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GOVERNOR
STATE OF HAWAII

JOBIE M. K. MASAGATANI
CHAIRMAN
HAWAIIAN HOMES COMMISSION

DARRELL T. YOUNG
DEPUTY TO THE CHAIRMAN

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS
P. O. BOX 1879
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COMMENTS OF JOBIE M. K. MASAGATANI, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE AND
COMMITTEE ON JUDICIARY
ON

HB 2356, RELATING TO MEDIATION AFFECTING JUDICIAL FORECLOSURE

February 10, 2014

Chair McKelvey, Chair Rhoads, and Members of the Committees:

The Department of Hawaiian Home Lands (DHHL) provides comments on Section 2 of this bill which amends the definition of

supports the intent of this bill which repeals the sunset date of a pilot program that enables DHHL to request and receive affordable housing credits from each county for units developed on Hawaiian home lands.

Affordable housing credits have afforded the department greater opportunities to gain resources to develop homesteads and, thus, meet our mission to return native Hawaiians to our trust lands. DHHL builds between 100 and 200 units annually statewide, so the credits DHHL receives from the counties account for a small portion of the counties affordable housing credits. Since Act 141 was passed by the legislature in 2009, this program has been very successful for DHHL, but it is set to repeal in 2015. By making this program permanent, DHHL can continue to form private-public partnerships through the

exchange of credits creating resources for the department, and DHHL can earn these resources without requiring any state funds.

Thank you for your consideration of our testimony.

Hawaii Bankers Association

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Presentation To
Committee on Consumer Protection and Commerce (CPC)
Committee on Judiciary (JUD)
February 10, 2014 at 2:10 pm
State Capitol Conference Room 325

Testimony in Opposition to Bill H.B. 2356

TO: The Honorable Angus L. K. McKelvey, Chair – CPC
The Honorable Derek S. K. Kawakami, Vice Chair – CPC
Members of CPC

The Honorable Karl Rhoads, Chair – JUD
The Honorable Sharon E. Har, Vice Chair – JUD
Members of JUD

My name is Neal Okabayashi and I testify for the Hawaii Bankers Association (HBA). HBA is the trade association representing all FDIC insured depository institutions with branch offices in the State of Hawaii.

The Hawaii Bankers Association believes that in light of changes to the law promulgated by the Consumer Financial Protection Bureau under its rule making power, this bill is unnecessary, redundant, and does not help borrowers. The Consumer Financial Protection Bureau is an unusual federal regulatory body because in the words of its director, Richard Cordray, "we are the only federal agency with the sole mission of protecting consumers . . . " It also is an independent agency with no oversight by a board or commission, and does not rely on congressional appropriations for its budget.

In January of 2014, two rules of the Consumer Financial Protection Bureau went into effect. One rule relates to foreclosures, including requirements for lenders to assist borrowers seeking loan mitigation. The other implements a provision in the Dodd-Frank act requiring lenders to make mortgage loans that the borrower can repay. These mortgages are called qualified mortgages and the rule is referred to as the QM rule.

The QM rule impacts Hawaii disproportionately because if the borrower's debt to income ratio is greater than 43%, absent certain exceptions, the loan will not be a QM loan, and many lenders will be wary of making non-QM loans. It is not unusual in Hawaii for a borrower to have a debt to income ratio that exceeds 43%. Thus unless Fannie Mae is willing to buy the loan, a borrower can only ask a local lender to make what we call a portfolio loan, meaning a loan we keep in our portfolio and do not sell to Fannie Mae. Lenders from the continent will not make portfolio loans in Hawaii, as they are transaction oriented and have little interest in establishing an overall relationship with our residents. Therefore, it will be up to the local lenders to fill the credit availability void.

We think it is important to understand that the new foreclosure rules are much better than mediation because it requires the lenders subject to the rule to engage in loan mitigation efforts before and during the foreclosure process. The new rules also prohibit the lender from filing for foreclosure until the loan is 120 days (4 months) delinquent because, in the words of the Consumer Financial Protection Bureau, "This will give borrowers reasonable time to submit modification applications."

Lenders are required to reach out to delinquent borrowers, including providing the borrower with written examples of loan mitigation options. The lender must also notify the borrower of credit counseling options, along with contact information. And, the lender must also assist the borrower to complete an incomplete application. Once submitted, the lender must evaluate and decide on the loan mitigation application within 30 days of receipt, and should the request be denied, the borrower has an appeal right, to someone who did not handle the original application.

In summary, before foreclosure is even filed, there has been ample opportunity for a thorough review of the borrower's current financial condition to determine if loan mitigation is possible. If the request is denied, the borrower is informed of the reasons for denial and appeal possibilities.

The Consumer Financial Protection Bureau requires that even after foreclosure is initiated, if a borrower applies for loan mitigation, the application must be evaluated. Since dual tracking is prohibited, the foreclosure process is suspended at such time. In fact, as long as an application is filed at least 37 days before the auction, the lender has 30 days to respond, and the sale may not occur if the application is pending. If circumstances have changed, the borrower can submit a new application even though an application has been previously denied.

Thus state mediation will not help the borrower because it would merely repeat the loan mitigation process with no different end result, since the same financial picture will be presented. The only result is delay, which results in a greater loss for the lender and possibly a condominium association.

Judicial foreclosures take a year on Oahu to be completed, and about a year and a half on the neighbor islands, and adding mediation to the process, might elongate the process by seven months under the present law on mediation, which all admit has serious defects. A better approach is to rectify the defects in the nonjudicial foreclosure mediation process to encourage Fannie Mae to once again use nonjudicial foreclosures.

While we recognize the helpful role played by credit counselors, as we do often work with them, this mandated State mediation will not help credit counselors help borrowers simply because Consumer Financial Protection Bureau rules make it legally impossible for counselors to play a helpful role. The data demonstrates that the longer a loan has been delinquent, the harder it is to craft a successful loan mitigation agreement. In a study by HUD on foreclosure counseling, released May 16, 2012, the success rate involving counseling was only 30% when the loan was six or more months delinquent, and that the 69% figure was reached when counseling was provided prior to delinquency or in the early stages of delinquency (1-3 months). Because of the Consumer Financial Protection Bureau rules, the timely intervention of a credit counselor envisioned by this bill will be legally impossible because a lender cannot send the first required notice of a foreclosure until the borrower has been afforded a chance to seek loan mitigation, which is a four month period. That four month period is the period when the credit counselor's role is helpful, and a survey of local banks shows that our success rate in the early stages of

delinquency mirrors the success rate reported in the HUD study. Under this bill, the loan will be six or more months delinquent before the visit to the credit counselor and the claims of a high success rate will not be replicated.

For one, I am familiar with the results of one local bank and its efforts on legitimate loan mitigation application for owner-occupants. For 2013, it was an 80% approval rate.

Interestingly, we have seen an upswing in applicants for loan mitigation who are not in distress but only seek a free refinance; these are borrowers who have the means of paying the loan, and in fact were not delinquent but merely did not want to pay the expense of a refinance to lower their interest rate. While these borrowers will not be in foreclosure, it does show that the landscape has changed.
When a judicial foreclosure action is brought against a borrower, the court's oversight over the proceedings also provides added protection for the borrower. The court then becomes the independent third party, which can serve in place of the mediation process, and courts have the inherent power to order mediation when appropriate. In fact, there is an ongoing judicial foreclosure mediation program on the Big Island, and on the other islands each judge does have the power to do so on a case by case basis as the facts warrant.

To the extent that this bill is aimed at certain national lenders, the National Mortgage Settlement of 2012, which was negotiated among state attorney generals (except for the Oklahoma attorney general), the U.S. Department of Justice, and five major lenders/servicers, should alleviate that concern. As noted by the Consumer Financial Protection Bureau, the five largest servicers service 53% of mortgage loans in the country, and those five are subject to the National Mortgage Settlement (and the oversight of a monitor) as well as the new Consumer Financial Protection Bureau rules. Since the concern is really about national lenders, the National Mortgage Settlement and the new Consumer Financial Protection Bureau rules address concerns of untoward behavior.

It should be noted that the Consumer Financial Protection Bureau does not believe in a "one size fits all" solutions as this bill does. The Consumer Financial Protection Bureau observed there is difference between the large lenders and more community oriented lenders. The Consumer Financial Protection Bureau noted: "The mortgage servicing industry, however, is not monolithic. Some servicers provide high levels of customer service. . . . Other servicers provide high levels of customer service because they are servicing loans of their own retail customers within their local community or (in the case of credit unions) membership base. These servicers seek to provide other products and services to consumers – and to others within the community or membership base – and thus have an interest in preserving their reputations and relationships with their consumers." Accordingly, the Consumer Financial Protection Bureau has exempted smaller community lenders from the foreclosure rules.

In other words, the Consumer Financial Protection Bureau said that certain lenders who are local lenders that serve their community have different incentives than large national lenders because the local banks/servicers have "an interest in maintaining a relationship with borrower as a customer of the bank or thrift or member of the credit union to provide other banking services. Further such servicers must be conscientious of reputational consequences within a community or member base." The views of the Consumer Financial Protection Bureau that local lenders are incentivized to help their borrowers are reflected in the success rate of local lenders and the widely held view that the local lenders are not the problem.

The Consumer Financial Protection Bureau said it was "not aware of any evidence indicating the performance of these types of institutions [community banks] in servicing the mortgage loans they originate or own generally results in substantial consumer harm." That statement of the Consumer Financial Protection Bureau is consistent with the message received from local credit counselors.

We also question the need for this measure when it is clear that locally and nationally, foreclosures, delinquencies, and bankruptcies are considerably lower. The Office of the Comptroller of the Currency (federal banking regulator for national banks such as Bank of America) publishes a Mortgage Metrics Report quarterly and the report of the third quarter of 2013 shows that as measured from 2008, re-default rates on loan modifications one year after loan modification has decreased from 57% to 18.9%. This decrease reflects a better economy and improved ability of lenders to work with borrowers to assist them. This trend will be supported and improved by the new Consumer Financial Protection Bureau rules.

Given the improving performance of national lenders in loan mitigation, the stellar performance of local lenders in loan mitigation and who did not engage in the risky lending that precipitated the foreclosure crisis, declining foreclosures and bankruptcies, one is reminded of the old adage: "if it ain't broke, don't fix it."

Accordingly, we are not aware of any problem that this bill will resolve in today's world, and this bill has the potential to create disincentives to making portfolio loans, and therefore we oppose this bill strongly.

Thank you for the opportunity to submit this testimony and please let us know if we can provide further information.

Neal Okabayashi
525-8785

MBa
MORTGAGE BANKERS ASSOCIATION

Mortgage Bankers Association of Hawaii
P.O. Box 4129, Honolulu, Hawaii 96812

February 7, 2014

The Honorable Angus L.K. McKelvey, Chair,
The Honorable Derek S.K. Kawakami, Vice Chair, and
Members of the House Committee on Consumer Protection and Commerce
State Capitol, Room 325
Honolulu, Hawaii 96813

Re: HB 2356 Relating to Mediation Affecting Judicial Foreclosure

Chair McKelvey, Vice Chair Kawakami, and Members of the House Committee on Consumer Protection and Commerce:

I am Linda Nakamura, representing the Mortgage Bankers Association of Hawaii ("MBAH"). The MBAH is a voluntary organization of individuals involved in the real estate lending industry in Hawaii. Our membership consists of employees of banks, savings institutions, mortgage bankers, mortgage brokers, financial institutions, and companies whose business depends upon the ongoing health of the financial services industry of Hawaii. The members of the MBAH originate or support the origination of the vast majority of residential and commercial real estate mortgage loans in Hawaii. When, and if, the MBAH testifies on legislation, it is related only to mortgage lending.

The MBAH opposes House Bill 2356 Relating to Mediation Affecting Judicial Foreclosure.

The Consumer Financial Protection Bureau (CFPB) issued new mortgage servicing rules which provides for strong protections for homeowners facing foreclosure. These mortgage servicing rules were placed into effect on January 10, 2014 requiring servicers to comply.

The new CFPB mortgage servicing rules require the following:

- Early notice and intervention with delinquent homeowners by making contact by the 36th day of delinquency
- Notification of foreclosure alternatives when the homeowner is 45 days or more past due
- Provide and maintain direct access to servicing personnel to assist with foreclosure alternatives
- Restricts commencement of foreclosure until the homeowner is 120 days or more past due
- Restricts commencement of foreclosure with a loss mitigation agreement

- Restricts dual tracking – foreclosure cannot commence or is required to be put on hold if an application for loss mitigation is received by a servicer
- Policies and procedures in place to review a homeowner's request for loss mitigation timely and fairly
- Accept and review all loss mitigation requests received during foreclosure and up to 37 days prior to a foreclosure sale

In addition to the above CFPB requirements, the Government Sponsored Enterprises (GSE), also known as Fannie Mae and Freddie Mac, have specific loss mitigation requirements imposed on servicers. Fannie Mae requires outreach beginning at 3 days after the payment due date for certain homeowners and a loss mitigation solicitation packet to be sent to homeowners who are 30 days or more delinquent and continued outreach until contact is made.

Prior to any foreclosure action and even during a foreclosure action, any delinquent homeowner will have had multiple opportunities to request for and be reviewed for loss mitigation options to avoid foreclosure.

The MBAH believes that this bill will duplicate current CFPB and GSE requirements.

Thank you for the opportunity to present this testimony.

LINDA NAKAMURA
Mortgage Bankers Association of Hawaii

HAWAII FINANCIAL SERVICES ASSOCIATION

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February 10, 2014

Rep. Angus L.K. McKelvey, Chair
Rep. Derek S.K. Kawakami, Vice Chair
and members of the House Committee on Commerce and Consumer Protection
Rep. Karl Rhoads, Chair
Rep. Sharon E. Har, Vice Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 2356 (Mediation Affecting Judicial Foreclosure)**
Hearing Date/Time: Monday, February 10, 2014, 2:10 P.M.

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

The HFSA opposes this Bill.

The purposes of this Bill are to: (1) expand the application of mandatory mortgage foreclosure dispute resolution by requiring mortgagees, including Hawaiian home lands trust homestead beneficiaries and lawful successors in interest, to participate, at the mortgagor's election, in mediation to avoid foreclosure or mitigate damages from foreclosure prior to filing a judicial foreclosure action for property that has been the mortgagor's primary residence for a specified period, and (2)apply the dispute resolution requirement to judicial foreclosure actions filed prior to the effective date of this bill and pending an initial court hearing.

This Bill attempts to address issues related to servicing delinquent mortgage loans. However, this Bill is not needed because of the existing practices of lenders and servicers, the terms of the National Mortgage Settlement, the requirements in the Consumer Financial Protection Bureau's new mortgage servicing rules, and recent Hawaii foreclosure trends.

A foreclosure action is the last resort for a lender when a borrower's mortgage loan is delinquent. Before commencing a foreclosure action (whether judicial or nonjudicial), a lender will consider many pre-foreclosure options such as a loan modification, a short sale, or a deed in lieu of foreclosure.

Furthermore, five major national lenders/servicers are subject to the court-approved National Mortgage Settlement of 2012 involving 49 state Attorneys General (including Hawaii's Attorney General) and the U.S. Department of Justice. The settlement provides relief, such as loan modification or refinancing, for eligible homeowners. There are also new servicing standards.

Next are the federal Consumer Financial Protection Bureau's new mortgage servicing rules. Last year on March 14, 2013, your Committees had a joint hearing on Senate Bill 1370, S.D. 2 (Mediation Affecting Judicial Foreclosure). That Bill is virtually identical to House Bill 2356 except for the reference now to Hawaiian home lands trust beneficiaries. In our testimony in opposition to Senate Bill 1370, we said that the new mortgage servicing rules of the Consumer Financial

Protection Bureau would be effective on January 10, 2014. Now that those rules are in place, we would like to repeat the quote from last year's testimony:

> "The new rules require servicers to provide loss mitigation options to delinquent borrowers prior to foreclosure and cannot foreclose until the mortgage is 120 days past due. Servicers will be required to make live contact or make a good faith attempt with the delinquent borrower by the 36th day of delinquency and provide the borrower with the available loss mitigation options. Servicers will be required to send out a written notice of the available loss mitigation options by the 45th day of delinquency. Servicers will be required to provide the borrower with continuity of contact and be accessible to the borrower by phone; have access to all the information the borrower provided; and be able to assist the borrower when they call. Servicers will be required to establish and follow loss mitigation procedures. These procedures must acknowledge a borrower's application for loss mitigation options within 5 business days of receipt of an application. If the application is not complete, the borrower must be provided with a list of information or documentation that is required to complete the application. Servicers are required to evaluate a borrower for loss mitigation options if the loss mitigation application is received 37 days before a scheduled foreclosure sale date and complete the loss mitigation evaluation within 30 days of receipt of a complete loss mitigation application and provide the borrower with a written decision. A borrower is able to appeal a denial of a loss mitigation request if the appeal is received at minimum 90 days prior to a scheduled foreclosure date. Servicers will not be allowed to "dual track," whereby the servicer simultaneously evaluates a loan for loss mitigation options at the same time the foreclosure is in process."

Finally, a review of court statistics from the State Judiciary for foreclosure cases filed in 2013 shows that the general trend has been a decline in recent filings month-over-month both statewide and in each circuit (Honolulu, Maui, the island of Hawaii, and Kauai). A Honolulu Star-Advertiser article dated February 5, 2014 reports that some "suggest that Hawaii's growing economy and real estate market are helping homeowners stay out of loan trouble while lenders also make more efforts to resolve delinquencies outside of foreclosure."

The mediation process envisioned in this Bill is unlikely to benefit a borrower who hasn't already been assisted by the existing practices of lenders and servicers, by the terms of the National Mortgage Settlement, by the requirements in the Consumer Financial Protection Bureau's mortgage servicing rules, and by Hawaii's improving economy and real estate market. One foreseeable consequence of this Bill, however, will be delays in an already long judicial foreclosure process. These delays will result in further losses for the lender and, if the property is a condominium unit, increased losses for the condominium association.

Based on all of the above, **this Bill should be held**.

Thank you for considering our testimony.

Marvin S.C. Dang

MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

(MSCD/hfsa)

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Testimony to the House Committees on Consumer Protection and Commerce and Judiciary
February 10, 2014

Testimony in Opposition to HB 2356, Relating to Mediation Affecting Judicial Foreclosure

To: The Honorable Angus McKelvey, Chair
The Honorable Derek Kawakami, Vice-Chair
The Honorable Karl Rhoads, Chair
The Honorable Sharon Har, Vice-Chair
Members of the Committees

My name is Stefanie Sakamoto, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 75 Hawaii credit unions, representing approximately 804,000 credit union members across the state. We are opposed to HB 2356, Relating to Mediation Affecting Judicial Foreclosure.

Approximately 60 of Hawaii's credit unions currently offer mortgages.

This bill would require mediation before a judicial foreclosure action. Credit unions often have close relationships with their members, and will do everything within reason to help keep homeowners from losing their homes when a member's mortgage loan becomes delinquent. Credit unions begin working with their members as soon as a potential default becomes apparent and provide their members with alternatives to foreclosure as a matter of course. This may include loan modification, or other alternatives.

Pre-foreclosure mediation will only duplicate these efforts. If the member has been unable to qualify for a loan modification or other alternative by that point, it is highly unlikely that pre-foreclosure mediation will do anything but delay a final resolution. Making mediation mandatory for judicial foreclosures could lengthen the foreclosure process by six to eight months. Lenders, including credit unions, will be more likely to begin the foreclosure process sooner, which is of no benefit to homeowners.

Thank you for the opportunity to provide comments.

MAUI COUNTY FEDERAL CREDIT UNION

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February 7, 2014

Testimony to the House Committees on Consumer Protection and Commerce, Judiciary, and Finance
In Opposition to HB 2356, Relating to Mediation Affecting Judicial Foreclosure

To: The Honorable Chairs and Members of the Committees

My name is Wesley Higuchi, and I am testifying as the Chief Lending Officer for Maui County Federal Credit Union.

We have been offering mortgages for a number of years and have **needed** to both modify loans for and foreclose on a number of our members. We are in opposition to this bill for the following reasons:

1) Doesn't add any additional benefit to our membership – for every loan that becomes delinquent we work with our members to attempt to solve not only their short term financial difficulty, but seek a long term alternative where they are able to successfully meet their financial obligations. This already includes having them seek credit counseling and meeting with them face to face to discuss their situations.
2) Adds to cost of foreclosure action – this will increase the costs for our remaining members.
3) Adds to the time for foreclosure action – reading through the requirements of the bill, this Act would add up to 6 months to the process. For those that truly want to work with us, we are already meeting with them.
4) Duplicates the purpose and requirements of current federal regulations and adds another layer of regulatory burden especially to smaller financial institutions to comply with.
5) Why are mortgagees required to contribute to the mortgage foreclosure dispute resolution special fund established under section 667—86 and not the mortgagor?

This bill will not increase the number of modifications we do and is overly burdensome to adhere to. Look at the requirements and see how many items are there that a borrower who had less than honorable intentions could use to delay the process.

I have personal experience working with members who are facing financial hardship and seeing the joy on their faces when we offer them hope of staying in their homes even after falling many months delinquent. I also have the experience of having members avoid contact with us and do everything in their power to delay foreclosure, not because they want to pay, but because they don't want to pay.

I agree that lenders need to work with their borrowers and the intent of this bill is fine, but we already fulfill the intent of this bill and at some point, if a borrower is unable or unwilling to meet their obligations, their collateral needs to be repossessed to protect the financial institution as well as other consumers from having to pay for additional losses.

Thank you for the opportunity to share with you.

Wes Higuchi
Chief Lending Officer, Maui County FCU