



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014**

**ON THE FOLLOWING MEASURE:
H.B. NO. 2060, H.D. 2, RELATING TO TAXATION.**

**BEFORE THE:
SENATE COMMITTEE ON ENERGY AND ENVIRONMENT**

DATE: Tuesday, March 11, 2014 **TIME:** 2:45 p.m.

LOCATION: State Capitol, Room 225

TESTIFIER(S): David M. Louie, Attorney General, or
Kathryn-Jean Kanemori, Deputy Attorney General

Chair Gabbard and Members of the Committee:

The Department of the Attorney General offers the following comments on this bill. The bill may be challenged as violating the Commerce Clause of the United States Constitution because it could be found to discriminate against interstate commerce.

The purpose of this bill is to repeal the existing income tax credit for ethanol facilities and add a new tax credit for the production of renewable fuels. The tax credit would be equal to an unspecified amount per one hundred fifteen thousand British thermal units of fuel produced, and would be capped at an unspecified amount per taxpayer. The tax credit would be certified by the Department of Business, Economic Development, and Tourism. This bill has a defective effective date of January 20, 2050.

Section 2, page 3, lines 17 through 20, of this bill defines "renewable fuels" as "fuels produced within the State from renewable feedstocks **transported less than one thousand miles from point of origin to the production facility located within the State[.]**" (Emphasis added.) Requiring that the renewable feedstock be "transported less than one thousand miles from point of origin to the production facility located within the State" in order to qualify as "renewable fuel" appears to have a similar purpose and effect as the tax exemption that violated the Commerce Clause Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984).

A cardinal rule of Commerce Clause jurisprudence is that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" Bacchus, 468 U.S. at 268, *citing Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

At issue in Bacchus was the Hawaii liquor tax, which was originally enacted in 1939 to defray the costs of police and other governmental services. Because the Legislature sought to encourage development of the Hawaiian liquor industry, it enacted an exemption from the liquor tax for okolehao (a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii) and for certain fruit wine manufactured in Hawaii. The United States Supreme Court concluded that the exemption violated the Commerce Clause because the exemption had both the purpose and effect of discriminating in favor of local products.

We recommend that the phrase "less than one thousand miles" in section 2, page 3, lines 18 and 19, of this bill be deleted.