

SB2328

Measure Title:	RELATING TO REAL ESTATE LICENSEE ADVERTISING.
Report Title:	Real Estate Brokers; Advertising; Solicitation Materials; Requirements
Description:	Provides definitions of "advertising" and "solicitation materials" as they apply to the regulation of real estate brokers and salespersons. Specifies information that must be included on advertising and solicitation materials.
Companion:	HB2164
Package:	None
Current Referral:	CPH
Introducer(s):	BAKER, ESPERO, KEITH-AGARAN, KIDANI, RUDERMAN, TOKUDA, Gabbard, Ihara, Nishihara, Taniguchi

**PRESENTATION OF THE
REAL ESTATE COMMISSION**

TO THE SENATE COMMITTEE ON
COMMERCE, CONSUMER PROTECTION, AND HEALTH

TWENTY-EIGHTH LEGISLATURE
Regular Session of 2016

Friday, February 19, 2016
9:00 a.m.

**TESTIMONY ON SENATE BILL NO. 2328, RELATING TO REAL ESTATE LICENSEE
ADVERTISING.**

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Nikki Senter and I am the Chairperson of the Hawaii Real Estate Commission ("Commission"). The Commission opposes Senate Bill No. 2328.

The purpose of this bill appears to attempt to codify and modify the current and proposed advertising requirement found in Hawaii Administrative Rules Chapter 99 ("Rules"). In June 2010, the Commission initiated the rule revision process and in 2012 included the requirement for licensees to prominently and conspicuously include the licensee's license number for all advertising and promotional material. This new proposal was designed to help protect and aid consumers in identifying licensees by having them use the Professional and Vocational Licensing Division's ("PVL") new internet based license search webpage and mobile application by typing in the license number.

In late 2013, the Hawaii Association of Realtors ("Realtors") after reviewing the draft advertising and promotional disclosure requirements, requested the Commission, and the Commission agreed, to only require the license number of either the brokerage

or the individual licensee, but not both, in all advertising. The current and proposed (the underlined and highlighted portions) Rules reads as follows:

"§ 16-99-11 Advertisement. (a) All real estate advertising and promotional materials shall prominently and conspicuously include the legal name of the brokerage firm or a trade name previously registered by the brokerage firm with the business registration division and with the commission[.] and the license number of the brokerage. The license number of the brokerage shall not be required for all advertising and promotional materials that comply with paragraph (e).

For advertising and promotional purposes only, a brokerage firm may:

- (1) Abbreviate "Incorporated[.]" ."Corporation[.]". "Limited[.]" ! or "Limited Liability Partnership" from the licensed name; and
- (2) Use "dba" in conjunction with the licensed name and a trade name.
- (b) No licensee shall advertise "For Sale by Owner[.]" ! "For Rent by Owner[.]" ! "For Lease by Owner[.]" ! or "For Exchange by Owner[.]" !
- (c) Current individual real estate licensees[~~, whether active or inactive,~~] on inactive status shall disclose the licensee's inactive status [~~as a real estate licensee~~] in all advertising and promotional material.
- (d) A leasehold property advertised for sale in any medium shall be identified by the word "leasehold[.]" !
- (e) All advertising and promotional materials that refer to the individual licensee's name, including but not limited to business cards, shall:

- (1) Include the licensee's legal name, name as licensed by the commission, or sole proprietor's trade name as licensed by the commission;
 - (2) Identify the licensee with the licensee's associating or employing brokerage firm; and
 - (3) [~~Specify that the licensee is a broker (B), or salesperson (S), or if a current member of the Hawaii Association of Realtors, Realtor (R) or Realtor-Associate (RA)~~] Include the licensee's license number as issued by the commission.
- (f) If the address of any unregistered place of business is included in advertising materials, then the street address of the principal place of business or the branch office, as the case may be, shall be included and respectively identified as such."

The main thrust of this section of the proposed rule amendment is to require the licensee's license number on all advertisements and promotional materials. The Rules went through all 26 steps of PVL's administrative rules adoption procedures. After close to six (6) years of going through the rule-making process, including numerous public hearings and comment efforts in October 2015, the Rules were very near to completion, requiring only final review and signature. Due to the efforts of HAR to "veto" the Rules based on this one provision, which they had the chance to comment on over the last six (6) years during the rule-making process, the Rules have yet to be signed into effect. A whole set of Rules, which contain other consumer protective provisions remain suspended, senselessly held up due to this single provision.

This measure would not only change the real estate practice in Hawaii, but will also cut against the Commission's consumer protection efforts by causing unnecessary confusion for consumers as well as in the industry. The real estate license law in Hawaii is fairly well settled, as historically evidenced by very few requests for interpretation. The proposed language nitpicks at and narrows what should be a common sense definition that should be interpreted based on common sense and the constant underlying goal of protecting the consumer. Paring down the requirement for licensee numbers from being on all advertising and promotional materials to only those that are "intended to solicit the creation of a professional relationship between the licensee and the consumer" proves problematic based on the following issues:

- On page 3, lines 4 – 10, what is meant by first point of contact? What happens if the licensee had a tweet re-tweeted or someone posted, in social media, a licensee's post without the licensee's knowledge? Was this meant to create a professional relationship? Does this mean it is NOT advertising? When is the first point of contact?
- On page 3, lines 11 – 16, advertising "does not include items designed to create general awareness of the individual licensee or brokerage firm licensee." Does this mean that full page advertisements in the newspaper showing pictures of licensees and their names are NOT advertising? Or are advertisements showing how many sales and for how much a licensee completed in a certain period not to be considered "advertising"? Or are advertisements showing which licensees

belong to which million dollar/ platinum/gold circle within a specific company not to be considered “advertising”? These examples seem to create a general awareness of either the license or the brokerage firm and under this new definition it would not be considered advertising. What about passing out pens or letter openers at trade shows or just to friends of friends? A licensee can easily argue the intent was to give out free pens, but having the license number on it no matter what would remove that argument. There would be no need to judge each pen giveaway based on "intent".

The Commission is statutorily mandated to protect the general public in its real estate transactions. The Commission strives in administering and simplifying a statute, and its associated rules, to ensure that all newcomers to the industry can succeed and understand what is required, but at the same time protecting the consumer in its real estate transactions. In this situation, requiring the license number on all advertising and promotional material is the simplest most efficient way to help the professional licensee understand what is required and at the same time protect the consumer by notifying them of the licensee’s status. The licensing industry should also be receptive to not having to argue the point of intent, which could be a huge waste of resources – more costly than simply including the license number on all promotional and marketing materials. It is neither difficult nor prohibitively expensive.

For these reasons, the Commission is in strong opposition to Senate Bill No. 2328 and thanks you for the opportunity to present testimony.

February 19, 2016

The Honorable Rosalyn H. Baker, Chair

Senate Committee on Commerce, Consumer Protection, and Health
State Capitol, Room 229
Honolulu, Hawaii 96813

RE: S.B. 2328, Relating to Real Estate Licensee Advertising

HEARING: Friday, February 19, 2016 at 9:00 a.m.

Aloha Chair Baker, Vice Chair Kidani, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® (“HAR”), the voice of real estate in Hawai'i, and its 8,800 members. HAR **strongly supports** S.B. 2328 which provides definitions of "advertising" and "solicitation materials" as they apply to the regulation of real estate brokers and salespersons. This measure also requires that certain information must be included on advertising and solicitation materials.

In 2015, proposed Hawai'i Administrative Rules for Chapter 16-99-11 were promulgated by the Real Estate Commission. Under the proposed rules, brokerages and/or real estate licensees would be required to include their license number on “all advertising and promotional materials.” However, a clear definition of advertising materials and how such materials can be used does not currently exist in either Chapter 467 or the proposed rules.

Traditional advertising and marketing materials include business cards, brochures, flyers, newspaper and magazine ads, lawn signs and electronic media, such as email messages and websites. The inclusion of a license number on these items assists the consumer because important identifying information (along with a licensee name or brokerage name) is included. These items are marketing tools intended to solicit business which may trigger action or interest by consumers – and providing licensee information on these materials provides a level of protection for consumers.

However, there is a difference between marketing materials that are intended to solicit business, and other branded items that are not intended to do so. Under the proposed rules, promotional items like logoed baseball caps, shirts and pens could require licensees to display a license number. In addition, agent name tags (identifying mechanisms rather than marketing material) might have to require this information. These types of items do not present the same concerns to the public. For example, a name tag merely facilitates conversation, and if a consumer wishes to have further

contact or discuss real estate services, the licensee would present his/her business card as the material that would be intended to solicit business.

Another item that would be impacted without the passage of this bill is office signs. Many brokers have a trademarked service logo which is maintained at significant cost. It usually is a specific graphic design and color scheme that is registered with the United States Patent and Trademark Office. Imposing a license number upon office signs may violate the integrity of the service mark and could raise legal issues as well as additional costs.

In summary, this bill proposes to provide a definition for advertising and clarify what is considered advertising and what is not. Without this definition, real estate licensees may be at risk to be cited for licensing violations, despite a real estate licensee or brokerage firm's best efforts to comply with the law.

HAR support efforts to enhance the practice of real estate and protect Hawaii's consumers. Our Code of Ethics is the cornerstone of REALTOR® membership and we train members in high ethical standards in both their dealings with the public and within the real estate community. As such, HAR believes that providing a clear definition of advertising and solicitation materials for real estate licensees and specifying how such advertising materials can be used is important to both real estate licensees and consumers.

We have been working closely with DCCA and the REC to reach a resolution of this matter. While we are hopeful these efforts will prove to be successful, the present situation continues to put real estate licensees at risk. Therefore, we would request that the committee move the bill forward.

HAR respectfully offers a technical amendment in Section 3:

""Advertising" means solicitation materials intended to be the first point of contact with consumers and designed to solicit the creation of a professional relationship between the licensee and a consumer or solicitation materials intended to incentivize, induce, or entice a consumer to contact the licensee about any services for which a real estate license is required.; provided that "Advertising" does not include items designed to create general awareness of the individual licensee or brokerage firm licensee, including but not limited to promotional items, such as hats, clothing, pins, pens, memo pads, name badges, and office signage identifying a brokerage's principal place of business and branch office.