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**STATE OF HAWAII
DEPARTMENT OF BUDGET AND FINANCE**

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ADMINISTRATIVE AND RESEARCH OFFICE
BUDGET, PROGRAM PLANNING AND
MANAGEMENT DIVISION
FINANCIAL ADMINISTRATION DIVISION
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

WRITTEN ONLY
TESTIMONY BY CRAIG K. HIRAI
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
TO THE HOUSE COMMITTEE ON FINANCE
ON
HOUSE BILL NO. 760, H.D. 1

**February 23, 2021
2:00 p.m.
Via Videoconference**

RELATING TO THE STATE FOUNDATION ON CULTURE AND THE ARTS

The Department of Budget and Finance (B&F) offers comments on House Bill (H.B.) No. 760, H.D. 1.

H.B. No. 760, H.D. 1, allows the Works of Art Special Fund (WOASF) to be used for performing arts, under certain conditions. It includes posting a recording of a performing art as a form of public display and defines “performance of art” and “performing arts.”

B&F has serious concerns regarding H.B. No. 760, H.D. 1. This measure allows for the recording of works of performing arts in a video or audio file. Such a recording is a capital expenditure under Internal Revenue Code Section 263(A) and Treasury Regulation Section 1.263A-2(a)2(ii), which provides that the production of “. . . films, sound recordings, video tapes and other similar property embodying words, ideas, concepts images, or sounds by the creator thereof” must be capitalized. This would be a permissible use of the WOASF. However, the showing or playback of such files would be an operating expense and would not be a permissible use of the WOASF.

Additionally, the WOASF is primarily funded by tax-exempt general obligation bonds. Using such bond proceeds for operating purposes puts the tax-exempt status of the bonds at risk (see Treasury Regulation Sections 1.148-(c)(4)(ii) and 1.148-10(a)(4)). Consequently, tax-exempt bond proceeds should not be used to fund operating expenses.

Thank you for your consideration of our comments.



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**TESTIMONY OF THE STATE FOUNDATION ON CULTURE AND THE ARTS
TO THE HOUSE COMMITTEE ON FINANCE**

**Tuesday, February 23, 2021 at 2:00 p.m. CR 308 via Videoconference
H. B. 760 H.D. 1**

RELATING TO THE STATE FOUNDATION ON CULTURE AND THE ARTS

Chair Sylvia Luke and members of the Committee, I am Jonathan Johnson, Executive Director of the State Foundation on Culture and the Arts (SFCA), and I am grateful for the opportunity to testify with **COMMENTS** on H. B. 760 H.D. 1.

Purpose of Works of Art Special Fund: Expenditures for the Works of Art Special Fund are restricted to the acquisition, interpretation, conservation and transportation of works of art. The SFCA [2020 Annual Report](#) offers a transparent look at how the SFCA fund efficiently and effectively administers the fund for public benefit. On a three-year average, the Works of Art Special Fund averages \$4.7M revenue and \$4.4M expenditures, however, **in 2020, Act 40 disrupted funding** with an unintended consequence that prevents the 1% from being allotted to the Special Fund resulting in only \$15,520 revenue to the fund, to date. With the revenue stream blocked, the \$9M current unencumbered cash balance will be completely depleted by the SFCA in two years. Maintaining a fund balance equal or greater than the legislative appropriation is necessary to ensure solvency as legislative appropriations are from the fund balance.

Works of Art Special Fund S-319	FY 17-18	FY 18-19	FY 19-20	FY 20-21 (as of 1-31-21)
1% Revenue (actual)	7,584,288.25	3,680,929.93	3,084,544.00	15,520.00
Total Expenses	4,003,645.42	4,329,333.25	4,575,636.76	5,000,000 e.
Appropriation	4,508,223.00	4,508,223.00	5,573,625.00	5,573,625.00

SFCA funds Performing Arts annually through the Biennium Grants and Artists in the School programs supported by the Legislature through a General Fund appropriation. Performing Arts represents 45% of total Biennium Grants and 75% of total Artists in the Schools projects. This year, Honolulu Theatre for Youth (HTY), a recipient of Biennium Grants, leveraged their grant with private funding and produced content that was aired on television and online, completely accessible to the community. HTY managed the copyrights, production, storage and fees associated with their presentation, while SFCA provided administration of the grant. This symbiotic relationship between SFCA and grantees allows for an efficiency in government while also allowing for organizational autonomy to produce creative, high-quality art and rich cultural experiences, with the support of government funding. SFCA grants go through rigorous monitoring to ensure compliance.

Based on discussions with the Attorney General's Office on what is allowable and not permissible, the Department of Business Economic Development and Tourism's Creative Industries Division regarding copyright, and industry professionals regarding best practices, we have the following comments on H.B. 760 H.D. 1 and the restrictions of the Works of Art Special Fund per 103-8.5.

Overall, the requirements in H.B. 760 H.D. 1 complicate and limit funding and support for Performing Arts.

Performing Arts as referenced in H.B. 760 H.D. 1 are already defined in Chapter 9 HRS;

§9-1 Definitions. The following terms, whenever used and referred to in this chapter, shall have the following respective meanings unless a different meaning clearly appears in context.

"Arts" includes music, dance, painting, drawing, sculpture, architecture, drama, poetry, prose, crafts, industrial design, interior design, fashion design, photography, television, motion picture art, unique or decorative plants, landscaping, and all other creative activity of imagination and beauty.

1)The performance shall be recorded as an audio file, video file, audiovisual file, or other medium intended to be shown by or through the use of machines or devices such as projectors, viewers, or electronic equipment or device, together with accompanying sounds, if any;

Allowable: Recording is an allowable expense in the Works of Art Special Fund and as is a tangible asset as a digital file.

Not Permissible: Playback of the digital file in any format, on any device, would be considered an operational expense and would not be a permissible use of the Works of Art Special Fund. H.B. 760 H.D. 1 opens the State up to liability if the funds are used outside of the tax code requirements.

2)The recording of the performance shall be archived and maintained by the foundation or the state art museum as property of the State;

Allowable: Although possible, may require technical expertise, expense of storage capacity and maintenance, as well as training of staff.

3)The State shall have whole and exclusive copyrights in the performance and its recordings pursuant to the works made for hire doctrine under Title 17, United States Code; and

Allowable: The State could negotiate with each contract, but Copyright law is multi-faceted and copyright infringement is a liability risk the State should not be taking. Performers working on union contracts that cover their live performances would need to be contracted again by the State for the use of a video recording of their performances.

Not Permissible: The State would not have whole and exclusive copyrights as copyright is owned by the author, composer, lyricist, etc., not the performer.

4)The recording of the performance shall be displayed for viewing and listening at presentation sites, in a format determined by the comptroller and the foundation to be most easily accessible to the public.

Allowable: Playback would involve royalties to the author, composer, etc. that the State would be responsible for.

Not Permissible: Playback of the digital file in any format, on any device, would be considered an operational expense and would not be a permissible use of the Works of Art Special Fund. Also, not every performance is suitable or desirable for digital viewing.

The State through the SFCA has an established and successful funding pathway for Performing Arts that is encompassing and not as limiting as the specifications of the Works of Art Special Fund.

Thank you for the opportunity to submit written testimony on this matter.

LATE

HB-760-HD-1

Submitted on: 2/22/2021 10:05:07 PM

Testimony for FIN on 2/23/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
georja skinner	creative industries	Comments	No

Comments:

Wish to participate via Zoom for hearing. Mahalo, G. Skinner



LATE

Preserving and Perpetuating Native Hawaiian Cultural Traditions for Future Generations

Rep Cedric Gates

Members of the House Committee on Culture, Art and International Affairs

RE: Support for HB760 Relating to the State Foundation on Culture and the Arts

Aloha!

I am Vicky Holt Takamine, the Executive Director of PA'I Foundation and Kumu Hula of Pua Ali'i 'Ilima. I am pleased to submit this letter of support for HB 760 "to further the Foundation's endeavors by allowing the works of art special fund to be used for the support and promotion of performing arts in the state."

I would encourage the SFCA to also review language developed by respected Hawaiian leaders in 2002 encouraging the foundation to adopt a formal policy supporting Native Hawaiian culture and arts.

However, we oppose language that gives to the State the exclusive copyrights of the performance and works. Artists must be allowed to retain their intellectual property rights to their original materials and/or creative works. Commissioned works, i.e. oli (chants), mele (songs), hula (dances) and other performing arts traditions that are created for a special occasion should be allowed to be shared not only at the opening of events and buildings etc. but at other occasions such as festivals, community events etc. to tell these stories in order for them to live on for future generations. These traditions, should not be exclusive to the State, but allowed to be shared with the people of Hawai'i.

I have attached a link to the [Paoakalani Declaration](#), a document that outlines the Intellectual Property Rights of Kanaka Maoli. Thank you for the opportunity to share our support of HB760. Should you have any questions, do not hesitate to contact me at Vicky@paifoundation.org or on my cell at 808-754-2301.

Mahalo Nui Loa for your consideration,

A handwritten signature in black ink that reads "Vicky Holt Takamine". The signature is written in a cursive, flowing style.

Vicky Holt Takamine



Preserving and Perpetuating Native Hawaiian Cultural Traditions for Future Generations

Executive Director, PA'I Foundation

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