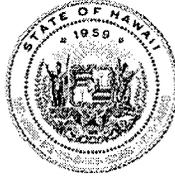


SB 2921



LINDA LINGLE
GOVERNOR
JAMES R. AIONA, JR.
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
www.hawaii.gov/dcca

LAWRENCE M. REIFURTH
DIRECTOR
RONALD BOYER
DEPUTY DIRECTOR

TO THE
SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
THE TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION OF 2010

Thursday, February 18, 2010
9:00 a.m.

TESTIMONY ON S.B. NO. 2921 - RELATING TO ESCROW DEPOSITORIES

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

My name is Nick Griffin, Commissioner of Financial Institutions ("Commissioner"),
testifying on behalf of the Department of Commerce and Consumer Affairs ("Department").
We appreciate the opportunity to testify on Senate Bill No. 2921. The Department
recommends amendments to this measure relating to escrow depositories.

This measure amends Section 449-5, Hawaii Revised Statutes ("HRS") to delete
certain language in subsection (a) thereof and adds a new subsection (b).

The Department is not conceptually opposed to new subsection (b), which will have
the result of requiring persons who wish to act from an out-of-state location as an escrow

depository as to property located in this State to obtain an escrow depository license from the Commissioner. In order to do so, an out-of-state person would be required, pursuant to other provisions of Chapter 449, HRS, to incorporate a domestic Hawaii corporation as the entity that would apply to be licensed as a Hawaii escrow depository, and that company would also be required to maintain a principal office in Hawaii. The practical result of these requirements is that out-of-state entities for the most part, may likely be deterred from applying for a Hawaii escrow depository license in view of the significant costs that will be involved over and above the application and initial license fees. From a regulatory and consumer protection standpoint, that result might well be salutary, given the fact that Hawaii consumers are currently exposed to the possibility that other states that regulate escrow companies may, and occasionally do decline to assist a Hawaii consumer if either the consumer's legal residence or property is located outside the state where the escrow company is licensed. Under the proposed amendment, Hawaii consumers would know with certainty that the Hawaii Division of Financial Institutions ("DFI") will be available to assist any consumer anywhere who has a complaint against a licensed Hawaii escrow depository, regardless of whether the licensee is headquartered within or outside the State of Hawaii.

However, DFI has been advised that the present language of proposed subsection (b) may result in disparate treatment for unlicensed out-of-state persons who violate Chapter 449, HRS vis-à-vis unlicensed persons located in this State who violate

Chapter 449, HRS. There is the appearance of disparate treatment given that a violation of the licensing requirement under Chapter 449, HRS by an out-of-state person could result in prosecution under Section 480-2, HRS, for an unfair or deceptive trade practice, subject to a potential fine of up to \$10,000 per day, while the same licensing violation by a person located in the State of Hawaii is subject only to a one-time (rather than *per diem*) administrative fine of \$5,000, pursuant to Section 449-4, HRS. Such disparate treatment might be found to be unconstitutional.

We therefore recommend that that the final sentence of proposed subsection (b) be deleted, to resolve all questions of constitutionality and disparate treatment.

Finally, we are opposed to the proposed deletion of any of the language presently contained in Subsection 449-5(a), HRS. In the first place, the proposed deletions are unnecessary to secure the objective contemplated by proposed new subsection (b). Moreover, if the objective of the proposed amendments in subsection (a) is to enable escrow depositories to be organized in some form other than as a corporation, further amendments throughout Chapter 449, HRS, would be required to attain that result. The amendment of Section 449-5, HRS, alone, would be legally insufficient to achieve that outcome. In fact, the Department had proposed, in several prior legislative sessions, a more comprehensive update to Chapter 449, HRS, which included the necessary amendments to allow escrow depositories to be organized other than as a corporation. While the Department's prior proposals were not enacted,

the present measure does not adequately achieve that outcome, if indeed that is the objective of the proposed amendment to subsection (a).

Lastly, the proposed deletion of the final paragraph of subsection (a) would, by removing the prohibitions therein contained, ostensibly now permit a person who is not licensed under Chapter 449, HRS, to transact business under a name, title, or descriptive term which contained the words "escrow", "escrow depository", or any other word or phrase having the same or similar meaning and potentially creating the appearance that the person is a licensed escrow depository, a result which we would clearly regard as undesirable and objectionable.

Thank you for the opportunity to testify. I would be happy to respond to any questions you may have.



Title Guaranty Escrow Services, Inc.

235 QUEEN STREET, HONOLULU, HI 96813 • P.O. BOX 1678, HONOLULU, HI 96806
TELEPHONE: (808) 521-0211 • FAX: (808) 521-0280 • EMAIL: main@tghawaii.com

February 5, 2010

Email: senbaker@Capitol.hawaii.gov

The Honorable Rosalyn H. Baker, Chair
Members of the Senate Commerce and Consumer Protection Committee
415 South Beretania Street
Conference Room 325
Hawaii State Capitol
Honolulu, HI 96813

Re: Senate Bill Relating to Escrow Depositories, SB No. 2921

Dear Senator Baker and Members of the Senate Commerce and Consumer Protection Committee:

We submit this testimony on behalf of Title Guaranty Escrow Services, Inc. in support of Senate Bill No. 2921, as amended. Attached hereto as Exhibit A.

Escrow transactions involve large sums of money and the handling of documents affecting title to real property. Escrow companies are charged with fiduciary duties to the parties to the transaction. Because of this, Hawaii has implemented statutes and DCCA regulations and requirements for the protection of these parties.

Escrow transactions concerning Hawaii real estate should therefore be handled by escrow depositories licensed in this State and subject to Hawaii regulations. Since in-State escrow companies are subject to regulation by the DCCA then in all fairness out of State escrow companies performing escrow services for Hawaii transactions should also be subject to Chapter 449. Under Chapter 449, in-State escrow companies are required to maintain an escrow depository bond with the Commissioner, a fidelity bond, and errors & omissions insurance. In-State escrow depository also must submit to the commissioner an annual financial statement. Presently, these requirements are not applicable to out of State companies or entities who perform closing or escrow services because Chapter 449 is only applicable to in-State escrow companies. This Bill will increase protection for the consumer and allow consistency for all companies performing escrow services relating to Hawaii real property.

We respectfully request that the Committee pass this Bill with the attached proposed amendment. We would be happy to answer any further questions that the Committee may have. Thank you for this opportunity to submit this testimony.

Very truly yours,

David T. Pietsch, Jr.
President

enclosure

EXHIBIT A

Section 449-5, Hawaii Revised Statutes, is amended to read as follows:

"§449-5 License required to act as escrow depository. (a) No person shall act as an escrow depository in this State unless it is a corporation licensed to do so by the commissioner.

No person subject to the provisions of this chapter not licensed or exempted under this chapter shall transact any business under any name, title, or descriptive term which contains the words "escrow", "escrow depository" or any word or phrase having the same or similar meaning.

(b) It shall be unlawful to act as an escrow depository as to property located in this State from out-of-state locations unless a license to act as a Hawaii escrow depository is obtained from the commissioner. A violation of this section shall be deemed an unfair and deceptive trade practice."