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Testimony of the Department of Commerce and Consumer Affairs

Office of Consumer Protection

Before the
House Committee on Tourism

Thursday, January 30, 2025

9:00 a.m.

Capitol Room 423
Via Video Conference

On the following measure:
H.B.973, RELATING TO TRANSIENT ACCOMMODATIONS

Chair Tam and Members of the Committee:

My name is Mana Moriarty and I am the Executive Director for the Department of Commerce and Consumer Affairs' (Department) Office of Consumer Protection (OCP). The Department opposes the provisions of this bill (1) that create an undue evidentiary burden by requiring any person bringing an enforcement action to prove the intent of the person or entity alleged to have committed a violation, and (2) that allow a county prosecutor but not OCP to bring an enforcement action.

The purpose of this bill is to require transient accommodations brokers and any other persons or entities to:

- (1) Offer, list, advertise, or display a transient accommodations rental rate that includes all resort fees required for the furnishing of transient accommodations; and

(2) Include all applicable taxes and fees imposed by a government on the stay in the total price to be paid before a consumer reserves the furnishing of transient accommodations.

OCP appreciates the intent of this bill which is to prohibit unfair, deceptive and misleading practices by persons involved in offering transient accommodations for short term rentals. The bill seeks to achieve this intent by imposing disclosure requirement to increase transparency in online consumer transactions involving transient accommodations rentals.

The same concerns animated the Federal Trade Commission's ("FTC") rulemaking to combat junk fees, which led to the December 2024 announcement of the FTC's final rule entitled "Rule on Unfair or Deceptive Fees" ("Junk Fee Rule"). The Junk Fee Rule is scheduled to take effect May 10, 2025, and specifies that it is an unfair and deceptive practice under federal consumer protection law for businesses to offer, display, or advertise any price of live-event tickets or short-term lodging without clearly, conspicuously and prominently disclosing the total price. The Junk Fees Rule also requires businesses to clearly and conspicuously make certain disclosures before a consumer consents to pay. It further specifies that it is an unfair and deceptive practice for businesses to misrepresent any fee or charge in any offer, display, or advertisement for live-event tickets or short-term lodging. See 90 F.R. 2066 (Jan. 10, 2025).

First among OCP's serious concerns with this bill is that the bill establishes that "Transient accommodations brokers and all other persons or entities" are liable for violations of this only if they "knew or should have known that they offered, listed, advertised, or displayed a transient accommodations rental rate in violation of this section." This requirement of proof of the intent of the sets a high bar for violations; higher than any bar set in the Junk Fees Rule, which makes it an unfair and deceptive act or practice to engage in prohibited conduct regardless of the person or entity's intent. Higher, too, than the bar under the state consumer protection law banning unfair and deceptive acts or practices, which does not require proof of intent. See HRS 480-2 (banning unfair and deceptive acts or practices in trade or commerce). Simply put, the person or entity's state of mind should be irrelevant to any civil enforcement action

asserting a violation of state or federal consumer protection laws. To the extent this bill intends civil enforcement should be pursued, this provision runs counter to longstanding consumer protection precedents that do not require proof of intent.

By requiring proof of intent, serious legal consequences could ensue because this bill provides less protection for Hawaii consumers than the consumer protections under the Junk Fees Rule. The FTC claims the authority to preempt state laws inconsistent with Section 5 of the Federal Trade Commission Act. In the Junk Fees Rule, the FTC invoked express preemption for laws inconsistent with the rule, adding that state laws are not inconsistent with the rule if they provide greater protection for consumers. By requiring proof of intent, this bill provides less protection for Hawaii consumers than federal law. The FTC's views on preemption state laws that provide less protection than federal laws are consistent with OCP's longstanding view that federal consumer protection laws should provide a "floor" for Hawaii consumers, and state consumer protection laws should only be adopted if they provide equal or greater protections to Hawaii consumers.

Second among OCP's concerns with this bill is that enforcement authority is expressly granted to county prosecutors but not to OCP. This runs counter to long established state statutory precedents related to civil enforcement of consumer protection laws. OCP, an agency "designated the consumer counsel for the State" and required to "represent and protect the State, the respective counties, and the general public as consumers," has long been charged with civil enforcement of laws enacted and rules adopted for consumer protection purposes. See HRS 487-5(6). Prosecuting attorneys' authority by contrast is derived from the authority of the state Attorney General to prosecute violations of criminal laws. It is not entirely clear from this bill whether the author intended violations of the bill to be pursued by criminal action or civil action. As drafted, the bill provides for fines for violations by persons offering transient accommodations rentals. Fines can be either criminal or civil, and the distinction should clearly be made as should a clear intent manifested whether this bill gives rise to civil or criminal enforcement actions by relevant government agencies.

For the foregoing reasons, while OCP appreciates the intent of this bill, OCP opposes this bill. Thank you for the opportunity to testify.