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TO THE HOUSE COMMITTEE ON FINANCE  
THE TWENTY-FIFTH STATE LEGISLATURE  
REGULAR SESSION OF 2009

Thursday, April 2, 2009  
2:00 p.m.

TESTIMONY ON S.B. NO. 887, S.D. 1, H.D. 1 - RELATING TO ESCROW  
DEPOSITORIES

THE HONORABLE MARCUS R. OSHIRO, 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"). With the necessary amendments that I am requesting today, the Department strongly supports this Administration bill relating to escrow depositories.

The purpose of the bill is to amend and update Hawaii Revised Statutes ("HRS") Chapter 449, the law that governs the licensing and regulation of Escrow Depositories. The Department has been advocating reform of this statute since 2004 to reflect developments in the way the industry operates and the growth in the size of transactions which are routinely handled by Hawaii's escrow depositories, many of

which are undercapitalized. Hawaii's consumers are not adequately protected by the existing statute, which has not been updated in 36 years as to minimum capital requirements. The current statute is also outdated in many other aspects, and does not provide either consumers or escrow depositories with a contemporary framework to conduct escrow transactions.

At a minimum, certain revisions to the escrow depository law are critical to clarify which escrow transactions are covered by the statute and which are not; to update the statute in order to accommodate the significantly larger transactions routinely handled by the industry; to provide for more flexibility in supervising and regulating the industry; and to ensure adequate protection for the consumer.

Several changes made to this measure during its Senate committee hearings have introduced irregularities and problems that must now be addressed and corrected, as follows:

1. At the request of the Senate Majority Research Office, the Department, through my office, the Division of Financial Institutions ("DFI"), earlier provided the following definition of the term "tangible net worth" to that office:

"Tangible Net Worth" means the net worth of a company, which does not include any value derived from goodwill and other intangible assets as defined from time to time by the Financial Accounting Standards Board.  
Tangible net worth is calculated by taking a firm's total assets and

subtracting the value of all liabilities and the value of all intangible assets and goodwill (Tangible Net Worth = Total Assets – Liabilities – Intangible Assets and Goodwill).

However, as you will note, the definition inserted by the Senate Committee on Commerce and Consumer Protection has altered and broadened the scope of that definition by referencing specific entities including “partnership, limited liability corporation (*sic*), or other business entity regardless of corporate designation”. We respectfully submit that this is a problem that requires correction, since Chapter 449, HRS clearly requires, at Sections 449-5 and 449-7.5 (and elsewhere by implication – see, for example, HRS Sections 449-17 and 449-22) that an applicant for an escrow depository license be organized solely as a corporation. We believe that it would be confusing and inappropriate to reference other kinds of legal entities in the definition of an escrow depository’s tangible net worth. We respectfully request that the definition of tangible net worth provided above by the Department be adopted to correct this problem.

2. For the same reason, a related correction is now also required at HRS Section 449-5.5, to eliminate references to any entities other than a corporation, since, as noted earlier, only a corporation may engage in business as a Hawaii escrow depository. Moreover, the reason the Senate Majority Research Office requested a definition of the term “tangible net worth” was, as we understood,

for the purpose of replacing the proposed term “Tangible net capital” with the term “tangible net worth” in HRS Section 449-5.5. The Senate Majority Research Office has inserted the definition of this term without making the related amendment to HRS Section 449-5.5. We therefore respectfully suggest and request that this Committee adopt the proposed amendment to HRS Section 449-5.5 to correct both of these problems and make the necessary changes to this section which are offered as Attachment “A” to my written testimony today.

3. The Department recommends and respectfully requests that the proposed new section entitled “Education”, which was added to Senate Bill No. 887, S.D. 1 by the Senate Committee on Commerce and Consumer Protection at the request of the Hawaii Escrow Association (“HEA”), be deleted for the following reason. The HEA is presently, and always has been free to provide its member escrow depositories with any educational materials, updated legislation, and any other industry-pertinent information or materials on a regular basis, without the need for a statutory mandate to do so, as is being proposed by this particular amendment. One consequence – perhaps unintended – of such an amendment, if enacted, is that HEA will now expose itself to periodic regulatory scrutiny by DFI to ascertain that the HEA is in fact, at all times, adequately discharging duties that will now be statutorily mandated with regard to the education of its

members and could even become subject to enforcement provisions, including administrative penalties under HRS Section 449-4, if it is hereafter determined that HEA has failed to properly and adequately discharge those mandated duties relating to the education of its members. Consequently, we believe that the HEA would be better advised not to seek the enactment of such an amendment to HRS Chapter 449, but rather to continue to fulfill such educational functions on its members' behalf, if it so chooses, as a component of the association's mission statement and/or its internal policies and procedures. Alternatively, the industry may wish to consider putting forward, for future legislative consideration, a more fully developed proposal for a continuing education program requirement that would be applicable to all licensed Hawaii escrow depositories, rather than a program that is limited to trade association members only, and which is presently nonspecific both as to course content and the number of hours of proposed continuing education that are to be provided each year.

4. Finally, we respectfully request the restoration of this measure's effective date provisions as originally introduced.

With the changes requested today, the Department strongly supports this bill and asks for your favorable consideration. Thank you for the opportunity to testify. I would be happy to respond to any questions you may have.

ATTACHMENT "A"

SECTION 5. Section 449-5.5, Hawaii Revised Statutes, is amended to read as follows:

**"§449-5.5 [Net capital.] Tangible net worth.** The tangible net [capital] worth of any corporation engaging in the escrow depository business under this chapter shall be not less than [~~\$50,000.~~] \$250,000. A corporation in lieu of the tangible net [capital] worth requirement may alternatively file a bond for [~~\$50,000~~] \$250,000 conditional upon its satisfactory performance of escrow conditions and satisfaction of all escrow liabilities. The amount of the minimum tangible net [capital] worth of [~~\$50,000,~~] \$250,000, or the bond, or a combination of both tangible net [capital-or] worth and bond totalling [~~\$50,000~~] \$250,000 shall be maintained at all times by the licensee.

~~[Licensees in operation on May 24, 1973, pursuant to this chapter with a net capital of less than \$50,000 shall increase its net capital to \$50,000 or file a bond for \$50,000, or take action so that a combination of its net capital and bond totals \$50,000, before May 24, 1978.]"~~