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PRESENTATION OF THE  
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

THE TWENTY-SEVENTH LEGISLATURE  
REGULAR SESSION OF 2013

MONDAY, MARCH 11, 2013  
2:00 P.M.

TESTIMONY ON SENATE BILL NO. 960, S.D. 1  
RELATING TO FORECLOSURES.

TO THE HONORABLE ANGUS L.K. MCKELVEY, CHAIR,  
AND TO THE HONORABLE DEREK S.K. KAWAKAMI, VICE CHAIR,  
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("DCCA"), Office of Consumer Protection ("OCP") appreciates the opportunity to appear today and testify on Senate Bill No. 960, S.D. 1, Relating to Foreclosures. My name is Bruce B. Kim and I am the Executive Director of OCP.

**OCP supports Senate Bill No. 960, S.D. 1.** S.D. 1 mandates that a notice of postponement or cancellation of sale be given to a homeowner by the foreclosing mortgagee in Part IA judicial foreclosures in the event that the foreclosure sale is either postponed or cancelled by the foreclosing mortgagee. The changes track existing

notice requirements applicable to Part II nonjudicial foreclosures requiring that the foreclosing mortgagee give notice of the postponement or cancellation of a foreclosure sale, including a requirement that such notice be published. See, HRS § 667-28. S.D. 1 requires that notice of the cancellation or postponement of be given to the mortgagor and the borrower among others, including prior or junior creditors who have a recorded lien on the mortgaged property before the commencement of the foreclosure action. It also requires that the notice of postponement or cancellation of public sale be published once in the format described in HRS § 667-20. In the event that a sale is postponed four consecutive times, the foreclosing mortgagee must follow all of the public notice of public sale requirements required by HRS § 667-20.

As indicated in S.D. 1, the intent of the measure is to provide homeowners with timely notice of the cancellation or postponement of the sale and help them avoid severe financial penalties which could result from a cancelled foreclosure sale which they knew nothing about. S.D. 1 addresses real concerns that homeowners will abandon their homes after receiving the notice of a foreclosure sale even though the sale is subsequently cancelled or postponed by the foreclosing mortgagee multiple times. S.D. 1 requires that homeowners be given timely notice of a postponement or cancellation of the sale to mitigate this serious problem. It also affords other interested parties, including the State director of taxation and the director of finance of the county in which the mortgaged property is located, with timely notice of the postponement or cancellation of sale.

Testimony on Senate Bill No. 960, S.D. 1  
March 11, 2013  
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Thank you for the opportunity to submit testimony on Senate Bill No. 960, S.D. 1.  
I would be happy to answer any questions members of the committee may have.

# HAWAII FINANCIAL SERVICES ASSOCIATION

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March 11, 2013

Rep. Angus McKelvey, Chair

and members of the House Committee on Consumer Protection and Commerce

Hawaii State Capitol

Honolulu, Hawaii 96813

Re: **Senate Bill 960, SD 1 (Foreclosures)**

**Hearing Date/Time: Monday, March 11, 2013, 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 submits comments on this Bill and offers a proposed House Draft 1.**

The purpose of this Bill is to establish a notice of postponement or cancellation of sale requirement under part IA, chapter 667, Hawaii Revised Statutes, relating to judicial foreclosures.

Certain provisions in this Bill should be revised because they are inconsistent with existing Court Orders, Court instructions, and practices regarding Hawaii judicial foreclosures.

In a judicial foreclosure, if the Circuit Judge orders the mortgaged property to be sold at a public auction, the Judge appoints a Commissioner to publicize and conduct the sale. The Order appointing the Commissioner is generally worded as follows:

“The Commissioner shall hold all equitable and legal title to the mortgaged property. The Commissioner is authorized and directed to take possession of the mortgaged property, to rent the mortgaged property pending foreclosure, if appropriate, and to sell the mortgaged property in its “AS IS” condition, without any representations or warranties whatsoever as to title or possession, and with a quitclaim conveyance, either by private sale or at a public foreclosure sale by auction to the highest bidder.” (emphasis added.)

In the First Circuit Court in Honolulu, the Judge’s 10 page “Instructions to Commissioner” (2011 version) states in part:

“A commissioner is a person appointed by the court to take possession of the property which is the subject of the litigation. The commissioner is a representative of the Court and does not represent any party to the litigation.

...  
“As commissioner, you must be strictly neutral. You must never give unfair advantage to any party or person . . .

...  
“If you are uncertain of your specific responsibilities, seek instructions from the Court by filing a ‘Motion for Instructions.’

“You must prepare a ‘Notice of Foreclosure Sale’ and make arrangements to publish it in the Classified Ad section of only one newspaper having general circulation in the County where the property is located. . . .

“PRIOR TO PUBLICATION OF NOTICE YOU SHOULD PROVIDE ALL PARTIES TO THE ACTION WITH A COPY OF YOUR NOTICE (BY MAIL OR E-MAIL).

“The commissioner manages, preserves and sells the property according to the Court’s orders. . . .

“You may consider giving reasonable extensions and reschedule the auction. . . . If the auction is cancelled or rescheduled, post on the date and time of the auction, a notice of cancellation at the place the auction was to be conducted. Obtain the names and addresses of all persons in attendance and send them a notice of the date/time of the rescheduled auction.”

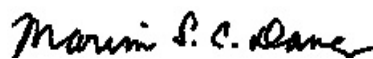
As you can see, once the Commissioner is appointed by the Judge, the Commissioner is the one who arranges for the publication of notices about the public sale auction and announces any postponements or cancellation of the public sale auction. The foreclosing mortgagee (i.e. the lender) does not and cannot do these acts.

In a judicial foreclosure, those who are parties to the foreclosure action will get notices of what is happening. The parties include the foreclosing mortgagee, the mortgagor, the borrower, and any one who has a recorded lien against the property. As provided by HRS Sec. 667-5.5, planned community associations, condominium associations, and cooperatives are given notice of the foreclosure action or are made parties to the action.

On the other hand, State Director of Taxation and the City or County Director of Finance are generally not parties to the foreclosure action. The State Director of Taxation is only made a party to the foreclosure action if there is a recorded tax lien against the property. The City or County Director of Finance is generally not a party because real property tax liens take priority over all other recorded liens on the property. Since they are not parties, they do not need to get foreclosure notices.

Based on the above, the wording in this Bill (Senate Draft 1) is inconsistent with existing Court Orders, Court instructions, and practices regarding judicial foreclosures. Accordingly, **we have prepared revisions to this Bill in the form of a proposed House Draft 1. The attached proposed House Draft 1 will conform the requirements in this Bill to what currently exists in the court system.**

Thank you for considering our testimony.



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

Marvin Dang  
3/8/13

For proposed H.D. 1

THE SENATE  
TWENTY-SEVENTH LEGISLATURE, 2013  
STATE OF HAWAII

S.B. NO. 960  
S.D. 1

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# A BILL FOR AN ACT

RELATING TO FORECLOSURES.

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

1           SECTION 1. The legislature finds that one little-known  
2 problem of the national foreclosure crisis occurs when banks or  
3 other mortgagees walk away from a foreclosure. This problem,  
4 sometimes referred to as the "zombie title" problem, occurs when  
5 homeowners move out after receiving notice of a foreclosure  
6 sale. Prior to a public sale, the bank, mortgagee, or other  
7 financial institution may walk away from the foreclosure process  
8 and cancel the sale without notifying the homeowners.

9           The legislature further finds that homeowners legally own  
10 their property and the homeowners' names remain on the title  
11 until the date of public sale. Without a public sale, the  
12 foreclosure process is left in limbo. Homeowners may be left  
13 with all of the responsibilities for a property but none of the  
14 rights that existed prior to the start of the foreclosure  
15 process. Unfortunately for homeowners, there are no regulations  
16 that require foreclosing mortgagees in a judicial foreclosure to  
17 inform a homeowner when a bank decides not to foreclose.



1 Unsuspecting homeowners may suffer severe financial penalties as  
2 a result of canceled foreclosure sales they knew nothing about.

3 Therefore, the purpose of this Act is to establish a notice  
4 of postponement or cancellation of sale requirement under part  
5 IA, chapter 667, Hawaii Revised Statutes, relating to judicial  
6 foreclosures.

7 SECTION 2. Chapter 667, Hawaii Revised Statutes, is  
8 amended by adding a new section to part IA to be appropriately  
9 designated and to read as follows:

10 "§667- Postponement, cancellation of sale. (a) The  
11 public sale may be either postponed or canceled by the  
12 ~~foreclosing mortgagee.~~ <sup>court-appointed commissioner.</sup> Notice of the postponement or the  
13 cancellation of the public sale shall be:

14 (1) Announced by the ~~foreclosing mortgagee~~ <sup>court-appointed commissioner.</sup> at the date,  
15 time, and place of the last scheduled public sale; and

16 (2) Provided to:

17 (A) The mortgagor, ~~and~~ <sup>and</sup> the borrower ~~and~~ <sup>and</sup> the foreclosing mortgagee;

18 (B) Any prior or junior creditors who have a recorded  
19 lien on the mortgaged property before the  
20 commencement of the foreclosure action;

21 ~~(C) The director of taxation;~~



(C) Any party named in the foreclosure action and any prospective bidder who requested notice of the public sale date or any change in the public sale date.

~~(D) The director of finance of the county in which the mortgaged property is located, and~~

~~(E) Any other person entitled to receive notification of the foreclosure action under this part.]~~

(b) If there is a postponement of the public sale of the mortgaged property, <sup>the court-appointed commissioner shall have</sup> a new public notice of the public sale ~~shall be~~ published once in the format described in section 667-20.

The new public notice shall state that it is a notice of a postponed sale. The public sale shall take place no sooner than fourteen days after the date of the publication of the new public notice. Not less than fourteen days before <sup>rescheduled</sup> the date of the public sale, a copy of the new public notice <sup>of the rescheduled public sale</sup> shall be ~~posted~~

~~on the mortgaged property or on another real property of which the mortgaged property is a part, and it shall be~~ mailed or delivered to the mortgagor, ~~to~~ the borrower, <sup>the foreclosing mortgagee,</sup> and ~~to~~ any other person entitled to receive notification of the foreclosure action under ~~this part~~. subsection (a)(2).

(c) Upon the fourth postponement of every series of four consecutive postponements, the ~~foreclosing mortgagee~~ <sup>Court-appointed Commissioner</sup> shall follow all of the public notice of public sale requirements of section 667-20."

SECTION 3. New statutory material is underscored.





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S.B. NO. 960  
S.D. 1

1 SECTION 4. This Act shall take effect upon its approval.

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Presentation To  
Committee on Consumer Protection and Commerce  
March 11, 2013 at 2:00 pm  
State Capitol Conference Room 325

**Testimony with COMMENTS on Bill S. B. 960, S. D. 1**

TO: The Honorable Angus L. K. McKelvey, Chair  
The Honorable Derek S. K. Kawakami, Vice Chair  
Members of 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.

While we are not opposed to the intent of this bill, we want to point out that the language of the bill does not correctly portray current roles and procedures with respect to foreclosure sales. When a mortgagee files a judicial mortgage foreclosure action, the courts will appoint a commissioner who will act on the disposition of the real estate. It is the commissioner, not the foreclosing mortgagee, who will set the date of the public auction and publicize it accordingly. It is also the commissioner who will decide if a postponement or cancellation of the public sale is appropriate. Therefore, the bill should be amended to reflect the correct party empowered to take such actions and ultimately responsible for announcement of any changes to the date, time and place of the rescheduled sale.

We would suggest that SB 960, SD 1 be amended to properly reflect current processes and we support the amendment proposed by the Hawaii Financial Services Association. Thank you for the opportunity to submit this testimony and please let us know if we can provide further information.

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Testimony to the House Committee on Consumer Protection & Commerce  
March 11, 2013

Testimony in opposition to SB 960 SD1, Relating to Foreclosures

To: The Honorable Angus McKelvey, Chair  
The Honorable Derek Kawakami, 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 opposition to SB 960 SD1, Relating to Foreclosures. This bill refers to “foreclosing mortgagee” as being the entity with the power to control judicial foreclosure sales. This is not the case; the Commissioner appointed by the court is the controlling entity. Therefore, this bill would only confuse the judicial foreclosure process.

We are in agreement with the amendments proposed by the Hawaii Financial Services Association.

Thank you for the opportunity to testify.