

ACT 231

H.B. NO. 2720

A Bill for an Act Relating to Activity Providers and Activity Desks.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the visitor industry is the State's single largest industry by far. For the foreseeable future, the visitor industry will remain the primary economic force driving Hawaii's economy as it continually generates directly or indirectly over one-third of the State's total employment. It is imperative that the visitor industry not only remain competitive with other resort areas of the world, but also increase its productivity to keep pace under the currently depressed economic conditions prevalent throughout our country. The continued success of Hawaii's visitor industry, and the State's economy lie largely in its ability to compete and successfully draw visitors to the islands. This, in turn, will depend greatly on the quality of service provided to visitors and the measure of satisfaction visitors experience regarding the services they receive. Of these services, a very great number of visitors to Hawaii avail themselves of various tourist activities offered throughout the State by activity desks and activity providers.

The legislature further finds that it is imperative that visitors receive predictable and a routinely high quality of services, particularly from activity desks and activity providers, to enhance visitor satisfaction in order for Hawaii's visitor industry to remain competitive in the world tourism market. Also, the legislature further finds that activity desks and activity providers should not be burdened unnecessarily in their commercial activities by regulatory requirements ill-suited to the nature of their businesses. The viability of activity desks and activity providers is vital to the health and growth of the entire visitor industry.

In light of this, the legislature finds that both consumers, especially visitors to Hawaii, and activity providers, require protection from potential irregularities in the commercial operation of activity desks. The legislature previously noted in House Standing Committee Report No. 777-90, dated March 2, 1990,

that certain activity desks allegedly covered up the names and telephone numbers of activity providers with their own, thus preventing consumers from dealing directly with activity providers. Conference Committee Report No. 39, dated April 26, 1990, viewed this practice of "stickering" as "deceptive and not in the best interest of consumers." In the following year, Act 240, Session Laws of Hawaii 1991, was enacted to amend Act 214, Session Laws of Hawaii 1990, by requiring client trust accounts to "be established and maintained for the benefit of the consumers paying money to the activity desk."

In addition, the legislature also established various measures to protect activity providers, which included the provision of a "stickering" ban, the prompt payment of fees to activity providers, injunctive relief and damages to injured activity providers, and the maintenance of client trust accounts by activity desks. Although these accounts ensure that activity providers are paid, they also protect consumers who pay for activity services.

While House Standing Committee Report No. 844, dated March 8, 1991, noted that there may be a need for a bonding requirement, the Sixteenth Legislature of 1991 was unable to act accordingly because of time constraints.

The legislature finds that the process of obtaining either a bond or an irrevocable letter of credit will entail a credit check of the applicant. This will further help to ensure that activity desks are financially responsible, and thus protect both the activity providers and the consuming public from irregular commercial practices. In addition, because representatives from activity desks have noted that the maintenance of client trust accounts mandated by Act 240, Session Laws of Hawaii 1991, has placed great hardship on the entire activity desk industry, the legislature finds that the option of obtaining either a bond or a letter of credit would greatly enhance the administrative efficiency of activity desks.

Accordingly, the purpose of this Act is to further protect activity providers and the consuming public by offering activity desks the option to post a bond or a yearly irrevocable letter of credit naming the director of commerce and consumer affairs as the obligee or beneficiary, respectively, in lieu of maintaining client trust accounts.

SECTION 2. Act 240, Session Laws of Hawaii 1991, is amended by amending Section 1 to read as follows:

""SECTION 1. Act 214, Session Laws of Hawaii 1990, is amended by amending Section 1 to read as follows:

"SECTION 1. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER ACTIVITY PROVIDERS AND ACTIVITY DESKS

§ -1 **Definitions.** Whenever used in this chapter, unless the context otherwise requires:

"Activity desk" means any sole proprietorship, organization, trust, group, association, partnership, corporation, society, or combination [of such,] thereof, which for compensation or other consideration, acts or attempts to act as an intermediary to sell, contract for, arrange, or advertise that it can or will arrange, or has arranged, activities which are furnished by an activity provider. This chapter shall not apply to any hotel as defined under section 486K-1, or air carrier as

defined by the Federal Aviation Act of 1958 (49 USCS Appx §1301), as amended, for services for which they do not accept consumer moneys for services other than their own.

"Activity provider" means an individual, firm, corporation, association, partnership, or any group of persons, whether incorporated or not, which provides specialized air, land, or sea tour excursions and activities, but does not mean sellers of airline coupons or tickets.

"Department" means the department of commerce and consumer affairs.

"Director" means the director of commerce and consumer affairs.

"Net sales" means gross sales minus the commission paid to activity desks.

§ -2 Registration required. (a) Activity desks shall register with the director prior to engaging in the business of selling, contracting for, arranging, or advertising that it can or will arrange, activities which are furnished by an activity provider. Notwithstanding section -7, any activity desk that violates the provisions of this section or rules promulgated pursuant thereto shall be fined a sum of \$100 for each day the activity desk is in violation. The sum shall be collected in a civil suit brought by the department.

(b) Registration shall expire on December 31 of each odd-numbered year. Before December 31 of each odd-numbered year, the director or the director's authorized delegate shall mail a renewal application for registration to the address on record of the registrant.

(c) The director by rule, shall establish fees and requirements for registration, maintenance of registration, renewal, restoration of registration, of activity desks.

[§ -2] **§ -3 Prohibited acts.** No activity desk shall engage in any of the following practices:

- (1) Covering, concealing, or obscuring the name, address, or telephone number of an activity provider in any card or brochure;
- (2) Placing a telephone number, address, or other information on any card, brochure, or other advertising material produced or published by an activity provider, whether by decal, sticker, stamp, or otherwise, without identifying the activity desk by name and address;
- (3) Using a promotional card or brochure that does not clearly display the name and telephone number of the activity provider whose activity is being sold or booked when the activity is located in this [state; or] State;
- (4) Withdrawing any funds of a consumer from a client trust account, other than a sales commission up to a maximum of fifteen per cent or to make a refund to the consumer, until the activity provider has been paid[.]; or
- (5) Failing to possess a current and valid registration prior to engaging in business or advertising as an activity desk.

[§ -3] **§ -4 Payment provision.** Unless the express written contract has a provision to the contrary, payment [is] shall be due and payable [forty-five] thirty days from the date of invoice.

[§ -4] **§ -5 Legal rate; computation.** Except as otherwise permitted by existing written contract, any activity desk [who] that directly or indirectly receives any interest on the payment due to the activity provider, shall remit the

interest and the payment due to the activity provider; provided that if the interest and payment due are not remitted within [forty-five] thirty days from the date of invoice, interest on the unpaid balance of the interest and payment due shall accrue at the rate of one per cent per month from the due date.

[§ -5] **§ -6 Injunctive relief; suits.** (a) Any activity provider may bring suit to enjoin any violation of this chapter and may sue in the circuit court in the circuit in which the defendant resides or has an agent or in which the violation has occurred.

(b) Any activity providers association may bring suit to enjoin any violation of this chapter and may sue in the circuit court in the circuit in which the [defendent] defendant resides or has an agent or in which the violation has occurred. The relief available to an activity providers association [is] shall be limited to injunctive and declarative relief and [does] shall not include a right to damages. As used in this section, "activity providers association" means a bona fide trade association of activity providers.

(c) The prevailing party, in a civil action brought under [the provisions of] this chapter, shall be entitled to recover the costs of the suit, including reasonable attorney's fees.

[§ -6] **§ -7 Action for damages.** Any activity desk shall be liable to the activity provider for a violation of this chapter for any damages which result from [such] a violation. Damages shall be awarded at the rate of no less than \$1,000 for each violation. Violations shall be calculated [by the following formula:] as follows:

- (1) For violations of section [-2(1)] -3(1), (2), or (3), by multiplying the number of days the violations occurred by the number of locations of an activity desk where the violations occurred; [or]
- (2) For violations of section [-2(4)] -3(4), by counting the number of days where the client trust account held funds insufficient to meet the requirements of section [-2(4).] -3(4); and
- (3) Notwithstanding [the above formula,] paragraphs 1 and 2, not more than \$10,000 shall be awarded if the activity desk has not previously been required to pay damages to an activity provider pursuant to this section.

[§ -7] **§ -8 Requirements for offering discounts.** When a discount offered for any activity is contingent upon any requirement that the recipient of the discount first attend a sales presentation of any kind, the activity desk shall disclose [such] the requirement in writing to the recipient of the discount before any payment is made. Failure to do so shall constitute a false and deceptive business practice subject to a civil fine of not less than \$1,000 per day for each occurrence.

[§ -8] **§ -9 Client trust accounts; maintenance of and withdrawal from such accounts.** (a) Within three business days of receipt, an activity desk shall deposit all sums received from a consumer, for excursions or activities offered by the activity desk in a trust account maintained in a federally insured financial institution located in Hawaii.

(b) The trust account required by this section shall be established and maintained for the benefit of the consumers paying money to the activity desk. The activity desk shall not in any manner encumber the amounts in trust and shall not withdraw money therefrom except: (1) in partial or full payment for excursion

or activities to the activity provider directly providing the services; or (2) to make refunds as required by this chapter.

(c) This section shall not prevent the withdrawal from the trust account of: (1) the amount of the sales commission, up to a maximum of fifteen per cent; (2) any interest earned and credited to the trust account; (3) refunds; or (4) remaining funds of a consumer once [all excursion or activities have been provided or once tickets or other similar documentation binding upon the ultimate] the activity provider [of the activity have been provided.] has been paid.

(d) At the time of registration, the activity desk shall file with the department the account number and the name of the financial institution at which the trust account is held[.] or submit a bond or letter of credit as provided in section -10. The activity desk shall notify the department of any change in the account number or location within one business day of the change.

(e) The director may, by rule, allow for the use of other types of funds or accounts provided that the protection for consumers is no less than that provided by this section.

§ -10 Performance bond and irrevocable letter of credit as alternative to client trust account required of activity desks; coverage amount and computation; annual report and option; adjustments; coverage upon transfer. (a) If a client trust account is not established and maintained as required under section -9, no activity desk shall be permitted to operate in the State unless the activity desk:

- (1) Posts a bond which is a performance or financial guaranty type bond naming the director as the obligee and which may be canceled only if the activity desk gives sixty days prior written notice to the surety or if the surety gives thirty days prior written notice to the director of cancellation of the bond; or
- (2) Obtains an irrevocable letter of credit which is a guarantee of payment for a term of one year naming the director as beneficiary, with a provision for automatic extension for additional annual periods, and which may be canceled only if the activity desk gives prior written notice by certified mail to the director and to the issuer at least ninety days before the letter's expiration date or the date on which the activity desk intends the letter to cease being effective or the issuer gives prior written notice by certified mail to the director at least sixty days before the expiration date.

(b) The bond or letter of credit shall be issued by a surety or federally insured lending institution authorized to do business in the State to indemnify any consumer who may suffer loss as a result of nonperformance by an activity desk.

(c) An activity desk shall not provide the required coverage through multiple bonds or irrevocable letters of credit but shall provide either a single bond or a single irrevocable letter of credit. An activity desk may substitute the bond with an irrevocable letter of credit. An activity desk may substitute the bond with an irrevocable letter of credit and vice versa pursuant to subsection (h), but shall not provide one in addition to the other to reach the required aggregate amount of coverage. If an activity desk has more than one branch desk location, the bond or irrevocable letter of credit shall cover all locations and computations on the coverage amount shall be based on the total net sales revenues of all branch locations.

(d) Upon cancellation or expiration of the bond or letter of credit, the surety or insurer shall remain liable for any claims against the bond or letter of credit for a period of six months; provided that:

(A) The debts were incurred while the bond or letter of credit was in effect; and

(B) The director notifies the surety or insurer, as the case may be, of any claims within ninety days of discovery of any claims.

(e) The surety or insurer is not required to release any moneys or collateral to the activity desk during the six months after cancellation of the bond or expiration of the letter of credit.

(f) The amount of coverage shall be equal to the average monthly net sales revenues of the activity desk as determined for the twelve-month period ending on the last sales period ending date of the fifth month prior to the anniversary date of the bond or the irrevocable letter of credit; provided that the amount of coverage of the bond or irrevocable letter of credit shall not be less than \$50,000 and shall not be more than \$100,000. Any activity desk providing a bond or irrevocable letter of credit for the first time during the period beginning on the effective date of this Act and ending on March 31, 1993, shall base its initial coverage amount on the twelve-month period ending on June 30, 1992. If an activity desk does not have a full twelve-month period on which to base the amount, the amount shall not be less than the average monthly net sales revenues as determined for the months available; provided that this amount shall not be less than \$75,000, notwithstanding the minimum amount of \$50,000 for regularly computed coverage.

(g) No later than four months before the anniversary date of coverage, each activity desk shall submit a notarized annual report to the department verifying the monthly net sales revenue figures for the twelve-month period upon which the amount of the bond or irrevocable letter of credit is based. However, each activity desk shall have the option not to submit the annual report if the activity desk provides a bond or an irrevocable letter of credit for the maximum amount of \$100,000.

(h) Each activity desk shall review the desk's coverage at least once each year and shall increase or decrease the amount of the coverage as necessary according to the computation method in subsection (f) at the time coverage is renewed on the anniversary date or on other dates if coverage is reinstated or replaced; provided that any downward adjustment in coverage shall not result in coverage below \$50,000.

A bond shall be accepted as replacement for another bond or an irrevocable letter of credit and an irrevocable letter of credit shall be accepted as replacement for another irrevocable letter of credit or a bond if:

(1) The effective date of a replacement bond is prior to or on the cancellation date of the bond being replaced;

(2) Where a letter of credit is about to expire, the effective date of the replacement bond is prior to or on the same date as the date of expiration of the irrevocable letter of credit and the replacement bond is received by the director before that expiration date;

(3) The replacement irrevocable letter of credit is received by the director at least fifteen days prior to the expiration date of the irrevocable letter of credit being replaced; or

(4) The replacement irrevocable letter of credit is received by the director on or before the cancellation date of the bond.

(i) An activity desk whose bond or letter of credit has been cancelled or has expired may continue to operate the activity desk provided the desk establishes the client trust account at least two months prior to the cancellation or expiration of the bond or letter of credit, and shall not be allowed to replace the client

trust account with a bond or letter of credit for at least one year.

(j) Failure to have in effect a client trust account, or current bond or letter of credit shall result in automatic forfeiture of the registration. An activity desk whose registration is forfeited shall apply as a new applicant for registration.

[§ -9] § -11 Violations; fraud. Any violations by an activity desk of any law relating to client trust accounts or the bond or letter of credit pursuant to section -10 shall constitute a prima facie showing of fraud on the part of the activity desk and may not be dischargeable as a debt to a consumer or an activity provider in any bankruptcy proceeding.

§ -12 Restitution. Any person who engages in an act or practice that violates any provision of this chapter or rules adopted pursuant hereto may be ordered by a court of proper jurisdiction to make restitution to all persons injured by the act or practice.

§ -13 Injunctions. In any civil proceeding brought pursuant to this chapter, the court may also enjoin any activity that violates this chapter.

§ -14 Consumer right of action. Any person who suffers damage as a result of a violation of this chapter shall be entitled to injunctive relief restraining further violations, and may sue to recover damages in any circuit court of the State, and, if successful, shall recover three times the actual damages or \$1,000, whichever is greater. In any action brought under this chapter, the prevailing party shall be entitled to the recovery of costs of suit, including reasonable attorney's fees.

§ -15 Remedies cumulative. Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to remedies or penalties available under other laws of this State.

§ -16 Criminal penalties. A person commits the criminal offense of theft if the person, being an activity desk or an agent, employee, or independent contractor of an activity desk, knowingly or intentionally violates section -9(a), (b) or (c) of this chapter.

§ -17 Rules and regulations. Subject to chapter 91, the director may adopt such rules as the director deems necessary for the effective administration and enforcement of this chapter.”

SECTION 3. Act 240, Session Laws of Hawaii 1991, is amended by amending Section 2 to read as follows:

“SECTION 2. Act 214, Session Laws of Hawaii 1990, is amended by amending Section 2 to read as follows:

“SECTION 2. This Act shall take effect upon its approval, and shall be repealed June 30, [1993.] 1995.”

SECTION 4. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 5. The director of commerce and consumer affairs shall submit

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a report to the legislature at least twenty days prior to the convening of the Regular Session of 1994 that shall include, but not be limited to:

1. A status report on the incidence of non-compliance by activity desks with the provisions of this Act; and
2. Proposed legislation it deems necessary to effectuate the purposes of this Act.

SECTION 6. This Act shall take effect on September 1, 1992 and shall be repealed on June 30, 1995.

(Approved June 17, 1992.)