



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

February 5, 2013

The Honorable Clayton Hee, Chair
The Honorable Maile S. L. Shimabukuro, Vice Chair
Honorable Members
Senate Committee on Judiciary and Labor
Hawaii State Capitol, Room 407
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **Testimony on Senate Bill No. 893, Relating to Ethics**

Hearing: February 5, 2013, 10:00 a.m.
State Capitol, Conference Room 016

Testimony From: Hawaii State Ethics Commission

The Hawaii State Ethics Commission strongly opposes SB No. 893, which will retroactively exempt members of the Mortgage Foreclosure Task Force from the conflicts of interest provision of the State Ethics Code.

The Mortgage Foreclosure Task Force, created by Act 162, Sessions Laws of Hawaii 2010, no longer exists. The Task Force ceased to exist on June 30, 2012, over seven months ago. For that reason alone, there is no reason to exempt the members of the Task Force - after-the-fact - from the State Ethics Code. The Commission suggests that it is neither a reasonable nor a prudent exercise of legislative power -- and more so in this case given that SB No. 893's purpose appears to be to protect only one person, a single member of the Mortgage Foreclosure Task Force.

In May, 2011, the Commission advised all of the members of the Task Force that a provision of the State Ethics Code prohibited them from lobbying the legislature, for pay, on behalf of private organizations relating to bills recommended by the Task Force.¹

¹ Specifically, the memo 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. For example, a member of the Task Force who is an employee of a company may not receive a salary to

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Commission staff discussed the Commission's position with many members of the Task Force and subsequently participated in a Task Force meeting to further explain the Commission's advice. The Commission understands that all of the members of the Task Force, except one, conformed their conduct to be consistent with the Commission's opinion, i.e., the members who previously, during the 2011 legislative session, were paid to testify on Task Force-recommended bills on behalf of private organizations did not do so during the 2012 legislative session.

In February 2012, the Commission reiterated its position to one member of the Task Force after learning that he had testified on a bill or bills reflecting the Task Force's recommendations on behalf of his private client.² These actions appeared to be in direct

lobby on behalf of the company on legislation that was recommended by the Task Force. Similarly, a member of the Task Force may not otherwise be paid to privately lobby on behalf of a company, trade organization, or other group on legislation that was recommended by the Task Force.

We emphasize that the State Ethics Code does not prohibit a member of the Task Force from testifying on behalf of the Task Force. We also note that private, nongovernmental organizations are not prohibited from lobbying on any matter. As explained above, in certain situations, the State Ethics Code prohibits a member of the Task Force from being compensated to lobby on behalf of an organization. Individuals other than the members of the Task Force may testify on behalf of the organization.

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 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 legislative session. 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.

(Emphasis added).

² By letter dated February 2, 2012, the Commission again advised, in relevant part:

In the event that you and the other members of the Task Force truly are unclear about the Commission's position, I am writing to make that position clear: Members of the Mortgage Foreclosure Task Force cannot, for pay or other compensation, lobby the legislature on behalf of a non-governmental organization on bills relating to the matters that the members worked on as part of the Task Force. More specifically, that means, among other things, Task

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contradiction to the advice repeatedly provided to him and to the other members of the Mortgage Foreclosure Task Force. The member continued lobbying the legislature during the entire 2012 legislative session on behalf of his client relating to the bills proposing the Task Force's recommendations. His lobbying activities continued despite the Commission's clear advice that these actions would violate the State Ethics Code.

Act 208 was passed in 2012. This law exempts members of state task forces from certain provisions of the State Ethics Code, including the conflicts of interests provision that was at issue with the Mortgage Foreclosure Task Force. The Act took effect on July 1, 2012. The Commission believes that amending the law to make Act 208 retroactive is poor policy. In effect, the legislature would be "rewarding" an individual for repeatedly and intentionally ignoring and defying the Commission's advice. A person who was displeased with the advice given by the Commission could consciously violate the State Ethics Code, as the Task Force member did, and then, after the fact, seek a legislative exemption for his conduct. This bill sets a precedent that would allow state employees, legislators and board members to seek retroactive amendments to "excuse" violations of the State Ethics Code. Accommodating such after-the-fact amendments would severely undermine the Commission's ability to effectively administer the State Ethics Code and erode the public trust.

For the reasons stated above, the Commission strongly urges the Committee to hold SB No. 893.

Thank you for considering the Commission's testimony.

Force members cannot be paid to testify on behalf of a non-governmental organization on a bill implementing the Task Force's recommendations. To be clear, the Commission's position is not dependent on whether you are testifying in support of the bill, testifying in opposition to the bill or seeking an amendment to the bill. You simply cannot testify on behalf of a non-governmental entity on the bill if you are paid to do so.

I am aware that you have been offering testimony on behalf of the Hawaii Financial Services Association ("HFSA") on House Bill No. 1875, which I understand implements the Mortgage Foreclosure Task Force's recommendations. If you are being paid by HFSA to testify on its behalf, unless there are factors to which I am unaware that might otherwise allow you to do so, your conduct appears to be contrary to the State Ethics Commission's guidance to you and appears to be a violation of the State Ethics Code.

(Emphasis added; footnote omitted).

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February 5, 2013

Senator Clayton Hee, Chair
and members of the Senate Committee on Judiciary and Labor
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **Senate Bill 893 (Ethics)**
Hearing Date/Time: Tuesday, February 5, 2013 at 10:00 a.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 as drafted.

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 retroactive date of June 3, 2010 for exemption.

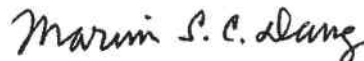
I was the Vice Chair of the Mortgage Foreclosure Task Force which began on June 3, 2010 and which ended on June 30, 2012.

Act 208 (2012) was enacted to exempt members of state task forces from some of the restrictions and prohibitions of the Hawaii Code of Ethics. 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 Code of Ethics. 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 prior to that date.

This Bill specifies a retroactive date of June 3, 2010 to clarify the legislature's intent that certain task forces created before the effective date of Act 208 are exempt from certain provisions of the Code of Ethics.

For these reasons, we support this Bill.

Thank you for considering our testimony.



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

Presentation To
Committee on Judiciary and Labor
February 5, 2013 at 10:00 am
State Capitol Conference Room 016

Testimony in Support of Bill S. B. 893

TO: The Honorable Clayton Hee, Chair
The Honorable Maile S. L. Shimabukuro, 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 created by Act 162 in 2010, which served a critically important purpose, was not afforded this benefit because it was created prior to the enactment of Act 208. However, as its term was two years in duration, and its creation occurred before enactment of Act 208, those task force members really should be afforded the same privileges. Therefore, we support SB 893 and urge its passage.

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

Edward Y. W. Pei
Executive Director
Hawaii Bankers Association
(808) 524-5161

Daniel J. Mollway, Esq.

Legislative Testimony

February 5, 2013

The Honorable Clayton Hee, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor
Hawaii State Capitol, 415 South Beretania Street
Honolulu, Hawaii 96813

Re: **Testimony on SB No. 893, Relating to Ethics**

Hearing: Tuesday, February 5, 2013; 10:00 AM
State Capitol, Conference Room 016

Testifying: Daniel J. Mollway

Testimony in Support

The Honorable Clayton Hee, Chair; the Honorable Maile S.L. Shimabukuro, Vice Chair; and Honorable Members of the Committee:

Thank you for this opportunity to testify today on SB No. 893, Relating to Ethics. I strongly support this bill.

For the record, I am the former executive director and general counsel of the Hawaii State Ethics Commission (Commission), and served in that capacity from 1986 to 2010.

The purpose of SB No. 893 is to exempt task forces that existed on or after June 3, 2010, from specific subsections of the State Ethics Code, chapter 84, HRS. These subsections are 84-14 (a), (b), and (d), HRS.

This bill is necessary, in my view, to obviate a clear misunderstanding by the Commission of the application of these subsections, and, in particular, HRS section 84-14(d), to task forces. This misunderstanding was first evidenced by the Commission around May of 2011 by an interpretation by the Commission of HRS section 84-14(d) to the Mortgage Foreclosure Task Force, which was created by law in 2010. When I first learned of this interpretation by the Commission, I immediately believed that it was clearly incorrect. I personally stated my view that HRS 84-14(d) had been misapplied by the Commission to the Mortgage Foreclosure Task Force in a comment on August 29, 2011, in response to a post by Ian Lind on his blog of that date.

Daniel J. Mollway
February 5, 2013
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Last year, Act 208 was enacted to address the Commission's misapplication, in particular, of HRS section 84-14(d), to task forces. However, Act 208 should have incorporated the earlier date of June 3, 2010, to achieve its purpose. SB No. 893 corrects this aspect of Act 208.

It is important to note that the Commission has a statute of limitations of six years (see HRS section 84-31(a)(6)) from the time of an apparent violation of the State Ethics Code. Thus, it is possible for the Commission to file a charge against a state employee or accept a charge (from a member of the public against a state employee) for up to six years from the time of a supposed violation of HRS section 84-14(d).

For this reason, this bill should be enacted into law to protect members of the Mortgage Foreclosure Task Force (and their designees or representatives) who all appear to be still in jeopardy as to the misapplication of HRS section 84-14(d) by the Commission, as well as the members of other task forces in state government that may have existed at the time.

Thank you for this opportunity to testify today on Senate Bill No. 893. I would be pleased to address any questions committee members may have.