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TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2013

Date: Wednesday, January 30, 2013
Time: 2:00 p.m.
Conference Room: 325

**TESTIMONY ON HOUSE BILL NO. 835**
**RELATING TO SECURITIES LAW**

TO THE HONORABLE ANGUS L.K. MCKELVEY, CHAIR, AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to testify. My name is Tung Chan, Commissioner of Securities and head of the Business Registration Division (Division) of the Department of Commerce and Consumer Affairs. The Department strongly supports this administrative bill.

The Hawaii Uniform Securities Act, HRS Chapter 485A, contains some errors and inconsistencies. This measure amends the Hawaii securities laws to correct and clarify these errors and inconsistencies. The bill makes corrections in the following areas:

1. This bill corrects a grammatical error, changing the verb "gives" to "give" in the definition of a "security."

2. This bill amends the definition of a "security" to correctly incorporate the fourth element of an investment contract to track the language of Hawaii case law as determined by the Hawaii Supreme Court in State v. Hawaii Market Center, Inc., 52 Haw. 642, 485 P.2d 105 (1971). For the past 35 years from 1971 until the codification of the definition of investment contract as adopted in the 2006 version of the Uniform Securities Act, HRS Chapter 485A, the definition of investment contract has been well established. The fourth element was inadvertently altered in the 2006 codification of the Hawaii case law and this bill amends the language to properly track the Hawaii case law.

3. This bill corrects an erroneous reference to section 15(h)(2) of the Securities Exchange Act of 1934 (15 U.S.C 78(o)(2)). HRS Section 485A-402(b)(1) is supposed to point to the de minimis transactions exemption in the federal laws which is now found at section 15(i)(3) of the Securities Exchange Act (15 U.S.C. 78o(i)(3)). This bill changes the reference to the correct federal provision and adds clarifying language.

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

TESTIMONY OF THE AMERICAN COUNCIL OF LIFE INSURERS
COMMENTING ON HOUSE BILL 835, RELATING TO SECURITIES LAW

January 30, 2013

Via e mail: houseinterpreter@capitol.hawaii.gov

Honorable Representative Angus L. K. McKelvey, Chair
Committee on Consumer Protection & Commerce
State House of Representatives
Hawaii State Capitol, Conference Room 325
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair McKelvey and Committee Members:

Thank you for the opportunity to comment on HB 835, relating to Securities Law.

Our firm represents the American Council of Life Insurers ("ACLI"), a Washington, D.C., based trade association with more than 300 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers' products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 90 percent of industry assets and premiums. Two hundred thirty-two (232) ACLI member companies currently do business in the State of Hawaii; and they represent 94% of the life insurance premiums and 92% of the annuity considerations in this State.

As drafted, Section 1 of HB 835 amends the definition of a "security" as set forth in Hawaii Revised Statutes, Section 485A-102, to correctly state the fourth element of an investment contract consistent with Hawai'i's Supreme Court decision in State v. Hawaii Market Center, Inc., 52 Haw. 642 (1971) (at page 3 lines 3 to 5 of the bill).

ACLI would suggest that Section 1 of the bill include an additional amendment to the definition of a "security" so as exclude a variable contract as a "security" under the laws of this State.

Hawaii is one of a minority of jurisdictions that include variable life insurance products and annuity contracts in whole or in part as a security under its laws. Thirty-five states across the country exclude ***all*** insurance, endowment and annuity contracts, as a security under their states' laws; and only 9 states (including Hawaii) define variable contracts as a security. Further, 48 states, including Hawaii, provide the insurance commissioner with exclusive jurisdiction to regulate the issuance and sale of variable contracts.

National state legislative groups have studied and oppose the inclusion of variable annuity contracts as a "security". The American Legislative Exchange Council (ALEC) and the National Conference of Insurance Legislators (NCOIL) are both on record as opposing creation of yet

another layer of regulation by state securities divisions by the inclusion of variable life insurance products and variable annuities within the definition of a state security.

As variable life and the variable annuity are products sold in all of the 50 states, it is important that the variable contracts be regulated in accordance with uniform national standards and rules.

Regulation at the state level by both the Hawaii Insurance Division and the Securities Division is redundant and unnecessary.

Under current Hawaii law, the variable annuity contract is subject to not one, but 4 levels of state and federal oversight. This oversight is provided by the Securities and Exchange Commission (SEC), the National Association of Securities Dealers (NASD), the Hawaii Insurance Division and the Hawaii Securities Division. No other financial product faces four levels of state and federal regulation.

Duplicative regulation opens the door to possible conflicts between the Hawaii Securities Division, Hawaii's Insurance Division, the SEC, and the NASD. The existing aberrant statutory scheme creates an uncertain regulatory environment that could further potentially increase the costs of legal advice, compliance and operating expenses. For example, sales literature that has already been approved by the Insurance Commissioner, the SEC, and the NASD, could nevertheless be deemed unacceptable by the Hawaii Securities Commissioner through the Commissioner's antifraud oversight. This type of conflict could be very expensive, because the life insurance company spends significant resources obtaining SEC approval of the registration statement and prospectus. All advertising is a subset of the prospectus, and all advertising must be filed with the SEC and approved in advance by the NASD. As stated previously, Article 10D of the Hawaii Insurance Code regulates the use and content of sales literature. If the Securities Commissioner has the authority to declare the use of this thrice approved sales literature fraudulent, it would cause significant marketplace dislocation, expense and delay.

The Securities Commissioner's Regulation of the Variable Annuity Contract is Expressly Prohibited By Existing Law.

Hawaii's Insurance Code currently states:

> Notwithstanding any other provision of law, the commissioner shall have sole and exclusive authority to regulate the issuance and sale of variable contracts and to provide for licensing of persons selling such contracts, and to issue such reasonable rules and regulations as may be appropriate to carry out the purposes and provisions of this section. (emphasis added) §431: 10D-118(d), Hawaii Revised Statutes.

Thus, for the foregoing reasons ACLI submits that paragraph (2) of HRS Section 485A-102, which is set forth in of Section 1 of HB 835 (at page 2, lines 5 to 9), should be amended to exclude the variable contract as a "security" to read as follows:

> (2) Does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period.

Again, thank you for the opportunity to comment on HB 835.

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