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**HOUSE COMMITTEE ON FINANCE
TESTIMONY REGARDING SB 1106 SD 2
RELATING TO TAXATION**

TESTIFIER: KURT KAWAFUCHI, DIRECTOR OF TAXATION (OR DESIGNEE)

DATE: MARCH 25, 2009

TIME: 3PM

ROOM: 308

This measure requires a buyer of real property located in Hawaii to obtain a tax clearance from the Department of Taxation (Department) confirming that the taxpayer's Hawaii income tax withholding on real property (HARPTA) obligations have been satisfied.

The Department **supports the SD 1 version of SB 1230** and **requests amendments to this measure.**

STRONG SUPPORT FOR ENSURING NONRESIDENTS PAY THEIR FAIR SHARE OF TAX—That Department strongly supports legislation that ensures all taxpayers, including nonresidents with Hawaii tax obligations, pay their fair share of taxes. With nonresidents specifically, tax compliance can be poor because of unfamiliarity with laws and obligations. In order to ensure nonresidents are aware of their income tax obligations from selling Hawaii property, Hawaii's HARPTA law requires a withholding tax on the buyer where the seller is a nonresident. This withholding tax is patterned after federal law and is an effective way of ensuring that nonresidents are compliant.

SUPPORT FOR THE CONCEPT OF TAX CLEARANCES ON SELLERS—Though very resource intensive, the Department supports the concept of tax clearances because they serve as a condition precedent to obtaining whatever action the taxpayer desires, *i.e.*, business permits or the recording of a deed in the case of this bill.

AMEND TO REQUIRE A TAX CLEARANCE OF SELLER—This measure appears to preclude the recording of a deed for bureau of conveyances purposes by requiring the buyer to ensure HARPTA obligations are carried out. The Department suggests that the bill be modified by amending to the SD 1 version of SB 1230, which requires the seller obtain a tax clearance prior to recording. Though HARPTA operates as a buyer's obligation, the tax clearance envisioned by this measure would operate better as a means of ensuring tax compliance if the seller were also required

to obtain a tax clearance for its Hawaii tax obligations. The reason why the seller tax clearance would be more fruitful is because most nonresident sellers have rental property in Hawaii, which would have yielded taxable income and transient accommodations taxes, as well as general excise taxes in Hawaii. The simple act of renting property in Hawaii subjects a person to three taxes at a minimum. Rather than a simple clearance for ensuring withholding requirements by the buyer, this measure could have a far greater impact if it were to require a seller to obtain a clearance from the Department ensuring that all income, TAT, and GET were paid.

OTHER ENFORCEMENT TOOLS—The Department suggests that the tax clearance requirement of SB 1230 SD 1, along with the other tax compliance tools contained in that measure, be adopted in lieu of this measure. For example, SB 1230 SD 1 imposes liability on escrow companies and others who facilitate real estate transactions for the HARPTA withholding tax; requires electronic payment of the HARPTA withholding tax; and subjects transfers of equity interests in certain entities holding Hawaii real estate to HARPTA withholding tax.

REVENUE IMPACT—Revenue gain will include a portion of the \$1.3 million annual shortfall in withholding tax revenues estimated by this bill and an additional gain of \$5 to \$10 million a year from increased GET and TAT collections. However, it is noted that the real estate market is rather weak currently.

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SUBJECT: INCOME, Verification of taxes paid on sale of real property by nonresidents

BILL NUMBER: SB 1106, SD-2

INTRODUCED BY: Senate Committee on Ways and Means

BRIEF SUMMARY: Amends HRS section 235-68 to require a nonresident person that is a transferee of real property to submit to the bureau of conveyances a certified Hawaii real property tax act payment verification form verifying that the transferee properly filed a return of the amount withheld to the department of taxation. The submission of a certified Hawaii real property tax act payment verification form to the bureau of conveyances shall be a precondition to recording any transfer of title by a nonresident person that is a transferee under this section.

Requires a nonresident person that is a transferor of real property to obtain a certified tax clearance certificate from the department of taxation verifying that the transferor has filed all required returns and paid all required taxes, penalties, and interest. The nonresident transferor shall submit a tax clearance application to the department no later than 15 days after the transfer date of the real property. Failure of the nonresident transferor to comply with the requirements of this subsection may subject the nonresident transferor to fines, penalties, and interest.

Directs the director of taxation to prepare the necessary forms to satisfy the requirements of this act and may require a nonresident transferee or transferor under this section to furnish information to ascertain the person's compliance.

EFFECTIVE DATE: January 1, 2010

STAFF COMMENTS: The proposed measure would ensure that all taxes are paid on the sale of real property by nonresidents in the state. This measure would require a nonresident transferee of real property to submit a Hawaii real property tax verification form that all taxes have been paid to the bureau of conveyances prior to the recordation of any transfer of title by the bureau.

While the measure would also require a nonresident person who is a transferor of real property to obtain a tax clearance to verify that all taxes have been paid by the nonresident transferor, it is not clear to whom the transferor would present the tax clearance. Is it submitted to the bureau of conveyances as is required of a nonresident transferee in order to record title? A nonresident transferor is required to obtain a tax clearance but no verification is provided in the measure.

Digested 3/24/09



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March 24, 2009

The Honorable Marcus R. Oshiro, Chair
House Committee on Finance
State Capitol, Room 308
Honolulu, Hawaii 96813

RE: S.B. 1106, S.D.2, Relating to Taxation

HEARING DATE: Wednesday, March 25, 2009 at 3:00 p.m.

Aloha Chair Oshiro and Members of the Committee on Finance:

I am Craig Hirai, a member of the Subcommittee on Taxation and Finance of the Government Affairs Committee of the Hawai'i Association of REALTORS® ("HAR"), here to testify on behalf of the HAR and its 9,600 members in Hawai'i.

S.B. 1106, S.D.2, Relating to Taxation, requires a nonresident buyer of real property located in Hawaii to furnish to the Bureau of Conveyances a Hawaii Real Property Tax Act (HARPTA) payment verification form issued from the Department of Taxation (DoTax) that certifies that the HARPTA withholding requirements were satisfied as a precondition to recording a change in title on the real property. It also requires a nonresident seller to submit a certified tax clearance certificate no later than 15 days after the transfer date of the real property or be subject to fines, penalties and interest.

HAR opposes S.B. 1106, S.D.2, unless the following conflict can be resolved.

Proposed HRS §235-68(h) reads as follows:

(h) Unless otherwise provided in this section, every nonresident person that is a transferee under this section shall submit to the bureau of conveyances a certified Hawaii real property tax act payment verification form issued from the department verifying that the transferee properly made a return of the amount withheld to the department pursuant to the requirements set forth in this section. Submission of a certified Hawaii real property tax act payment verification form to the bureau of conveyances shall be a precondition to recording any transfer of title by a nonresident person that is a transferee under this section.

HRS §235-68(c) currently states that:

(c) Every transferee required by this section to withhold tax under subsection (b) shall make a return of the amount withheld to the department of taxation not more than twenty days following the transfer date. [Emphasis added.]



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Proposed HRS §235-68(h) thus appears to conflict with HRS §235-68(c).

HAR would also note that proposed HRS §235-68(i) only requires a nonresident transferor to submit a tax clearance application to DoTax "no later than fifteen days after the transfer date of the real property", and that the failure of a nonresident transferor to comply with this requirement may only subject the nonresident transferor to "fines, penalties, and interest."

HAR would submit that the real problem here is that a nonresident transferor may have no remaining property in the State upon which DoTax can lien or levy for any unpaid taxes, fines, penalties, and interest; and that, except for any HARPTA withholding, any remaining proceeds from the subject sale will have been disbursed outside of the State.

HAR therefore respectfully suggests that; (a) current HRS §235-68(c) be left intact; (b) current proposed HRS §§ 235-68(h), (i) and (j) be deleted; and (c) the following proposed HRS §§ 235-68(h) and (i) be inserted:

(h) Every nonresident person that is a transferor under this section shall submit to the bureau of conveyances a certified tax clearance certificate issued by the department stating that the transferor has paid all general excise, transient accommodations, and income taxes. Submission of the tax clearance certificate shall be made a condition to recording of any transfer of title of real property located in Hawaii by a nonresident person that is a transferor under this section.

(i) The director of taxation shall prepare forms as may be necessary to satisfy the requirements of subsection (h). The director may also require a nonresident transferor under this section to furnish information to ascertain the person's compliance with the requirements of subsection (h), and may adopt rules necessary to effectuate the purposes of this subsection pursuant to chapter 91."

HAR looks forward to working with our state lawmakers in building better communities by supporting quality growth, seeking sustainable economies and housing opportunities, embracing the cultural and environmental qualities we cherish, and protecting the rights of property owners.

Mahalo for the opportunity to testify.

GOODSILL ANDERSON QUINN & STIFEL

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MEMORANDUM

TO: Representative Marcus R. Oshiro
Chair, Committee on Finance
Hawaii State Capitol, Room 306

FROM: Gary M. Slovin

DATE: March 25, 2009

RE: S.B. No. 1106, S.D.1 – Relating to Taxation
Hearing Date: Wednesday, March 25, 2009 at 3:00 p.m., Agenda #2

Dear Chair Oshiro and Members of the Committee on Finance:

I am Gary Slovin, testifying on behalf of Wyndham Worldwide. Wyndham Worldwide offers individual consumers and business-to-business customers a broad suite of hospitality products and services across various accommodation alternatives and price ranges through its portfolio of world-renowned brands. Wyndham Worldwide has substantial interests in Hawaii that include Wyndham Vacation Ownership, with its new resort at Waikiki Beach Walk.

Wyndham Worldwide respectfully opposes S.B. 1106, S.D.1, which requires that a nonresident buyer of real property located in Hawaii furnish a payment verification form to the Bureau of Conveyances to certify that HARPTA withholding requirements are satisfied prior to recording a change in title on the real property, and requires the seller to submit a certified tax clearance certificate as a condition to transferring real property title.

HARPTA was originally intended to provide a mechanism to capture the tax related to the gain on the transfer of property from a non-resident seller. By requiring the tax clearance certificate, this bill greatly expands the scope of the measure, by requiring not only the HARPTA tax is withheld and paid, but that all taxes are paid by the non-resident seller.

March 25, 2009
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Wyndham Worldwide believes that it would have a significant detrimental impact on real estate transactions to link non-resident seller transactions to the collection of all taxes. In addition, to the extent that the bill adds the requirement that a non-resident buyer file a verification as a "precondition to recording a transfer of title," it creates an inconsistency with the existing statute, which states that a buyer has to make payment of the HARPTA withholding no more than 20 days after the transfer date.

As the measure is presently drafted, requiring a tax clearance certificate will result in an added administrative burden to a non-resident seller, non-resident buyer, and the director of taxation to issue every clearance certificate expeditiously. This could result in delays in the recording of a deed, the release of sales proceeds from escrow, and the ability to close and securitize the receivable, which would makes it more difficult for the seller to obtain operating cash. In addition, there will be additional costs to the seller to secure letters and communicate with the director of taxation. Finally, with the high volume nature of timeshare sales, requiring a tax clearance certificate on potentially every sale of a timeshare interest would be excessively burdensome.

While we understand the budget challenges the Legislature faces this session, we ask this Committee to consider the considerable impact this measure would have on the real estate industry, which is so critical to Hawai'i's economy.

For these reasons, we respectfully oppose this bill and ask that it be held.

Thank you very much for the opportunity to testify.

**HOUSE COMMITTEE ON
FINANCE**

March 25, 2009

Senate Bill 1106, SD 2 Relating to Taxation

Chair Oshiro and members of the House Committee on Finance, I am Rick Tsujimura, representing Marriott Vacation Club International, Inc. (Marriott). Marriott opposes Senate Bill 1106, SD 2 Relating to Taxation.

As the world suffers through an economic decline, Hawaii has likewise not escaped the decline in visitor travel. Fortunately Hawaii's timeshare industry has steadily continued despite downtrends in visitors. Timeshares are vital to Hawaii's future. Marriott has invested heavily in Hawaii. And during this downturn has partnered with Hawaiian Airlines to bring visitors to Hawaii to advertise its timeshare opportunities. Marriott strongly believes in the future of timeshare operations, and believes that the growth in this market is vital for Hawaii and the economy. It is in this light and with this in mind that we respectfully oppose Senate Bill 1106 in all of its permutations as it applies to timeshare sales. We believe that the state should be encouraging timeshare sales and resales. Senate Bill 1106 can be modified to encourage this desperately needed growth. For every timeshare sold we gain one more visitor who will contribute to this economy both in infusing money into the economy but also by paying the real property taxes, general excise taxes for food and beverages and maintenance, as well as providing stable jobs for local employees.

Currently, many timeshare units which are being transferred are being sold with little or no gain. Under California's equivalent of HARPTA (a copy of which is attached to this testimony) there is a provision for an exemption for sales under \$100,000. We are requesting that if the committee is interested in moving this measure forward that a similar exemption be inserted for timeshare interests for which the sales price is less than \$50,000. This does not eliminate taxes owed but merely eliminates the time lost in closing sales as tax clearances are obtained for these transactions, many of which will be at little or no gain or possibly a slight loss. As for real property taxes, TAT/TOT and GET payments, timeshare plan managers are required to pay those amounts regularly so the likelihood of a nonpayment is slim to none. We also believe that as applied to the timeshare interests, the measure's new provisions will impose burdensome paperwork on interval owners, DOTAX, and the Bureau of Conveyances that are out of proportion to the narrow risk of tax loss from timeshare transactions. We are therefore requesting an amendment which is attached as a proposed House Draft 1.

We believe that this amendment will encourage more time share sales and consequently more visitors to the Hawaii market. We encourage your consideration. Thank you for this opportunity to offer testimony on this measure.

California Codes, REVENUE AND TAXATION CODE, DIVISION 2 OTHER TAXES, PART 10.2 ADMINISTRATION OF FRANCHISE AND INCOME TAX LAWS, Chapter 2 Returns, Article 5 Withholding.

Sec. 18662.

Sec. 18662, as reproduced below, is applicable to dispositions of California real property interests that occur before January 1, 2009. For provisions applicable to dispositions of California real property interests that occur on or after January 1, 2009, see below. CCH.

[

18662 (a) The Franchise Tax Board may, by regulation, require any person, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and any officer or department of the state or any political subdivision or agency of the state, or any city organized under a freeholder's charter, or any political body not a subdivision or agency of the state, having the control, receipt, custody, disposal, or payment of items of income specified in subdivision (b), to withhold an amount, determined by the Franchise Tax Board to reasonably represent the amount of tax due when the items of income are included with other income of the taxpayer, and to transmit the amount withheld to the Franchise Tax Board at the time as it may designate.

(b) The items of income referred to in subdivision (a) are interest, dividends, rents, prizes and winnings, premiums, annuities, emoluments, compensation for services, including bonuses, partnership income or gains, and other fixed or determinable annual or periodical gains, profits, and income.

(c) The Franchise Tax Board may authorize the tax under subdivision (a) to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent.

(d) Any person failing to withhold from any payments any amounts required by subdivision (a) to be withheld is liable for the amount withheld or the amount of taxes due from the person to whom the payments are made to an extent not in excess of the amounts required to be withheld, whichever is greater, unless it is shown that the failure to withhold is due to reasonable cause.

(e) (1) This subdivision applies to any disposition of a California real property interest by:

(A) Any person, other than either of the following:

(i) A corporation, including an entity classified for tax purposes as a corporation under Part 11 (commencing with Section 23001).

(ii) A partnership, as determined in accordance with Subchapter K of Chapter 1 of Subtitle A of the Internal Revenue Code, including an entity classified as a partnership for tax purposes under Part 10 (commencing with Section 17001).

(B) A corporation, if the corporation immediately after the transfer of the title to the California real property has no permanent place of business in California. For purposes of this subdivision, a corporation has no permanent place of business in California if all of the following apply:

- (i) It is not organized and existing under the laws of California.
- (ii) It does not qualify with the office of the Secretary of State to transact business in California.
- (iii) It does not maintain and staff a permanent office in California.

(2) (A) Except as provided in subparagraph (B), in the case of any disposition of a California real property interest by a transferor described in paragraph (1), the transferee, including for this purpose any intermediary or accommodator in a deferred exchange, is required to withhold an amount equal to 31/3 percent of the sales price of the California real property conveyed.

(B) If the transferor makes an election under this subparagraph, the transferee, including any intermediary or accommodator in a deferred exchange, is required to withhold an amount equal to an amount certified by the transferor in writing under penalty of perjury. The amount certified shall not be less than the gain required to be recognized under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001) on the disposition of the California real property multiplied by the rate specified in either Section 23151 or Section 23186, as applicable, for transferors that are corporations, or the highest rate specified in Section 17041 for transferors other than corporations. For purposes of applying the previous sentence, the highest rate specified in Section 17041 is determined without regard to any other tax rate specified under Part 10 (commencing with Section 17001) irrespective of whether the applicable statute provides that tax shall be treated as if imposed under Section 17041.

(C) (i) The written certification required by subparagraph (B) shall be in a form, as prescribed by the Franchise Tax Board. The form shall provide as follows:

"Title and escrow persons and exchange accommodators are not authorized to provide legal or accounting advice for purposes of determining withholding amounts. Transferors are strongly encouraged to consult with a competent tax professional for this purpose."

(ii) The Franchise Tax Board shall make this form available electronically on its Web site in a format that allows a transferor to complete and print the form. The Franchise Tax Board shall also provide electronic means to enable the transferor to estimate the amount of gain required to be recognized by the transferor in the transaction. Any form or worksheet, electronic or otherwise, developed for this purpose shall provide as follows:

"Title and escrow persons and exchange accommodators are not authorized to provide legal or accounting advice for purposes of determining withholding amounts. Transferors are strongly encouraged to consult with a competent tax professional for this purpose."

(3) Notwithstanding any other provision of this subdivision, all of the following shall apply:

(A) No transferee is required to withhold any amount under this subdivision unless the sales price of the California real property conveyed exceeds one hundred thousand dollars (\$100,000).

(B) No transferee, other than an intermediary or an accommodator in a deferred exchange, is required to withhold any amount under this subdivision unless written notification of the withholding requirements of this subdivision has been provided by the real estate escrow person.

(C) (i) No transferee, trustee under a deed of trust, or mortgagee under a mortgage with a power of sale is required to withhold under this subdivision when the transferee has acquired

California real property at a sale pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the property by a deed in lieu of foreclosure.

(ii) No transferee is required to withhold under this subdivision when the transferor is a bank acting as trustee other than a trustee of a deed of trust.

(D) No transferee, including for this purpose any intermediary or accommodator in a deferred exchange, is required to withhold any amount under this subdivision if the transferee, in good faith and based on all the information of which he or she has knowledge, relies on a written certificate executed by the transferor, certifying, under penalty of perjury, one of the following:

(i) (I) The California real property being conveyed is the seller's or decedent's principal residence, within the meaning of Section 121 of the Internal Revenue Code.

(II) The last use of the property being conveyed was use by the transferor as the transferor's principal residence within the meaning of Section 121 of the Internal Revenue Code.

(ii) (I) The California real property being conveyed is being exchanged, or will be exchanged, for property of like kind, within the meaning of Section 1031 of the Internal Revenue Code, but only to the extent of the amount of the gain not required to be recognized for California income or franchise tax purposes under Section 1031 of the Internal Revenue Code.

(II) Subclause (I) may not apply if an exchange does not qualify for nonrecognition treatment for California income or franchise tax purposes under Section 1031 of the Internal Revenue Code, in whole or in part, due to the failure of the transaction to comply with the provisions of Section 1031(a)(3) of the Internal Revenue Code, relating to the requirement that property be identified and that the exchange be completed not more than 180 days after the transfer of the exchanged property.

(III) In any case where clause (ii) applies, the transferee, including for this purpose any intermediary or accommodator in a deferred exchange, is required to notify the Franchise Tax Board in writing within 10 days of the expiration of the statutory periods specified in Section 1031(a)(3) of the Internal Revenue Code and thereafter remit the applicable withholding amounts determined under this subdivision in accordance with paragraph (4).

(iii) The California real property has been compulsorily or involuntarily converted, within the meaning of Section 1033 of the Internal Revenue Code, and the transferor intends to acquire property similar or related in service or use so as to be eligible for nonrecognition of gain for California income tax purposes under Section 1033 of the Internal Revenue Code.

(iv) The transaction will result in either a net loss or a net gain not required to be recognized for California income or franchise tax purposes.

(v) The transferor is a corporation with a permanent place of business in California.

(E) (i) In the case of any transaction otherwise subject to this subdivision that qualifies as an "installment sale," within the meaning of Section 453(b) of the Internal Revenue Code, for California income tax purposes, the provisions of this subdivision may, upon the irrevocable written election of the transferee, be separately applied to each principal payment to be made under the terms of the installment sale agreement between the parties.

(ii) For purposes of clause (i), subparagraph (A) of paragraph (3) does not apply to each individual payment to be received under the terms of the installment sale agreement.

(iii) The election under this subparagraph shall be made at the time, and in the form and manner, specified by the Franchise Tax Board in forms and instructions, except that the form shall, at a minimum, include the requirement specified in clause (iv) of this subparagraph.

(iv) The election under this subparagraph is valid only if the transferee agrees to withhold and remit from each installment payment the amount specified under this subdivision in the form and manner, and at the time, specified in paragraph (4).

(4) (A) Amounts withheld and payments made in accordance with this subdivision shall be reported and remitted to the Franchise Tax Board in the form and manner and at the time specified by the Franchise Tax Board. Notwithstanding the foregoing, funds withheld on individual transactions by real estate escrow persons may, at the option of the real estate escrow person, be remitted by the 20th day of the month following the close of escrow for the individual transaction, or may be remitted on a monthly basis in combination with other transactions closed during that month.

(B) The transferor shall submit a copy of the written certificate and supporting documentation for the reduced withholding specified in subparagraph (B) of paragraph (2) or subparagraph (D) of paragraph (3), executed by the transferor, to the Franchise Tax Board upon request.

(5) For purposes of this subdivision, "California real property interest" means an interest in real property located in California and defined in Section 897(c)(1)(A)(i) of the Internal Revenue Code.

(6) For purposes of this subdivision, "real estate escrow person" means any of the following persons involved in the real estate transaction:

(A) The person, including any attorney, escrow company, or title company, responsible for closing the transaction.

(B) If no person described in subparagraph (A) is responsible for closing the transaction, then any other person who receives and disburses the consideration or value for the interest or property conveyed.

(7) (A) Unless the real estate escrow person provides "assistance," it shall be unlawful for any real estate escrow person to charge any customer for complying with the requirements of this subdivision.

(B) For purposes of this paragraph, "assistance" includes, but is not limited to, helping the parties clarify with the Franchise Tax Board the issue of whether withholding is required under this subdivision or, upon request of the parties, withholding an amount under this subdivision and remitting that amount to the Franchise Tax Board.

(C) For purposes of this paragraph, "assistance" does not include providing the written notification of the withholding requirements of this subdivision.

(D) In a case where the real estate escrow person provides "assistance" in complying with the withholding requirements of this subdivision, it shall be unlawful for the real estate escrow person to charge any customer a fee that exceeds forty-five dollars (\$45).

(8) For purposes of this subdivision, "sales price" means the sum of all of the following:

(A) The cash paid, or to be paid, but excluding for this purpose any stated or unstated interest or original issue discount, as determined under Sections 1271 through 1275, inclusive, of the Internal Revenue Code.

(B) The fair market value of other property transferred, or to be transferred.

(C) The outstanding amount of any liability assumed by the transferee or to which the California real property interest is subject immediately before and after the transfer.

(9) The Franchise Tax Board may prescribe, by forms, instructions, published notices, or regulations, any requirements necessary for the efficient administration of this subdivision relating to the treatment of "de minimus" amounts otherwise required under this section.

(f) Whenever any person has withheld any amount pursuant to this section, the amount so withheld shall be held in trust for the State of California. The amount of the fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations, including penalties, as are applicable with respect to the taxes imposed by Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or this part.

(g) Withholding is not required under this section with respect to wages, salaries, fees, or other compensation paid by a corporation for services performed in California for that corporation to a nonresident corporate director for director services, including attendance at a board of directors' meeting.

(h) In the case of any payment described in subdivision (g), the person making the payment shall do each of the following:

(1) File a return with the Franchise Tax Board at the time and in the form and manner specified by the Franchise Tax Board.

(2) Provide the payee with a statement at the time and in the form and manner specified by the Franchise Tax Board.

(i) (1) The amendments to this section made by Chapter 488 of the Statutes of 2002 apply to dispositions of California real property interests that occur on or after January 1, 2003.

(2) In the case of any payments received on or after January 1, 2003, pursuant to an installment sale agreement relating to a disposition occurring before January 1, 2003, the amendments to this section made by Chapter 488 of the Statutes of 2002 do not apply to those payments.

Sec. 18662, as reproduced below, amended by Ch. 305 (A.B. 3078), Laws 2008, is effective January 1, 2009, and applicable to dispositions of California real property interests that occur on or after January 1, 2009, except as noted in (i)(2). For provisions applicable to dispositions of California real property interests that occur before January 1, 2009, see above. CCH.

[Withholding of tax from payments; transmission to FTB].

18662(a) The Franchise Tax Board may, by regulation, require any person, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and any officer or department of the state, or any political subdivision or agency

of the state, or any city organized under a freeholder's charter, or any political body not a subdivision or agency of the state, having the control, receipt, custody, disposal, or payment of items of income specified in subdivision (b), to withhold an amount, determined by the Franchise Tax Board to reasonably represent the amount of tax due when the items of income are included with other income of the taxpayer, and to transmit the amount withheld to the Franchise Tax Board at the time as it may designate.

18662(b) The items of income referred to in subdivision (a) are interest, dividends, rents, prizes and winnings, premiums, annuities, emoluments, compensation for services, including bonuses, partnership income or gains, and other fixed or determinable annual or periodical gains, profits, and income.

18662(c) The Franchise Tax Board may authorize the tax under subdivision (a) to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent.

18662(d) Any person that fails to withhold from any payments any amounts required to be withheld by this section or fails to remit the taxes withheld is liable for the amount specified in Section 18668.

18662(e)(1) This subdivision applies to any disposition of a California real property interest by:

18662(e)(1)(A) Any person, other than either of the following:

18662(e)(1)(A)(i) Except as otherwise provided in this subdivision, a corporation, including an entity classified for tax purposes as a corporation under Part 11 (commencing with Section 23001).

18662(e)(1)(A)(ii) Except as otherwise provided in this subdivision, a partnership, as determined in accordance with Subchapter K of Chapter 1 of Subtitle A of the Internal Revenue Code, including an entity classified as a partnership for tax purposes under Part 10 (commencing with Section 17001).

18662(e)(1)(B) A corporation or partnership, if that corporation or partnership immediately after the transfer of the title to the California real property has no permanent place of business in California. For purposes of this subdivision, a corporation or partnership has no permanent place of business in California if all of the following apply:

18662(e)(1)(B)(i) It is not organized and existing under the laws of California.

18662(e)(1)(B)(ii) It does not qualify with the office of the Secretary of State to transact business in California.

18662(e)(1)(B)(iii) It does not maintain and staff a permanent office in California.

18662(e)(2)(A) Except as provided in subparagraph (B), in the case of any disposition of a California real property interest by a transferor described in paragraph (1), the transferee, including for this purpose any intermediary or accommodator in a deferred exchange, is required to withhold an amount equal to $3\frac{1}{3}$ percent of the sales price of the California real property conveyed.

18662(e)(2)(B) If the transferor makes an election under this subparagraph, the transferee, including any intermediary or accommodator in a deferred exchange, is required to withhold an amount equal to an amount certified by the transferor in writing under penalty of perjury. The amount certified shall not be less than the gain required to be recognized under Part 10 (commencing with Section 17001) and Part 11 (commencing with Section 23001) on the disposition of the California real property multiplied by the rate specified in either Section 23151 or Section 23186, as applicable, for transferors that are corporations, or the highest rate specified in Section 17041 for transferors other than corporations. For purposes of applying the previous sentence, the following shall apply:

18662(e)(2)(B)(i) The highest rate specified in Section 17041 is determined without regard to any other tax rate specified under Part 10 (commencing with Section 17001) irrespective of whether the applicable statute provides that tax shall be treated as if imposed under Section 17041.

18662(e)(2)(B)(ii) For corporations that are "S" corporations subject to the modified tax rate specified in Section 23802, the rate shall be the sum of the rate specified in subdivision (b) of Section 23802 and the highest rate specified in Section 17041, as described in clause (i).

18662(e)(2)(C)(i) The written certification required by subparagraph (B) shall be in a form, as prescribed by the Franchise Tax Board. The form shall provide as follows:

"Title and escrow persons and exchange accommodators are not authorized to provide legal or accounting advice for purposes of determining withholding amounts. Transferors are strongly encouraged to consult with a competent tax professional for this purpose."

18662(e)(2)(C)(ii) The Franchise Tax Board shall make this form available electronically on its Web site in a format that allows a transferor to complete and print the form. The Franchise Tax Board shall also provide electronic means to enable the transferor to estimate the amount of gain required to be recognized by the transferor in the transaction. Any form or worksheet, electronic or otherwise, developed for this purpose shall provide as follows:

"Title and escrow persons and exchange accommodators are not authorized to provide legal or accounting advice for purposes of determining withholding amounts. Transferors are strongly encouraged to consult with a competent tax professional for this purpose."

18662(e)(3) Notwithstanding any other provision of this subdivision, all of the following shall apply:

18662(e)(3)(A) No transferee is required to withhold any amount under this subdivision unless the sales price of the California real property conveyed exceeds one hundred thousand dollars (\$100,000).

18662(e)(3)(B) No transferee, other than an intermediary or an accommodator in a deferred exchange, is required to withhold any amount under this subdivision unless written notification of the withholding requirements of this subdivision has been provided by the real estate escrow person.

18662(e)(3)(C)(i) No transferee, trustee under a deed of trust, or mortgagee under a mortgage with a power of sale is required to withhold under this subdivision when the transferee has acquired California real property at a sale pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the property by a deed in lieu of foreclosure.

18662(e)(3)(C)(ii) No transferee is required to withhold under this subdivision when the transferor is a bank acting as trustee other than a trustee of a deed of trust.

18662(e)(3)(D) No transferee, including for this purpose any intermediary or accommodator in a deferred exchange, is required to withhold any amount under this subdivision if the transferee, in good faith and based on all the information of which he or she has knowledge, relies on a written certificate executed by the transferor, certifying, under penalty of perjury, one of the following:

18662(e)(3)(D)(i)(I) The California real property being conveyed is the seller's or decedent's principal residence, within the meaning of Section 121 of the Internal Revenue Code.

18662(e)(3)(D)(i)(II) The last use of the property being conveyed was use by the transferor as the transferor's principal residence within the meaning of Section 121 of the Internal Revenue Code.

18662(e)(3)(D)(ii)(I) The California real property being conveyed is being exchanged, or will be exchanged, for property of like kind, within the meaning of Section 1031 of the Internal Revenue Code, but only to the extent of the amount of the gain not required to be recognized for California income or franchise tax purposes under Section 1031 of the Internal Revenue Code.

18662(e)(3)(D)(ii)(II) Subclause (I) may not apply if an exchange does not qualify for nonrecognition treatment for California income or franchise tax purposes under Section 1031 of the Internal Revenue Code, in whole or in part, due to the failure of the transaction to comply with the provisions of Section 1031(a)(3) of the Internal Revenue Code, relating to the requirement that property be identified and that the exchange be completed not more than 180 days after the transfer of the exchanged property.

18662(e)(3)(D)(ii)(III) In any case where clause (ii) applies, the transferee, including for this purpose any intermediary or accommodator in a deferred exchange, is required to notify the Franchise Tax Board in writing within 10 days of the expiration of the statutory periods specified in Section 1031(a)(3) of the Internal Revenue Code and thereafter remit the applicable withholding amounts determined under this subdivision in accordance with paragraph (4).

18662(e)(3)(D)(iii) The California real property has been compulsorily or involuntarily converted, within the meaning of Section 1033 of the Internal Revenue Code, and the transferor intends to acquire property similar or related in service or use so as to be eligible for nonrecognition of gain for California income tax purposes under Section 1033 of the Internal Revenue Code.

18662(e)(3)(D)(iv) The transaction will result in either a net loss or a net gain not required to be recognized for California income or franchise tax purposes.

18662(e)(3)(D)(v) The transferor is a corporation with a permanent place of business in California.

18662(e)(3)(E)(i) In the case of any transaction otherwise subject to this subdivision that qualifies as an "installment sale," within the meaning of Section 453(b) of the Internal Revenue Code, for California income tax purposes, the provisions of this subdivision shall be separately applied to each principal payment to be made under the terms of the installment sale agreement between the parties.

18662(e)(3)(E)(ii) For purposes of clause (i), subparagraph (A) of paragraph (3) does not apply to each individual payment to be received under the terms of the installment sale agreement.

18662(e)(4)(A) Amounts withheld and payments made in accordance with this subdivision shall be reported and remitted to the Franchise Tax Board in the form and manner and at the time specified by the Franchise Tax Board. Notwithstanding the foregoing, funds withheld on individual transactions by real estate escrow persons may, at the option of the real estate escrow person, be remitted by the 20th day of the month following the close of escrow for the individual transaction, or may be remitted on a monthly basis in combination with other transactions closed during that month.

18662(e)(4)(B) The transferor shall submit a copy of the written certificate and supporting documentation for the reduced withholding specified in subparagraph (B) of paragraph (2) or subparagraph (D) of paragraph (3), executed by the transferor, to the Franchise Tax Board upon request.

18662(e)(5) For purposes of this subdivision, "California real property interest" means an interest in real property located in California and defined in Section 897(c)(1)(A)(i) of the Internal Revenue Code.

18662(e)(6) For purposes of this subdivision, "real estate escrow person" means any of the following persons involved in the real estate transaction:

18662(e)(6)(A) The person, including any attorney, escrow company, or title company, responsible for closing the transaction.

18662(e)(6)(B) If no person described in subparagraph (A) is responsible for closing the transaction, then any other person who receives and disburses the consideration or value for the interest or property conveyed.

18662(e)(7)(A) Unless the real estate escrow person provides "assistance," it shall be unlawful for any real estate escrow person to charge any customer for complying with the requirements of this subdivision.

18662(e)(7)(B) For purposes of this paragraph, "assistance" includes, but is not limited to, helping the parties clarify with the Franchise Tax Board the issue of whether withholding is required under this subdivision or, upon request of the parties, withholding an amount under this subdivision and remitting that amount to the Franchise Tax Board.

18662(e)(7)(C) For purposes of this paragraph, "assistance" does not include providing the written notification of the withholding requirements of this subdivision.

18662(e)(7)(D) In a case where the real estate escrow person provides "assistance" in complying with the withholding requirements of this subdivision, it shall be unlawful for the real estate escrow person to charge any customer a fee that exceeds forty-five dollars (\$45).

18662(e)(8) For purposes of this subdivision, "sales price" means the sum of all of the following:

18662(e)(8)(A) The cash paid, or to be paid, but excluding for this purpose any stated or unstated interest or original issue discount, as determined under Sections 1271 through 1275, inclusive, of the Internal Revenue Code.

18662(e)(8)(B) The fair market value of other property transferred, or to be transferred.

18662(e)(8)(C) The outstanding amount of any liability assumed by the transferee or to which the California real property interest is subject immediately before and after the transfer.

18662(e)(9) The Franchise Tax Board may prescribe, by forms, instructions, published notices, or regulations, any requirements necessary for the efficient administration of this subdivision relating to the treatment of "de minimis" amounts otherwise required under this section.

18662(f) Withholding is not required under this section with respect to wages, salaries, fees, or other compensation paid by a corporation for services performed in California for that corporation to a nonresident corporate director for director services, including attendance at a board of directors' meeting.

18662(g) In the case of any payment described in subdivision (f), the person making the payment shall do each of the following:

18662(g)(1) File a return with the Franchise Tax Board at the time and in the form and manner specified by the Franchise Tax Board.

18662(g)(2) Provide the payee with a statement at the time and in the form and manner specified by the Franchise Tax Board.

18662(h)(1) The amendments to this section made by Chapter 488 of the Statutes of 2002 apply to dispositions of California real property interests that occur on or after January 1, 2003.

18662(h)(2) In the case of any payments received on or after January 1, 2003, pursuant to an installment sale agreement relating to a disposition occurring before January 1, 2003, the amendments to this section made by Chapter 488 of the Statutes of 2002 do not apply to those payments.

18662(i)(1) The amendments made to this section by the act adding this subdivision shall apply to dispositions of California real property interests that occur on or after January 1, 2009.

18662(i)(2) In the case of any payments received on or after January 1, 2009, pursuant to an installment sale agreement relating to a disposition occurring before

January 1, 2009, the amendments made to this section by the act adding this subdivision do not apply to those payments.

(As added by Ch. 31, Laws 1993; as amended Ch. 475, Laws 1995; Ch. 605, Laws 1997, Laws 1997; Ch. 987 (S.B. 1229), Laws 1999; Ch. 488 (A.B. 2065), Laws 2002; Ch. 528 (A.B. 1338), Laws 2004, applicable to dispositions of California real property interests occurring after 2004, except applicable to installment payments received after 2003 for sales occurring after 2002; Ch. 428 (A.B. 2962), Laws 2006, effective January 1, 2007; Ch. 305 (A.B. 3078), Laws 2008, effective January 1, 2009, and applicable to dispositions of California real property interests that occur on or after January 1, 2009, except as noted in (i)(2).)

A BILL FOR AN ACT

RELATING TO TAXATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 235-68, Hawaii Revised Statutes,
2 is amended to read as follows:

3 "**§235-68 Withholding of tax on the disposition of**
4 **real property by nonresident persons.** (a) As used in this
5 section:

6 "Nonresident person" means every person other than a
7 resident person.

8 "Property" or "real property" has the meaning as the
9 same term is defined in section 231-1.

10 "Resident person" means any:

11 (1) Individual included in the definition of
12 resident in section 235-1;

13 (2) Corporation incorporated or granted a
14 certificate of authority under chapter 414,
15 414D, or 415A;

16 (3) Partnership formed or registered under
17 chapter 425 or 425E;

- 1 (4) Foreign partnership qualified to transact
2 business pursuant to chapter 425 or 425E;
- 3 (5) Limited liability company formed under
4 chapter 428 or any foreign limited liability
5 company registered under chapter 428;
6 provided that if a single member limited
7 liability company has not elected to be
8 taxed as a corporation, the single member
9 limited liability company shall be
10 disregarded for purposes of this section and
11 this section shall be applied as if the sole
12 member is the transferor;
- 13 (6) Limited liability partnership formed under
14 chapter 425;
- 15 (7) Foreign limited liability partnership
16 qualified to transact business under chapter
17 425;
- 18 (8) Trust included in the definition of resident
19 trust in section 235-1; or
- 20 (9) Estate included in the definition of
21 resident estate in section 235-1.
- 22 "Transferee" means any person, the State and the
23 counties and their respective subdivisions, agencies,

1 authorities, and boards, acquiring real property [~~which~~]
2 that is located in Hawaii.

3 "Transferor" means any person disposing real property
4 that is located in Hawaii.

5 (b) Unless otherwise provided in this section, every
6 transferee shall deduct and withhold a tax equal to five
7 per cent of the amount realized on the disposition of
8 Hawaii real property. Every person required to withhold a
9 tax under this section is made liable for the tax and is
10 relieved of liability for or upon the claim or demand of
11 any other person for the amount of any payments to the
12 department made in accordance with this section.

13 (c) Every transferee required by this section to
14 withhold tax under subsection (b) shall make a return of
15 the amount withheld to the department of taxation not more
16 than twenty days following the transfer date.

17 (d) No person shall be required to deduct and
18 withhold any amount under subsection (b), if the transferor
19 furnishes to the transferee an affidavit by the transferor
20 stating the transferor's taxpayer identification number
21 and:

- 22 (1) The transferor is a resident person; or
23 (2) That by reason of a nonrecognition provision
24 of the Internal Revenue Code as operative

1 under this chapter or the provisions of any
2 United States treaty, the transferor is not
3 required to recognize any gain or loss with
4 respect to the transfer;

5 (3) A brief description of the transfer; and

6 (4) A brief summary of the law and facts
7 supporting the claim that recognition of
8 gain or loss is not required with respect to
9 the transfer.

10 This subsection shall not apply if the transferee has
11 actual knowledge that the affidavit referred to in this
12 subsection is false.

13 (e) An application for a withholding certificate may
14 be submitted by the transferor to the department setting
15 forth:

16 (1) The name, address, and taxpayer
17 identification number, if any, of the
18 parties to the transaction and the location
19 and general description of the real property
20 to be transferred; and

21 (2) A calculation and written justification
22 showing that the transferor will not realize
23 any gain with respect to the transfer; or

24 (3) A calculation and written justification

1 showing that there will be insufficient
2 proceeds to pay the withholding required
3 under subsection (b) after payment of all
4 costs, including selling expenses and the
5 amount of any mortgage or lien secured by
6 the property.

7 Upon receipt of the application, the department shall
8 determine whether the transferor has realized or will
9 realize any gain with respect to the transfer, or whether
10 there will be insufficient proceeds to pay the
11 withholding. If the department is satisfied that no gain
12 will be realized or that there will be insufficient
13 proceeds to pay the withholding, it shall issue a
14 withholding certificate stating the amount to be withheld,
15 if any.

16 The submission of an application for a withholding
17 certificate to the department does not relieve the
18 transferee of its obligation to withhold or to make a
19 return of the tax under subsections (b) and (c).

20 (f) No person shall be required to deduct and
21 withhold any amount under subsection (b) if one or more
22 individual transferors furnishes to the transferee an
23 affidavit by the transferor stating the transferor's
24 taxpayer identification number, that for the year preceding

1 the date of the transfer the property has been used by the
2 transferor as a principal residence, and that the amount
3 realized for the property does not exceed \$300,000.

4 (g) The department may enter into written agreements
5 with persons who engage in more than one real property
6 transaction in a calendar year or other persons to whom
7 meeting the withholding requirements of this section are
8 not practicable. The written agreements may allow the use
9 of a withholding method other than that prescribed by this
10 section or may waive the withholding requirement under this
11 section.

12 (h) Unless otherwise provided in this section, every
13 nonresident person that is a transferee under this section
14 shall submit to the bureau of conveyances a certified
15 Hawaii real property tax act payment verification form
16 issued from the department verifying that the transferee
17 properly made a return of the amount withheld to the
18 department pursuant to the requirements set forth in this
19 section. Submission of a certified Hawaii real property
20 tax act payment verification form to the bureau of
21 conveyances shall be a precondition to recording any
22 transfer of title by a nonresident person that is a
23 transferee under this section.

1 (i) Unless otherwise provided in this section, every
2 nonresident person that is a transferor under this section
3 shall obtain a certified tax clearance certificate from the
4 department verifying that the transferor has filed all
5 required returns and paid all required taxes, penalties,
6 and interest. To comply with the requirements of this
7 subsection, the nonresident transferor shall submit a tax
8 clearance application to the department no later than
9 fifteen days after the transfer date of the real property.
10 Failure of the nonresident transferor to comply with the
11 requirements of this subsection may subject the nonresident
12 transferor to fines, penalties, and interest.

13 (j) The director of taxation shall prepare forms as
14 may be necessary to satisfy the requirements of subsections
15 (h) and (i). The director may also require a nonresident
16 transferee or transferor under this section to furnish
17 information to ascertain the person's compliance with the
18 requirements of subsections (h) or (i), as applicable, and
19 may adopt rules necessary to effectuate the purposes of
20 this subsection pursuant to chapter 91.

21 (k) Notwithstanding anything to the contrary in this
22 section, no transferor or transferee of a time share
23 interest, as defined in section 514E-1, is required to
24 deduct and withhold any amount under subsection (b) or to

1 satisfy the requirements of subsections (h), (i), or (j),
2 if the amount realized for the transfer of a time share
3 interest does not exceed \$50,000."

4 SECTION 2. Statutory material to be repealed is
5 bracketed and stricken. New statutory material is
6 underscored.

7 SECTION 3. This Act shall take effect on January 1,
8 2010.



Title Guaranty of Hawaii, Inc.

235 QUEEN STREET, HONOLULU, HI 96813 • P.O. BOX 3084, HONOLULU, HI 96802

Phone (808) 521-0211

Fax (808) 521-0210

March 24, 2009

Via Email: FINTestimony@Capitol.hawaii.gov

The Honorable Marcus Oshiro, Chair
The Honorable Marilyn B. Lee, Vice Chair
Members of The House Committee On Finance
415 South Beretania Street, Room 308
Honolulu, Hawaii 96813

Re: Senate Bill 1106, S.D. 2, Relating to Taxation
Hearing Date: Wednesday, March 25, 2009
Hearing Time: 3:00 p.m.

Dear Representatives Oshiro and Lee and Members of the House Committee on Finance:

I am writing on behalf of Title Guaranty of Hawaii, Inc. and Title Guaranty Escrow Services, Inc. We respectfully oppose the adoption of Senate Bill 1106, S.D. 2 Relating to Taxation. We testified earlier that we support the philosophy of making sure that valid taxes are collected; however, as with the original draft of the Bill and S.D.1, the mechanism suggested by S.D. 2 continues to place an undue burden on the Bureau of Conveyances and implements a confusing set of criteria for reporting the HARPTA tax payment.

First, the proposed section 235-68(h) requires a nonresident transferee to submit a tax payment verification form to the Bureau, but the bill provides no mechanism for the Bureau to index it. When the transferee intends to sell the property, which could be many years later, there is no good way for the Bureau or the subsequent buyer to determine whether the requirements of this bill have been complied with. In addition, the Bill treats nonresidents and residents inconsistently even though it is the residency status of the transferor that determines whether HARPTA withholding must take place or not. The result is that a resident transferee of property from a nonresident transferor does not have to submit a tax payment verification form under this bill, while a nonresident transferee from a resident must submit a form even though no HARPTA withholding is required. There is also no mechanism for allowing the Bureau to determine whether the transferee is a resident or not. The result will be confusion.

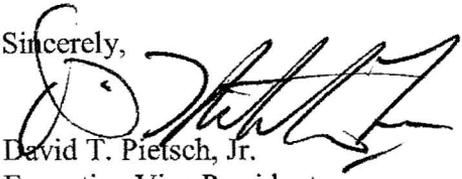
Second, as presently drafted, proposed section 235-68(i) requires the submission of the tax clearance application by the transferor within 15 days following the transfer date. However, the current law allows the transferee 20 days to make the payment. These provisions are inconsistent.

House Committee on Finance
March 24, 2009
Page 2

While we are sure the Bill is well-intentioned, its passage will create inconsistencies, delays and additional expense for the Bureau of Conveyances and for persons buying and selling real property in this State without appreciably aiding the collection of the tax imposed by HARPTA. We respectfully urge the Committee to decline to pass this Bill.

Thank you very much for your consideration and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Pietsch, Jr.", written over a horizontal line.

David T. Pietsch, Jr.
Executive Vice President



American Resort Development Association
c/o PMCI Hawaii 84 N. King Street Honolulu, HI 96817 (808) 536-5688

March 25, 2009

TO: House Finance Committee
Representative Marcus R. Oshiro, Chair
Representative Marilyn B. Lee, Vice Chair

FROM: Ed Thompson
ARDA-Hawaii

DATE: Wednesday, March 25, 2009
Conference Room 308
4:00 p.m.

RE: **SB 1106, SD2, Relating to Taxation**

Chair Oshiro and Members of the Committee:

ARDA-Hawaii is the local chapter of the national timeshare trade association. Hawaii's timeshare industry currently accounts for ten percent of the State's lodging inventory with 7,700 timeshare units and more planned in the future.

ARDA-Hawaii opposes SB 1106, SD2, which requires a nonresident buyer of real property located in Hawaii to furnish to the bureau of conveyances a Hawaii Real Property Tax Act (HARPTA) payment verification form issued from the department of taxation that certifies that the HARPTA withholding requirements were satisfied as a precondition to recording a change in title on the real property. It will also require the seller to submit a certified tax clearance certificate as a condition to transferring real property title.

With the high volume nature of timeshare sales, requiring a tax clearance certificate on potentially every sale of a timeshare interest would be excessively burdensome. We respectfully ask that you hold this measure.

Thank you for the opportunity to provide testimony on this measure.