and was heard by the House LMG Committee on March 21, 2013. By amending HRS Sec. 84-14(d), S.B. 893, S.D. 1 simply furthers the purpose of Act 208 by specifying a retroactive date of June 3, 2010. S.B. 893, S.D. 1 reiterates the intent that certain task forces created before the effective date of Act 208 are exempt from specific provisions of the Ethics Code. The LMG Committee deferred S.B. 893.

C. The concept of a retroactive date was first suggested by Mr. Kondo of the Ethics Commission in 2012.

The concept of a retroactive date was first suggested in 2012 by Leslie Kondo, Executive

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Director of the Hawaii State Ethics Commission. In a letter dated February 2, 2012 from Mr. Kondo to me, he referenced S.B. 2240 (2012 Legislative Session) which, as introduced, would exempt members of groups convened solely to provide comments, share technical knowledge or expertise, or assist in formulating recommendations to, with or for the Legislature, Governor, or other state departments, agencies, or boards, from the State Code of Ethics. S.B. 2240 had a similar intent as H.B. 2175 (2012). H.B. 2175, Conference Draft 1, became Act 208 (2012).

In his February 2, 2012 letter to me (and copied to all the members of the Mortgage Foreclosure Task Force), Mr. Kondo, representing the Ethics Commission, wrote:

“For your information, after the [January 27, 2012] Committee hearing [on Senate Bill 2240], I informed Senator Clayton Hee that the bill, as passed by the Committee, does not appear to apply retroactively. I suggested to Senator Hee that, if the Legislature’s intent is to exempt you [Marvin Dang] and the other members of the Mortgage Foreclosure Task Force from the State Ethics Code, the Legislature should consider including language in the bill to make the amendment retroactive to a specific date.” (Bracketed material added; emphasis added.)

Last year, the House passed to the Senate a bill to retroactively exclude members of task forces from the State Ethics Code. This was H.B. 2455, H.D. 1 (State Code of Ethics). The House Judiciary Committee, which had heard the bill on February 2, 2012, had voted without opposition to insert a retroactive date of January 1, 2007.

Having a retroactive date in this year’s bill is entirely consistent with the suggestion that Mr. Kondo made to Sen. Hee in 2012 and with the action taken by the House in 2012.

D. Meetings of the Mortgage Foreclosure Task Force were publicly held in compliance with the Hawaii Sunshine Law.

Some opponents of S.B. 893, S.D. 1 believe that members of various state task forces can obtain “inside” information. From my experience with task forces, that is a misconception. The members of the Mortgage Foreclosure Task Force didn’t receive any “inside” information. That’s because all 16 meetings were conducted in accordance with the Hawaii Sunshine Law (HRS Chapter 92). Written notices of all the meetings were publicly given. The meetings were open to the public and held in a public location (Department of Commerce & Consumer Affairs). All input, discussion, motions, and votes were done in public. A Deputy Attorney General was present at each meeting to advise the Task Force on Hawaii Sunshine Law issues. Minutes of meetings were posted on the State’s website. A Preliminary Report of the Task Force was submitted to the Legislature before the 2011 Legislative Session. A Final Report of the Task Force was submitted to the Legislature before the 2012 Legislative Session. Both Reports were prepared with the assistance of the Legislative Reference Bureau and are publicly posted on the DCCA’s website. Legislation was prepared and introduced based on the recommendations in the Reports. There was transparency in all of the Task Force’s activities.

The public, open, and transparent manner in which the activities of the Mortgage Foreclosure

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Task Force were conducted is similar for other state task forces. I speak from experience. I was a member and Vice Chair of the Hawaii Identity Theft Task Force created by Act 140 (2006) from 2006 through 2008. I was also a member of the Hawaii Anti-Phishing Task Force created by Act 65 (2005) from 2005 to 2006.

Some opponents of Act 208 and S.B. 893 believe that when there are task forces, there is “influence-peddling”. They are wrong. There is no “influence-peddling” with task forces like the Mortgage Foreclosure Task Force. “Influence peddling” is a situation where State employees are hired by third parties who want to take advantage of inside contacts and information that the State employees have acquired from working for the State. The situation with the Mortgage Foreclosure Task Force (and other task forces) is the reverse of “influence-peddling”. In creating the Task Force, the Legislature contemplated and expected that some Task Force members, i.e. stakeholders including paid lobbyists, would appear before the Legislature to testify and share their views on foreclosure issues and foreclosure legislation. Task Force members, some of whom were lobbyists, were selected specifically to be on the Task Force because they could bring their own independent expertise or knowledge to the Task Force. As stated, the activities of the Mortgage Foreclosure Task Force (and other task forces) were conducted in a public, open, and transparent manner.

E. Mr. Kondo of the Ethics Commission said in May, 2011 he will not recommend action by the Commission for apparent violations in 2011.

As mentioned above, Mr. Kondo, on behalf of the State Ethics Commission, sent a May 26, 2011 Memorandum to the Mortgage Foreclosure Task Force. He wrote:

“We are providing you with this letter to alert members of the Task Force of our concerns that members who are paid lobbyists or employees of non-governmental organizations may have testified [during the 2011 legislative session] on bills that were drafted or recommended by the Task Force. As noted above, such action appears to be in violation of the State Ethics Code. Staff, however, does not intend to recommend any further action by the State Ethics Commission relating to any lobbying by Task Force members on Task Force-related matters this past [2011] legislative session.”
(Bracketed material added; emphasis added.)

Mr. Kondo is saying that the Ethics Commission’s staff can selectively choose not to recommend that the Commission take action against Task Force members who he said appeared to violate the State Ethics Code in 2011. Yet it is puzzling why Mr. Kondo would oppose the Legislature’s choice to put a retroactive date in this year’s bill to exempt task force members from the same provisions of the Ethics Code that Act 208 exempted task force members. It should be noted that Mr. Kondo has not said that the Ethics Commission itself will not pursue any action against any task force members for any alleged violations prior to July 1, 2012 (the effective date of Act 208).

It should also be noted that even if the Ethics Commission chooses not to conduct an investigation or bring a charge, any member of the public can file a complaint with the Ethics Commission against any member of any task force or working group. There is a 6 year period for

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members of the public to file such complaints. The 6 year statute of limitations is in HRS Sec. 84-31(a)(6). During the past few years, besides the Mortgage Foreclosure Task Force, there have been various other task forces in existence.

F. The May 26, 2011 Memorandum of the Ethics Commission has been deemed “erroneous” in its determination that task force members are state “employees” for purposes of the Ethics Code.

After Mr. Kondo wrote his Memorandum in May 26, 2011, the **Senate Majority Research Office** concluded in a July 15, 2011 Memorandum (approved by Senate Majority Attorney Richard Wada) that:

“The State Ethics Commission is erroneous in its determination that members of a task force are state “employees” for purposes of the Ethics Code, despite the Ethics Commission’s long-standing practice of defining task force members as “employees” and reliance on that definition as precedent in issuing opinions.” (Emphasis added.)

The Senate Majority Research Office’s Memorandum further stated:

“By contrast [to boards and commissions], task force members do not act on behalf of the State. They perform no adjudicatory or decision-making actions, and they do not bind the State. Task force members are selected and invited onto the task force to advocate for their private or professional positions. They are selected to represent the point of view of a particular industry or business and to bring their knowledge and perspective to assist the task force in its information-gathering and recommendation-making functions. Task force members are not required to be impartial, because it is their partiality in representing their industry or business that makes their input valuable. They do not represent the State in actions with third parties, have no authority to make concrete decisions regarding the rights of others, and cannot bind the State. There is no potential for a conflict of interest because they do not have a public duty with which their private interests can conflict. Thus, because Task Force members do not exercise sovereign powers of the State or act on behalf of the State, they do not constitute officers of the State.

“Accordingly, the plain language of the definition of “employee” [in the Ethics Code] excludes task force members because (a) they are not nominated, appointed, or elected, and (b) they are not “public officers” because they do not exercise any sovereignty of the State or act on its behalf. As Task Force members do not satisfy the two tests for an “employee” under section 84-3, HRS, they are not subject to the Ethics Code.” (Bracketed material added; emphasis added.)

The Senate Majority Research Office’s Memorandum of July 15, 2011 additionally stated:

“Including task force members within the scope of the Ethics Code frustrates the will of the Legislature and the public policy purposes in establishing task forces.

“The specific authority to convene a task force or to define its operations is not found in either the Hawaii State Constitution or the Hawaii Revised Statutes. Rather, in the exercise of the Legislature's inherent legislative powers pursuant to article III, section 1 of the Hawaii State Constitution, the Legislature authorizes task forces on an ad hoc basis to perform an information-gathering function, specifically to investigate certain policy issues and to make non-binding recommendations to the Legislature for proposed future laws. In establishing task forces, the Legislature brings together stakeholders and those who may come to the Legislature to testify or petition legislators regarding legislation in order to give these individuals and representatives an opportunity to discuss their divergent views and to make recommendations to the Legislature. It is not unusual that these stakeholders may also act as lobbyists for their particular business or interests, because often, it is lobbyists who have the necessary expertise and are in the best position to advocate and make recommendations to the Legislature. During task force meetings, members share information and viewpoints and hammer out compromises on complicated legislative issues. Essentially, these task force meetings serve as a prescreening of legislative committee meetings, saving legislators time by creating recommendations that are intended to address the respective concerns of stakeholders. During the legislative session, members of the public and these and other stakeholders may comment on and request amendments or changes to the task force’s recommendation. However, the task force’s recommendation serves as an important starting point for the Legislature.” (Emphasis added.)

G. HRS Sec. 84-14(d) needs to be amended through S.B. 66.

Even though the Mortgage Foreclosure Task Force terminated on June 30, 2012, HRS Sec. 84-14(d) still needs to be amended. The issues raised in this testimony are not moot. The Ethics Commission is able to conduct investigations and to take actions against alleged violations going back 6 years, including actions in 2012 and 2011. The 6 year statute of limitations is in HRS Sec. 84-31(a)(6).

Mr. Kondo has not said ... and he cannot say ... that the Ethics Commission (which has 5 members appointed by the Governor) will not pursue any action against any task force member for any alleged violations prior to July 1, 2012 (the effective date of Act 208) based on Mr. Kondo’s “erroneous” determination.

Additionally, Mr. Kondo does not know if any member of the public will, in the future, file a complaint against any task force members for any alleged violations of the Ethics Code prior to July 1, 2012 based on Mr. Kondo’s “erroneous” determination.

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The amendment of HRS Sec. 84-14(d) is not just about exempting one person or about exempting all the members of the Mortgage Foreclosure Task Force. This amendment will also exempt the members of all other task forces that were in existence during the past two years. Those task force members were placed in jeopardy by the “erroneous” determination made by Mr. Kondo on May 26, 2011 that task force members are state “employees” for the purpose of the State Ethics Code.

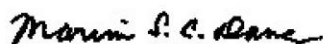
H. Conclusion.

Act 208, effective July 1, 2012, corrected Mr. Kondo’s “erroneous” determination that task force members are state “employees” for the purpose of the State Ethics Code. The Act exempted future members of state task forces from some of the restrictions and prohibitions of the Ethics Code.

Amending HRS Sec. 84-14(d) through S.B. 66 simply furthers the purpose of Act 208 by specifying a retroactive date of June 3, 2010. This amendment reiterates the intent that certain task forces created by the Legislature before the effective date of Act 208 were and are exempt from specific provisions of the Ethics Code because the task force members are not state “employees” for the purpose of the Ethics Code.

For these reasons, we ask that you amend this Bill accordingly.

Thank you for considering our testimony.



MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

THE SENATE
TWENTY-SEVENTH LEGISLATURE, 2013
STATE OF HAWAII

S.B. NO. 893
S.D. 1

A BILL FOR AN ACT

RELATING TO ETHICS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 84-14, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§84-14 Conflicts of interests. (a) No employee shall
4 take any official action directly affecting:

5 (1) A business or other undertaking in which the employee
6 has a substantial financial interest; or

7 (2) A private undertaking in which the employee is engaged
8 as legal counsel, advisor, consultant, representative,
9 or other agency capacity.

10 A department head who is unable to disqualify the
11 department head's self on any matter described in paragraphs (1)
12 and (2) will not be in violation of this subsection if the
13 department head has complied with the disclosure requirements of
14 section 84-17.

15 A person whose position on a board, commission, or
16 committee is mandated by statute, resolution, or executive order
17 to have particular qualifications shall only be prohibited from
18 taking official action that directly and specifically affects a



1 business or undertaking in which the person has a substantial
2 financial interest; provided that the substantial financial
3 interest is related to the member's particular qualifications.

4 (b) No employee shall acquire financial interests in any
5 business or other undertaking which the employee has reason to
6 believe may be directly involved in official action to be taken
7 by the employee.

8 (c) No legislator or employee shall assist any person or
9 business or act in a representative capacity before any state or
10 county agency for a contingent compensation in any transaction
11 involving the State.

12 (d) No legislator or employee shall assist any person or
13 business or act in a representative capacity for a fee or other
14 compensation to secure passage of a bill or to obtain a
15 contract, claim, or other transaction or proposal in which the
16 legislator or employee has participated or will participate as a
17 legislator or employee, nor shall the legislator or employee
18 assist any person or business or act in a representative
19 capacity for a fee or other compensation on such bill, contract,
20 claim, or other transaction or proposal before the legislature
21 or agency of which the legislator or employee is an employee or
22 legislator.



1 (e) No employee shall assist any person or business or act
2 in a representative capacity before a state or county agency for
3 a fee or other consideration on any bill, contract, claim, or
4 other transaction or proposal involving official action by the
5 agency if the employee has official authority over that state or
6 county agency unless the employee has complied with the
7 disclosure requirements of section 84-17.

8 (f) Subsections (a), (b), and (d) shall not apply to a
9 task force member or the designee or representative of that task
10 force member whose service as a task force member would not
11 otherwise cause that member, designee, or representative to be
12 considered an employee, if the task force member or the designee
13 or representative of that task force member complies with the
14 disclosure requirements under section 84-17.

15 (g) Subsections (a), (b), and (d) shall not apply to a
16 member or the designee or representative of a member of any task
17 force that existed on or after June 3, 2010."

18 SECTION 2. New statutory material is underscored.

19 SECTION 3. This Act shall take effect on July 1, 2050.

20





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Presentation To
House Committee on Legislative Management
March 21, 2013 at 2:00pm
State Capitol Conference Room 423

Testimony in SUPPORT of Bill S. B. 893, SD1

TO: The Honorable Scott Y. Nishimoto, Chair
The Honorable John M. Mizuno, Vice Chair
Members of the Committee

My name is Edward Pei and I am the Executive Director of the Hawaii Bankers Association (HBA). HBA is the trade association representing all FDIC insured depository institutions operating in the State of Hawaii.

The legislature was wise to pass legislation last session (Act 208 became effective on July 3, 2012) to exempt members of task forces from certain provisions of the State's code of ethics. Not doing so would discourage members of the community from participating on task forces. The Mortgage Foreclosure Task Force was created by Act 162 in 2010, and served a critically important purpose. The Task Force served for two long years, with its term expiring on June 30, 2012, just days prior to the enactment of Act 208. Although its creation and duration occurred before enactment of Act 208, those task force members really should be afforded the same privileges, as it was the intent of Act 208 to protect all task force members from specific requirements of the ethics code. We urge the passage of SB 893, SD1 and thank the members of this task force for their important work and countless hours of devoted service.

Thank you for the opportunity to submit this testimony and please let us know if we can provide further information.

Edward Y. W. Pei
(808) 524-5161



Mortgage Bankers Association of Hawaii
P.O. Box 4129, Honolulu, Hawaii 96812

March 20, 2013

The Honorable Scott Y. Nishimoto, Chair,
The Honorable John M. Mizuno, Vice Chair, and
Members of the House Committee on Legislative Management
State Capitol, Room 423
Honolulu, Hawaii 96813

Re: Senate Bill 893, SD1 Relating to Ethics

Chair Nishimoto, Vice Chair Mizuno, and Members of the House Committee on
Legislative Management:

I am Linda Nakamura, representing the Mortgage Bankers Association of Hawaii ("MBAH"). The MBAH is a voluntary organization of real estate lenders in Hawaii. Our membership consists of employees of banks, savings institutions, mortgage bankers, mortgage brokers, and other financial institutions. The members of the MBAH originate the vast majority of residential and commercial real estate mortgage loans in Hawaii. When, and if, the MBAH testifies on legislation, it is related only to mortgage lending.

The MBAH supports Senate Bill 893. SD1 Relating to Ethics.

Act 208 enacted in 2012 exempted members of legislative task forces from some provisions of the State Code of Ethics. Legislative task forces were created to provide the legislature with information from subject matter experts to assist our legislatures in creating laws to benefit our community. Legislative task force members are volunteer members of our community who commit time out of their own busy work and personal lives in the same pursuit of the Legislatures.

Members of task forces created prior to Act 208 were not afforded the same rights. The MBAH provided two members to participate in the Mortgage Foreclosure Task Force in 2010. We feel that our member participants as well as all the participants of the Mortgage Foreclosure Task Force in 2010 should be afforded the same rights in Act 208.

Thank you for the opportunity to present this testimony.

LINDA NAKAMURA
President, Mortgage Bankers Association of Hawaii

888 Mililani Street, 2nd Floor
Honolulu, Hawaii 96813-2918
March 20, 2013

HOUSE COMMITTEE ON LEGISLATIVE MANAGEMENT
REGARDING SENATE BILL 893, SD1

Hearing Date: THURSDAY, March 21, 2013
Time : 2:00 p.m.
Place : Conference Room 423

Chair Nishimoto, Vice Chair Mizuno, and Members of the Committee,

My name is John Morris and I am testifying in support of Senate Bill 893, SD1. Last year, I served on the Mortgage Foreclosure Task Force and was surprised by the ruling that certain members of the task force had conflicts of interest serving on the task force. There seemed to be no logical basis for the ruling. Therefore, SB 893, SD1 serves a worthwhile purpose of clarifying there was no conflict of interest and should be no conflict of interest when volunteers agreed or agree to serve on a task force to assist the Legislature.

In 2012, there was no confusion or misunderstanding on the Mortgage Foreclosure Task Force that certain people represented certain interest groups and held positions supporting those interest groups. Every member of the Mortgage Foreclosure Task Force was very clear on that issue. In addition, that was true of everyone on the task force: they all had positions to advocate. Moreover, recognizing that everyone had a particular position was not seen as a conflict or even a disadvantage. Instead, it was seen as a benefit, by allowing the task force to receive information on all points of view and to hear arguments from all sides on how mortgage foreclosures should be handled.

The fact that some of the members of the task force were or might have been paid lobbyists for their interest groups seems to have been significant in the ruling of conflict of interest. I received no payment and was simply on the task force as a representative of the homeowner association interest group. Nevertheless, the possibility that some members of the group might have been or have served as paid lobbyists did not change my perception of the benefits of having them on the task force. Nor did it give them any advantage.

TESTIMONY REGARDING SENATE BILL 893, SD1

March 20, 2013

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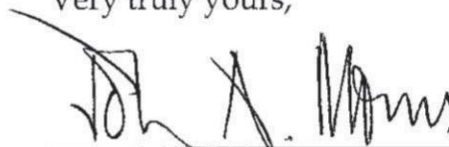
Certainly, their opinions received no more weight than anyone else's opinion, paid or unpaid. Moreover, the benefit of having them on the task force was to provide the opinions and concerns of their interest groups. The Legislature's purpose in appointing task forces would be undermined if the task forces did not consider and present all points of view on the subject of the task force. In addition, whether paid or not, everyone else on the task force, including me, was working hard to advocate and protect the interests of the group they represented, consistent with the overall benefit to the community.

Finally, everyone on the committee recognized -- and it was made clear to everyone on the committee -- that they were only making recommendations to the Legislature and that the Legislature would make the ultimate decision on any legislation that might be recommended by the task force. On that basis, the fact that anyone represented a particular interest group and was paid or not paid to do so was irrelevant for purposes of the work of the task force.

In summary, potential members of a task force should not be prohibited or have their participation in a task force limited by claims of conflict of interest because they represent particular groups or interests. Otherwise, the legislature will lose sources of important and relevant information that should be available to allow them to make informed and reasonable decisions for their constituents. The fact that task force members are paid or unpaid has no bearing on that issue. Therefore, I support SB 893, SD1.

Please contact me at 523-0702 if you have any questions. Thank you for this opportunity to testify.

Very truly yours,

A handwritten signature in black ink, appearing to read "John A. Morris", written over a horizontal line.

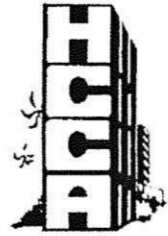
John A. Morris

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G:\C\2013 Testimony SB 893, SD1 (03.20.13)



**Hawaii Council of Associations
of Apartment Owners**
DBA: Hawaii Council of Community Associations
1050 Bishop Street, #366, Honolulu, Hawaii 96813



March 20, 2013

LATE

Rep. Scott Y. Nishimoto, Chair
Rep. John M. Mizuno, Vice-Chair
House Committee on Legislative Management


Re: SB893 SD1 RELATING TO ETHICS
Hearing: Thurs., March 21, 2013, 2 p.m., Conf. Rm. #423

Chair Nishimoto, Vice-Chair Mizuno and Members of the Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment Owners (HCAAO). I was a member of the Mortgage Foreclosure Task Force in 2011 and in 2012. HCAAO's participation on the Task Force was specifically required by Act 182 since our constituent group, i.e., condominium associations, were stakeholders in connection with changes to the foreclosure laws and procedures. When HCAAO was asked to participate in the Task Force and to share our expertise with the Task Force, I was not aware that I and my organization would be subject to the State ethics law since I was neither a State employee nor did I consider my participation in the Task Force as taking official action that directly affected a business or undertaking in which I had a financial interest.

I join in the comments contained in John Morris' testimony in support of this measure. I fully agree with the intent and purpose of this bill and ask that it be passed without any further amendments.

Thank you for the opportunity to testify.


Jane Sugimura
President



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LATE

Testimony to the House Committee on Legislative Management
March 21, 2013

Testimony in Support of SB 893 SD1, Relating to Ethics

To: The Honorable Scott Nishimoto, Chair
The Honorable John Mizuno, Vice-Chair
Members of the Committee

My name is Stefanie Sakamoto, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 78 Hawaii credit unions, representing approximately 804,000 credit union members across the state.

We are in support of SB 893 SD1, Relating to Ethics, which would provide an exemption for members of task forces or working groups established by the legislature from the conflict of interest law under the state ethics code, and excludes such members from the definition of "employee". As the legislature is aware, an ethics problem arose with respect to the Mortgage Foreclosure Task Force in 2011, of which HCUL was a member. We appreciate the efforts of the legislature to provide an exemption for the Mortgage Foreclosure Task Force, and to avoid similar problems in the future, so that we may continue to participate in such task forces and/or working groups if asked.

Thank you for the opportunity to testify.

HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law

P.O. Box 4109

Honolulu, Hawaii 96812-4109

Telephone No.: (808) 521-8521

Fax No.: (808) 521-8522

March 21, 2013

Rep. Scott Y. Nishimoto, Chair
and members of the House Committee on Legislative Management
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **Senate Bill 893, S.D. 1 (Ethics)**
Hearing Date/Time: Thursday, March 21, 2013 at 2:00 p.m.

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** (“HFSA”). The HFSA is a trade association for Hawaii’s consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

The HFSA supports this Bill, and requests that it be effective “on approval”.

The purposes of this Bill are to: (1) exempt members and designees or representatives of members of task forces that existed on or after June 3, 2010 from certain provisions of the Code of Ethics, and (2) specify a retroactive date of June 3, 2010 for the exemption.

A. Background.

The Mortgage Foreclosure Task Force (“Task Force”) was created by the Legislature by Act 162 in 2010 to “undertake a study to develop both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in [Hawaii].” The Task Force was directed to submit reports of its findings and recommendations, including any proposed legislation, to the 2011 and 2012 Legislatures.

The Task Force began on June 3, 2010 and ended on June 30, 2012. Because the HFSA was one of the organizations required by Act 162 (2010) to be represented on the Task Force, I was its representative. I was a member and the Vice Chair of the Task Force. (This testimony is not written on behalf of the Task Force or on behalf of any of the other Task Force members.)

The Mortgage Foreclosure Task Force started meeting in July, 2010. Ten months later, the Leslie Kondo, the Executive Director of the Hawaii State Ethics Commission, sent a Memorandum dated May 26, 2011 to the members of the Task Force. Mr. Kondo’s Memorandum stated:

“The State Ethics Code prohibits a member of the Task Force from being compensated to represent non-governmental organizations, such as businesses, both for-profit and not for-profit, trade organizations, or other groups, on matters in which the Task Force participated or will participate.

...

“ ... We strongly advise members of the Task Force against testifying, in the future, as paid representatives of non-governmental organizations on matters in which the Task Force participated or will

participate.”

The relevant provision of the Ethics Code is Hawaii Revised Statutes Sec. 84-14(d):

“No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.” (Emphasis added.)

On July 18, 2011, I sent a letter to the Ethics Commission in which I wrote:

“I disagree with the conclusions in your Memorandum. A copy of your Memorandum is attached for your reference. I contend that your Memorandum is overly broad and inconsistent with applicable statutes. Accordingly, I am respectfully requesting that you reconsider and retract your Memorandum.” (Emphasis included.)

Also in my letter to the Ethics Commission, I stated:

“For you to make that interpretation, you needed to have determined that a “task force”, such as the Mortgage Foreclosure Task Force, is a board, commission or committee under the definition of “employee” in HRS §84-3. ...

“As you may know, a “task force” is different from a board or commission, and it is not a committee (such as a committee that is part of a department). The Mortgage Foreclosure Task Force has a limited duration: it was created by Act 162 on June 3, 2010 and it sunsets on June 30, 2012. It was established by the Legislature to conduct an analysis of all factors affecting mortgage foreclosures and to recommend appropriate legislation. It is required to submit reports of its findings and recommendations to the Legislature. The Task Force is solely advisory. It does not have regulatory powers. It does not make policy. Its members are not appointed by the Governor nor are they confirmed by the Senate. The Task Force is within the Department of Commerce & Consumer Affairs for administrative purposes.” (Emphasis added.)

The Ethics Commission did not retract its Memorandum. Unfortunately, as a result of the Memorandum of May 26, 2011, two members of the Mortgage Foreclosure Task Force resigned before the Task Force’s August 2, 2011 meeting.

Last year, Act 208 was enacted to exempt members of state task forces from some of the restrictions and prohibitions of the State Ethics Code. The Legislature believed that this would

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encourage people with specialized knowledge and experience to serve on temporary task forces created by the legislative and executive branches. These people would be able to volunteer their time and expertise to serve the public by studying issues, making recommendations, and offering advice without fear of violating the conflicts of interest provisions in the Ethics Code.

However Act 208, which was effective on July 3, 2012, did not have a retroactive date and did not clarify that the exemption applied to task forces created before that date.

Senate Bill 893 simply furthers the purpose of Act 208 by specifying a retroactive date of June 3, 2010. This Bill reiterates the Legislature's intent that certain task forces created before the effective date of Act 208 are exempt from specific provisions of the Ethics Code.

B. The concept of a retroactive date was first suggested by Leslie Kondo of the Ethics Commission.

The concept of a retroactive date was first suggested in 2012 by Leslie Kondo, Executive Director of the Hawaii State Ethics Commission. In a letter dated February 2, 2012 from Mr. Kondo to me, he referenced Senate Bill 2240 (2012 Legislative Session) which, as introduced, would exempt members of groups convened solely to provide comments, share technical knowledge or expertise, or assist in formulating recommendations to, with or for the Legislature, Governor, or other state departments, agencies, or boards, from the State Code of Ethics. Senate Bill 2240 had a similar intent as House Bill 2175 (2012). House Bill 2175, Conference Draft 1, became Act 208 (2012).

In his February 2, 2012 letter to me (and copied to all the members of the Mortgage Foreclosure Task Force), Mr. Kondo, representing the Ethics Commission, wrote:

“For your information, after the [January 27, 2012] Committee hearing [on Senate Bill 2240], I informed Senator Clayton Hee that the bill, as passed by the Committee, does not appear to apply retroactively. I suggested to Senator Hee that, if the Legislature’s intent is to exempt you [Marvin Dang] and the other members of the Mortgage Foreclosure Task Force from the State Ethics Code, the Legislature should consider including language in the bill to make the amendment retroactive to a specific date.” (Bracketed material added; emphasis added.)

Having a retroactive date in this year's Senate Bill 893 is entirely consistent with the helpful suggestion that Mr. Kondo made to Sen. Hee in 2012.

C. Meetings of the Mortgage Foreclosure Task Force were publicly held in compliance with the Hawaii Sunshine Law.

Some opponents of this Bill believe that members of various state task forces can obtain “inside” information. From my experience with task forces, that is a misconception. The members of the Mortgage Foreclosure Task Force didn't receive any “inside” information. That's because all

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16 meetings were conducted in accordance with the Hawaii Sunshine Law (HRS Chapter 92). Written notices of all the meetings were publicly given. The meetings were open to the public and held in a public location (Department of Commerce & Consumer Affairs). All input, discussion, motions, and votes were done in public. A Deputy Attorney General was present at each meeting to advise the Task Force on Hawaii Sunshine Law issues. Minutes of meetings were posted on the State's website. A Preliminary Report of the Task Force was submitted to the Legislature before the 2011 Legislative Session. A Final Report of the Task Force was submitted to the Legislature before the 2012 Legislative Session. Both Reports were prepared with the assistance of the Legislative Reference Bureau and are publicly posted on the DCCA's website. Legislation was prepared and introduced based on the recommendations in the Reports. There was transparency in all of the Task Force's activities.

The public, open, and transparent manner in which the activities of the Mortgage Foreclosure Task Force were conducted is similar for other state task forces. I speak from experience. I was a member and Vice Chair of the Hawaii Identity Theft Task Force created by Act 140 (2006) from 2006 through 2008. I was also a member of the Hawaii Anti-Phishing Task Force created by Act 65 (2005) from 2005 to 2006.

Some opponents of Act 208 and this Bill believe that when there are task forces, there is "influence-peddling". They are wrong. There is no "influence-peddling" with task forces like the Mortgage Foreclosure Task Force. "Influence peddling" is a situation where State employees are hired by third parties who want to take advantage of inside contacts and information that the State employees have acquired from working for the State. The situation with the Mortgage Foreclosure Task Force (and other task forces) is the reverse of "influence-peddling". In creating the Task Force, the Legislature contemplated and expected that some Task Force members, i.e. stakeholders including paid lobbyists, would appear before the Legislature to testify and share their views on foreclosure issues and foreclosure legislation. Task Force members, some of whom were lobbyists, were selected specifically to be on the Task Force because they could bring their own independent expertise or knowledge to the Task Force. As stated, the activities of the Mortgage Foreclosure Task Force (and other task forces) were conducted in a public, open, and transparent manner.

D. Leslie Kondo of the Ethics Commission said in May, 2011 he will not recommend action by the Commission for apparent violations in 2011.

As mentioned above, Mr. Kondo, on behalf of the State Ethics Commission, sent a May 26, 2011 Memorandum to the Mortgage Foreclosure Task Force. He wrote:

"We are providing you with this letter to alert members of the Task Force of our concerns that members who are paid lobbyists or employees of non-governmental organizations may have testified [during the 2011 legislative session] on bills that were drafted or recommended by the Task Force. As noted above, such action appears to be in violation of the State Ethics Code. Staff, however, does not intend to recommend any further action by the State Ethics Commission relating to any lobbying by Task Force members on Task Force-related matters this past [2011] legislative session."
(Bracketed material added; emphasis added.)

Mr. Kondo is saying that the Ethics Commission's staff can selectively choose not to recommend that the Commission take action against Task Force members who he said appeared to violate the State Ethics Code in 2011. Yet it is puzzling why Mr. Kondo would oppose the Legislature's choice to put a retroactive date in this year's Senate Bill 893 to exempt task force members from the same provisions of the Ethics Code that Act 208 exempted task force members. **It should be noted that Mr. Kondo has not said that the Ethics Commission itself will not pursue any action against Task Force members for any alleged violations prior to July 3, 2012 (the effective date of Act 208).**

E. The May 26, 2011 Memorandum of the Ethics Commission has been deemed "erroneous" in its determination that task force members are state employees for purposes of the Ethics Code.

After Mr. Kondo wrote his Memorandum in May 26, 2011, the **Senate Majority Research Office** concluded in a July 15, 2011 Memorandum (approved by Senate Majority Attorney Richard Wada) that:

"The State Ethics Commission is erroneous in its determination that members of a task force are state "employees" for purposes of the Ethics Code, despite the Ethics Commission's long-standing practice of defining task force members as "employees" and reliance on that definition as precedent in issuing opinions." (Emphasis added.)

The Senate Majority Research Office's Memorandum further stated:

"By contrast [to boards and commissions], task force members do not act on behalf of the State. They perform no adjudicatory or decision-making actions, and they do not bind the State. Task force members are selected and invited onto the task force to advocate for their private or professional positions. They are selected to represent the point of view of a particular industry or business and to bring their knowledge and perspective to assist the task force in its information-gathering and recommendation-making functions. Task force members are not required to be impartial, because it is their partiality in representing their industry or business that makes their input valuable. They do not represent the State in actions with third parties, have no authority to make concrete decisions regarding the rights of others, and cannot bind the State. There is no potential for a conflict of interest because they do not have a public duty with which their private interests can conflict. Thus, because Task Force members do not exercise sovereign powers of the State or act on behalf of the State, they do not constitute officers of the State.

"Accordingly, the plain language of the definition of "employee" [in the Ethics Code] excludes task force members because (a) they are not nominated, appointed, or elected, and (b) they are not "public

officers" because they do not exercise any sovereignty of the State or act on its behalf. As Task Force members do not satisfy the two tests for an "employee" under section 84-3, HRS, they are not subject to the Ethics Code.” (Bracketed material added; emphasis added.)

The Senate Majority Research Office’s Memorandum of July 15, 2011 additionally stated:

“Including task force members within the scope of the Ethics Code frustrates the will of the Legislature and the public policy purposes in establishing task forces.

“The specific authority to convene a task force or to define its operations is not found in either the Hawaii State Constitution or the Hawaii Revised Statutes. Rather, in the exercise of the Legislature's inherent legislative powers pursuant to article III, section 1 of the Hawaii State Constitution, the Legislature authorizes task forces on an ad hoc basis to perform an information-gathering function, specifically to investigate certain policy issues and to make non-binding recommendations to the Legislature for proposed future laws. In establishing task forces, the Legislature brings together stakeholders and those who may come to the Legislature to testify or petition legislators regarding legislation in order to give these individuals and representatives an opportunity to discuss their divergent views and to make recommendations to the Legislature. It is not unusual that these stakeholders may also act as lobbyists for their particular business or interests, because often, it is lobbyists who have the necessary expertise and are in the best position to advocate and make recommendations to the Legislature. During task force meetings, members share information and viewpoints and hammer out compromises on complicated legislative issues. Essentially, these task force meetings serve as a prescreening of legislative committee meetings, saving legislators time by creating recommendations that are intended to address the respective concerns of stakeholders. During the legislative session, members of the public and these and other stakeholders may comment on and request amendments or changes to the task force’s recommendation. However, the task force’s recommendation serves as an important starting point for the Legislature.” (Emphasis added.)

F. Why Senate Bill 893 is needed.

Even though the Mortgage Foreclosure Task Force terminated on June 30, 2012, this Bill is not moot. The Ethics Commission is able to conduct investigations and to take actions against alleged violations going back 6 years, including actions in 2012 and 2011. The 6 year statute of limitations is in HRS Sec. 84-31(a)(6). **Mr. Kondo has not said ... and he will not say ... that the Ethics Commission will not pursue any action against Task Force members for any alleged violations prior to July 3, 2012 (the effective date of Act 208) based on Mr. Kondo’s “erroneous” determination.**

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And, this Bill is not just about exempting one person or about exempting all the members of the Mortgage Foreclosure Task Force. This Bill will also exempt the members of all other task forces that were in existence during the past two years. Those task force members were placed in jeopardy by the “erroneous” determination made by Mr. Kondo on May 26, 2011 that task force members are state “employees” for the purpose of the State Ethics Code.

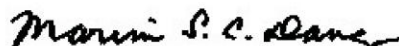
G. Conclusion.

Act 208, effective July 3, 2012, corrected Mr. Kondo’s “erroneous” determination that task force members are state “employees” for the purpose of the State Ethics Code. The Act exempted future members of state task forces from some of the restrictions and prohibitions of the Ethics Code.

Senate Bill 893 simply furthers the purpose of Act 208 by specifying a retroactive date of June 3, 2010. This Bill reiterates the Legislature’s intent that certain task forces created before the effective date of Act 208 are exempt from specific provisions of the Ethics Code.

For these reasons, we support this Bill. We ask that the retroactive date continue as June 30, 2010, and we request that the effective date of this Bill be “on approval”.

Thank you for considering our testimony.



MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

(MSCD/hfsa)