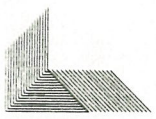
Sunset Evaluation Update: Travel Agencies

A Report to the Governor and the Legislature of the State of Hawaii



THE AUDITOR
STATE OF HAWAII

STATE OF HAWAII
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawaii 96813

(808) 548-2450
FAX: (808) 548-2693

December 17, 1990

ERRATA

The Auditor, State of Hawaii, *Sunset Evaluation Update: Travel Agencies*, Report No. 90–16, December 1990.

Overview Sheet

Front Page of Overview, lines 12–14:

So much as reads

"Travel agencies are among the Better Business Bureau's most complaint–ridden businesses, accounting for almost 20 percent of all reported complaints."

should read

"Travel agencies are among the Better Business Bureau's most complaint–ridden businesses, accounting for almost 20 percent of all reported complaints against the 15 most–complained–of businesses."

Chapter 2

Page 7, lines 25–27:

So much as reads

"These accounted for 18 percent of total complaints, making travel agencies the bureau's most complaint–ridden–businesses."

should read

"These accounted for 18 percent of total complaints against the 15 most complained–of–businesses, making travel agencies the bureau's most complaint–ridden business."

Sunset Evaluation Update: Travel Agencies

A Report to the Governor and the Legislature of the State of Hawaii

Submitted by

THE AUDITOR
STATE OF HAWAII

Report No. 90-16
December 1990

Foreword

Hawaii's Sunset Law, or the Hawaii Regulatory Licensing Reform Act of 1977, schedules regulatory programs for termination on a periodic cycle. Unless specifically reestablished by the Legislature, the programs are repealed. The auditor is responsible for evaluating each program for the Legislature prior to the date of repeal.

This report evaluates the regulation of travel agencies under Chapter 468K, *Hawaii Revised Statutes*. It presents our findings as to whether the program complies with policies in the Sunset Law and whether there is a reasonable need to regulate travel agencies to protect the health, safety, and welfare of the public. It includes our recommendation on whether the program should be continued, modified, or repealed. In accordance with Act 136, SLH 1986, the report incorporates in Appendix B the draft legislation intended to improve the regulatory program.

We acknowledge the cooperation and assistance of the Department of Commerce and Consumer Affairs, the trustees of the travel agency recovery fund and other officials, and industry representatives contacted during the course of our evaluation. We appreciate the assistance of the Legislative Reference Bureau, which drafted the recommended legislation.

Newton Sue
Acting Auditor
State of Hawaii

December 1990

Table of Contents

Chapter 1 Introduction

Background on Travel Agencies 1
1980 Sunset Evaluation 2
Subsequent Developments 2
Current Regulatory Program 3
Objectives of the Evaluation 5
Scope and Methodology 5

Chapter 2 Findings and Recommendations

Findings 7
Continued Regulation Is Needed 7
Recovery Fund Alone Is Not Adequate Protection 9
Enforcement of Program Should Be With RICO 14
Activity Desk Controversy Is a Business Dispute 14
Recommendations 16

Appendix A: Response of the Affected Agency 17
Appendix B: Proposed Legislation 29

Chapter 1
Introduction

The Sunset Law, or the Hawaii Regulatory Licensing Reform Act (Chapter 26H, *Hawaii Revised Statutes*), repeals occupational licensing statutes according to a specified timetable. The law establishes policies for occupational licensing and directs the auditor to evaluate each licensing statute to determine if the health, safety, and welfare of the public are best served by reenactment, modification, or repeal.

This report evaluates whether the regulation of travel agencies under Chapter 468K, HRS, complies with policies in the Sunset Law.

Background on Travel Agencies

The travel industry is complex and diverse. Lodging, transportation, food service, entertainment, sales of travel services, and tour wholesalers and packagers are among the many segments of the industry.

Travel agencies are intermediaries who play a major role in distributing travel services to customers. Typically, they are retail businesses that plan travel itineraries, make reservations, and sell transportation, lodging, and other travel services on behalf of airlines, ship lines, hotels, tour wholesalers, and other suppliers. Generally, retail travel agencies provide these services free to customers; they make their income from commissions paid by the suppliers. Wholesalers of travel services may also be considered travel agencies, for example, tour wholesalers that package plane tickets, hotel accommodations, meals, and sightseeing tours for sale through retail agencies.

Many travel agencies are officially appointed sales agents for one or more transportation carriers. Carriers have joined together to form associations, such as the Airlines Reporting Corporation (ARC), the International Airlines Travel Agency Network (IATAN), and the Pacific Cruise Conference. Members of ARC have agreements on passenger and cargo movements, joint marketing facilities, and standards for approval, retention, and compensation of travel agencies. The ARC grants sales agency status to travel agencies that meet specified standards, including bonding, prior travel sales experience, and financial soundness. The IATAN serves the same function as ARC for international carriers. It also requires appointed agencies to meet experience, financial, and performance requirements.

The agreements between the appointed travel agencies and the air and ocean carriers include rules governing procedures for ticketing and reporting. According to the rules, only appointed travel agencies may issue tickets and receive commissions for these sales.

Nonappointed agencies may also offer the same kinds of travel services. Some nonappointed agencies sell transportation tickets they purchase from appointed agencies. Others offer limited services such as local tours (including land transportation, hotel accommodations, and sightseeing arrangements within the state) or hotel and tour bookings for out-of-state travel agencies.

1980 Sunset Evaluation

In 1980, we evaluated the regulation of travel agencies under a previous law, Chapter 468J. Enacted in 1975, Chapter 468J required travel agencies and sales representatives to be licensed and to post a bond in favor of the State. The statute, however, exempted travel agencies officially appointed by carriers. Regulation was deemed unnecessary for agencies that had met the strict financial scrutiny of the carriers. Nearly two-thirds of the travel agencies were appointed and thus escaped regulation.

We found a need to regulate all travel agencies, appointed and nonappointed, because consumers suffered financial loss from both kinds of agencies for a variety of reasons--nonperformance by agents, misrepresentation, delay or refusal to pay proper refunds, or overcharging. The exemption for appointed agencies we found to be unjustified because the financial requirements imposed by the carriers were designed to protect the carriers' interests and not those of consumers. Some carriers did not require bonds. Many customers who had filed complaints against appointed agencies could not recover their losses. To protect consumers against financial losses, we recommended that all travel agencies, regardless of their appointment status, be required to post a bond in favor of the state.

Subsequent Developments

After considering the regulatory program, the Legislature replaced Chapter 468J with Chapter 468K. The new law retained many elements of Chapter 468J. The program stayed with the director of the Department of Regulatory Agencies (now the Department of Commerce and Consumer Affairs, or DCCA). Consistent with our recommendations, the new chapter regulated both appointed and nonappointed agencies. But instead of requiring agencies and sales representatives to be bonded, it named the director as trustee of a recovery fund for aggrieved consumers. Consumers could file suit

to recover up to $10,000 for damages resulting from the act, representation, transaction, or conduct of a travel agency or sales representative in violation of the chapter.

Since then, the Legislature has amended the law several times, primarily those portions dealing with the recovery fund. Amendments in 1981 made clear that recovery from the fund applied only to violations by licensed travel agencies or sales representatives. They also lowered the recovery limit from $10,000 to $8,000 and raised from 6 percent to 10 percent the annual interest rate on money not repaid to the fund by a travel agency or sales representative.

Amendments in 1984 and 1985 expanded the ways the fund could help consumers. Consumers could recover money for violations of rules and for unfair or deceptive practices under Section 480-2. The Office of Consumer Protection (OCP)--the office in DCCA responsible for enforcing Chapter 468K--could act on behalf of consumers by obtaining a court order for restitution in a lawsuit against the licensee. Consumers could also act on their own behalf, using the court order for restitution obtained by OCP. The OCP testified that without these provisions, consumers seeking recovery from the fund might duplicate the efforts of the office at unnecessary expense.

In 1987, amendments set up procedures for pursuing the recovery of funds based on a consent judgment or agreement between potential litigants without the actual filing of a lawsuit. In 1988, amendments clarified the right of consumers to recover funds when travel agencies omitted material facts in sales transactions.

Current Regulatory Program

The travel agency law, Chapter 468K, licenses both travel agencies and sales representatives. The law defines a travel agency as an entity that, for compensation, acts as an intermediary between a person seeking to buy travel services and a person seeking to sell them. Air and ocean carriers are exempt. Travel services are defined as transportation by air, sea, or rail, ground transportation, hotel accommodations, or package tours, whether sold on a wholesale or retail basis. A sales representative is any employee or agent of a travel agency who arranges for the purchase of travel services for a commission.

The director of commerce and consumer affairs is responsible for administering the program. The director may adopt and repeal rules; issue, renew, suspend, and revoke licenses; and do all things necessary to carry out the program.

The only requirement for licensure is payment of fees. The license application fee is $40 for a travel agency (principal office), $25 for a branch office, and $25 for a sales representative. Upon licensure, principal offices must pay $50 into the recovery fund; sales representatives pay $25. (If the fund drops below $30,000 at the end of any calendar year, principal offices and sales representatives are assessed an additional sum to make up the difference.) Licensees must also pay standard fees into the compliance resolution fund established by Section 26-9(m), HRS, to employ personnel to enforce statutes relating to occupational licensing.

According to department records, there were 2,085 licensees as of March 6, 1990. Of these, 641 were travel agencies, 66 were branch offices, and 1,378 were sales representatives. The great majority of licensees are on Oahu.

Requirements, prohibitions, and penalties

Travel agencies must provide the name, address, and license number of each of their sales representatives. The department issues each licensee an identification card. Licensees are required to include their name and license number in their advertising; the name used by a travel agency in advertising must match the name on the identification card.

Travel agencies must report to the department within seven days any transfers in ownership, changes in partners, changes in name or address, and terminations of business. Licenses are nontransferable, and any change in agency ownership invalidates the license, as does the involuntary dissolution of an agency under the state's general corporations statute (Chapter 416, HRS). Travel agencies must preserve for two years accurate records on all travel arrangements.

Licensees must disclose to consumers all restrictions, limitations, conditions, and fees connected with canceling travel arrangements, obtaining refunds, changing itineraries, or making claims for lost tickets. When airline incentive awards are purchased, the licensee must disclose in boldface type that some airlines believe they can void such awards at any time and that if this occurs, the licensee will refund the price of the award. Licensees may not make misleading or deceptive statements, omit material facts, fail to perform agreements and promises, fail to make timely refunds, act fraudulently or dishonestly, engage in unfair competition or deceptive acts or practices, or file false statements with the department.

Violations can result in the denial, revocation, or suspension of licenses, in fines ranging from $500 to $2,500, and in court orders for restitution. The director may deny a license to any officer, director, or partner who has participated in the illegal activity of an agency that has had its license revoked or suspended.

Recovery fund

Under the recovery fund provisions of Chapter 468K, consumers can collect up to $8,000 in damages from a licensee who violates the statute or engages in unfair or deceptive practices. Three trustees now maintain the fund. They have a dual responsibility to pay out legitimate claims and to preserve the fund's assets. They may invest the money deposited in the fund; the interest from the investments goes into a travel agency education fund. A private attorney on contract to the department counsels the trustees and represents them in litigation.

Objectives of the Evaluation

This evaluation sought to determine whether the regulation of travel agents complies with policies in the Sunset Law. Specific objectives were to:

1. Determine whether there is a reasonable need to regulate travel agencies to protect the health, safety, and welfare of the public;

2. Determine whether current regulatory requirements are appropriate for protecting the public;

3. Establish whether the regulatory program is being implemented effectively and efficiently; and

4. Make recommendations on these issues.

Scope and Methodology

To accomplish the objectives, we reviewed the literature on travel agencies and their regulation. We examined developments in the industry, and we reviewed the statutes and rules on travel agencies in Hawaii and the changes in these since our last sunset evaluation. To determine the need for regulation, we reviewed complaints relating to travel agencies and other evidence of potential harm to consumers. We interviewed travel agents and other representatives of the travel industry. We also interviewed personnel from the Department of Commerce and Consumer Affairs and examined the department's correspondence and other files relating to the subject.

This evaluation examined regulatory activities since our last sunset evaluation in 1980, but it focused primarily on operations during FY 1989.

Chapter 2
Findings and Recommendations

Regulation of travel agencies by the Department of Commerce and Consumer Affairs (DCCA) has been helpful to consumers, and Chapter 468K therefore should be reenacted. To further improve regulation, some changes are needed, particularly with respect to the travel agency recovery fund.

Findings

1. There is a reasonable need to regulate travel agencies to protect consumers. A substantial number of complaints and lawsuits have been filed.

2. The recovery fund has not adequately protected the consumer. It does not ensure the financial solvency of businesses operating as travel agencies. Gaining access to the fund has been a cumbersome and time-consuming process for consumers. In addition, the limit of $8,000 that can be recovered from a single licensee is too low.

3. There is little justification for making the Office of Consumer Protection (OCP) responsible for complaints management and enforcement under Chapter 468K.

4. The controversy over activity desks appears to stem from a dispute between businesses rather than from a need to protect consumers under the provisions of the Sunset Law.

Continued Regulation Is Needed

Consumers have suffered substantial financial losses because of travel agencies. The number of complaints and the nature of payments from the recovery fund provide evidence of harm.

The Better Business Bureau of Hawaii received 71 complaints about travel agencies in 1989. These accounted for 18 percent of total complaints, making travel agencies the bureau's most complaint-ridden businesses. The DCCA received or initiated 278 complaints in 1987 concerning travel agencies or sales representatives; 149 in 1988; 573 in 1989; and 130 in the first five months of 1990. The amounts varied considerably. In 1989, for example, claims ranged from as little as $18 to as much as $16,000.

The most common complaint received by the department, failure to make a refund, accounted for 53 percent of complaints in 1989. Other complaints in the same year were for unlicensed activity (15 percent of complaints) and advertising violations such as failing to include the license number in advertisements (5 percent). Additional complaints charged unfair and deceptive practices, misrepresentation, failure to provide services, unsatisfactory services, billing problems, nondelivery of merchandise, and other violations.

Payments made from the recovery fund greatly understate the losses suffered by consumers and are further evidence of harm. The fund paid out to consumers $1,357 in FY 1987-88, $34,098 in 1988-89, and $8,456 in 1989-90. These amounts represent only those losses that led to a lawsuit, a judgment, or a settlement, and subsequently to a court order directing payment from the fund; they do not include losses that the consumer or State did not pursue. They include only those cases brought by the enforcing agency, OCP. They do not include those cases brought by consumers on their own, or those losses attributed to unlicensed travel agencies or sales representatives. The OCP reports that damages in a case involving an unlicensed operator were approximately $280,000.

Moreover, there is an $8,000 cap on recoveries for losses caused by any one licensee. In one case, the court judgment against one agency was for $29,473; in another $22,899; and in a third $10,875. In a fourth case, which was settled, OCP calculated claims of $322,983. In each instance, the fund paid only $8,000.

Finally, losses paid by the fund represent only those amounts that the consumer paid and lost to the travel agency. They do not include interest on lost money, business costs, and other expenses.

There is sufficient evidence of consumer harm to support reenactment of Chapter 468K. The law contains many provisions that protect consumers. The recovery fund provides consumers with some measure of financial restitution. Requiring travel agents to disclose such matters as restrictions on tickets and policies on refunds clarifies consumers' rights to refunds and other protections. The director's power to revoke, suspend, and deny licenses can discourage those who engage in fraudulent, dishonest, or deceptive practices.

Recovery Fund Alone Is Not Adequate Protection

Our examination of complaints about travel agencies shows that consumers need two kinds of protection. The first is to ensure that license applicants are financially sound, and the second is to ensure that money is available to provide restitution to injured consumers. The recovery fund was established in lieu of requiring travel agencies and sales representatives to post a bond in favor of the State. It was supported by the industry, which had testified that a bond would impose a financial hardship on agencies.

At first glance, the substitution of a recovery fund for a bond is an appealing compromise between the interests of consumers and those of travel agents. The fund would provide restitution to aggrieved consumers, and the small fees that maintain the fund would not overburden licensees. Upon closer examination, however, the substitution does not adequately protect the interests of consumers. The recovery fund does not ensure the financial soundness of applicants. Its structure makes adequate restitution difficult and may create the perception of industry control of what should be a consumer-oriented process.

No assurance of financial soundness

The recovery fund does not ensure the financial standing or solvency of a travel agency. It is designed only to provide restitution. Complaints and lawsuits show that financial soundness should be a source of concern. Agencies that "go under," with or without a bankruptcy filing, leave customers without the services they purchased. To prevent this problem, regulation should ensure that agencies have some degree of financial solvency. The current regulations, however, do not require applicants to provide any evidence of financial capability. The only requirements for licensure are the fees paid for the license application, the compliance resolution fund, and the recovery fund. For a total of $120, a person can be licensed to do business as a travel agency.

To help ensure the financial solvency of travel agencies and sales representatives, license applicants should be required to post either a bond or a letter of credit to the benefit of the State. In our 1980 sunset evaluation we recommended bonding. We see no reason to change our position. Agencies appointed by the Airlines Reporting Corporation (ARC) are required to have either a bond or a letter of credit for a minimum of $20,000 initially and $10,000 after two years. The actual amount depends on an agency's volume of business; the maximum is $70,000.

Some insurance companies on Oahu have confirmed the difficulty of obtaining a bond without collateral, particularly for marginal businesses. Banks will issue a letter of credit, but they may also require that the letter be secured for the amount requested, depending on the financial standing of the applicant.

It is because there has to be some evidence of financial solvency that a bond or letter of credit should be required. We believe that $5,000 would be an appropriate amount for travel agencies and $500 for sales representatives. These sums would not be prohibitive for reputable parties entering into the travel agency business. At the same time, the amount would provide evidence of an agency's financial capability and commitment to do business. Of the seven states that regulate travel agencies, three require a bond of $10,000 and one requires a bond of $50,000 or appointment by carriers. The three remaining states require agencies to either place 90 percent of their receipts in a trust fund or have an adequate bond.

The State could follow the same procedures as those imposed by ARC in asking applicants to supply either a bond or an irrevocable letter of credit made out to the benefit of the State. In the event of default, the State could draw from this as well as from the recovery fund.

Cumbersome recovery process

In spite of amendments adopted to make the fund more accessible, the recovery process is still costly and time-consuming for the consumer and the department. The main problems are a complicated series of legal steps, a complex organization of the fund under the trustees, and an $8,000 limit on what can be recovered from an individual agency.

Legal steps

Recovery from the fund requires civil court proceedings of some kind. The statute lays out a series of steps. The consumer or OCP must first obtain a judgment in civil court against the licensee for a violation of Chapter 468K or Section 480-2. The judgment can result from a civil suit brought by the consumer or by OCP, or from a proceeding for a consent judgment brought by OCP. A settlement without a judgment may also serve as the first step.

The consumer or the OCP must then obtain a court order directing payment from the recovery fund. The order is granted only after all legal appeals have ended and after the consumer or the OCP have exhausted all other remedies for recovering the judgment, such as

taking legal action to apply the licensee's assets to the judgment. Only then is a court hearing held on the application for a court order.

It is unrealistic to expect the average consumer to pursue these complex proceedings for what is likely to be a small sum. Even if OCP takes the case, legal maneuvering can go on for months and years.

Fund organization

The organization of the recovery fund under the trustees adds to the cost and time for restitution. When weighed against costs, the benefits are questionable. Furthermore, the current organization creates a possible perception of industry control of compensation paid to consumers.

Amendments to the statute in 1985 transferred trusteeship of the fund from the DCCA director to three trustees appointed by the director. The purpose was to head off potential conflicts of interest within the department if, in seeking recovery from the fund, the OCP had to file an action against the director. Further amendments in 1987 authorized the trustees to intervene in and defend any lawsuit that could result in recovery from the fund, and to intervene in any application to the court that could result in an order directing payment from the fund. This has created a cumbersome process.

The consumer or the OCP must notify the trustees in writing when starting a civil action against a licensee that might result in collection from the recovery fund. The trustees must be served with all pleadings filed in the case. They must receive ten days' notice of any court hearing for an order directing payment from the recovery fund.

At their meetings, the trustees consult with their attorney concerning the merits of claims against the fund, the appropriateness of intervening in litigation, and other matters. Sometimes the legal issues are complex, such as whether current case law justifies bringing into the litigation another party besides the licensee--an airline, for instance--who may be liable for all or part of the consumer's damages. Such a move can be justified by the attorney and the trustees because it is their responsibility to preserve the fund's assets.

These legal machinations take time and money. In FY 1987-88, the recovery fund paid out $17,383 to the attorney but only $1,357 to consumers. In 1988-89, it paid $17,256 to the attorney and $34,098

to consumers, and in 1989-90 it was $7,514 to the attorney and $8,456 to consumers. These payments raise a question as to the cost effectiveness of the process.

The trustees are required to be licensed travel agents. In support of this requirement, one could argue that trustees familiar with the industry will make more knowledgeable decisions and that other licensees will have greater faith in the process. However, with only industry members as trustees, consumers may perceive the process as controlled by the industry and biased toward it, regardless of the trustees' good intentions. Furthermore, the trustees may be faced with a direct conflict of interest. If they pay out amounts that put the fund balance below $30,000, they, along with other licensees, will be assessed additional sums to make up the difference.

Limitation of $8,000

The statutes place an $8,000 cap on the amount that aggrieved persons can collect from a licensee. For example, if 100 consumers each claim losses of $1,500 against a licensee for a total of $150,000, no more than $8,000 can be prorated among them. Each consumer would thus receive only $80 instead of $1,500.

Case study

A recent case against a travel agency illustrates the limitations of the recovery fund. In June 1987, a travel agency closed down, leading to about $30,000 in total claims by 32 consumers who said they had prepaid the agency for tickets but had received neither the tickets nor a refund. The OCP sued the travel agency in First Circuit Court for violations of the unfair and deceptive practices statute (Section 480-2, HRS), and for violations of the administrative rules governing travel agencies. The travel agency apparently had no assets and it agreed to a stipulated judgment against it, which was approved by the court in mid-1988. A *stipulated* judgment is normally agreed on by the parties *after* a lawsuit is filed.

The trustees of the recovery fund then intervened in the case, resulting in the filing of motions on the disputed issue of whether the trustees could defer payment to consumers by six months under Section 468K-5(i). This section allows a six-month delay for *consent* judgments, which are judgments normally agreed on by the parties *before* a lawsuit is filed. The waiting period established by Section 468K-5(i) appears designed to ensure that a consent judgment against a licensee does not exhaust the $8,000 limit to the exclusion of later claimants among whom the $8,000 could be prorated. The OCP contended that because the case in question did

not involve a consent judgment, payment should not be deferred. Legal proceedings to resolve this issue may have had merit, but consumed time and resources.

It was not until mid-1989, two years after the travel agency closed down, that consumers received any restitution from the recovery fund. Even then, only $8,000 was paid out, prorated in amounts ranging from $10.87 (to a consumer who had originally claimed $40) to $670.99 (to a consumer who had originally claimed $2,472). Thus, current regulation did not ensure the financial solvency of the travel agency. Instead, it both delayed and limited the compensation that consumers received. Both OCP and the trustees carried out their statutory responsibilities; however, the structure of the fund created a drawn out, unsatisfactory resolution to the problem.

Restructure the recovery fund

The Legislature should consider making the director of commerce and consumer affairs the trustee of the recovery fund; raising the recovery limit from $8,000 to $10,000; and substituting an expedited administrative hearings process for the complex court procedures now required for fund recovery. Although raising the limit to $10,000 would not fully protect consumers, it would improve the current situation. When Chapter 468K was enacted in 1980, the limit was $10,000; in 1981 the limit was amended to $8,000. The higher amount is more realistic. Making the director the fund trustee--as was the case until 1985--would reduce any perception that the fund is biased toward the industry.

We believe the following administrative hearing process would be more efficient, less costly, and more responsive to consumers:

- The department's Regulated Industries Complaints Office (RICO) would take over investigation and prosecution of travel agency complaints. (We discuss the reasons for this proposal later in this report.)

- The DCCA hearings office would conduct two types of hearings concerning travel licensees.

- The first type of hearing would be the customary licensure or disciplinary hearing already conducted by the hearings office. As now, these hearings would culminate in a recommended decision, with the final decision to be made by the director. Judicial review of the director's decision would be available.

- The second type of hearing would deal with the recovery fund and would replace the cumbersome civil procedures now used. Either RICO or the consumer could initiate the process. There would be no requirement that exhaustive efforts be undertaken to prove travel agency assets were not available. If the hearings officer found that the travel licensee had caused the consumer damages, the officer would then determine the amount of damages and issue a final decision ordering payment from the fund. The director could not change the decision, although judicial review would be available. As now, payment from the fund would result in loss of the travel agent's license.

Enforcement of Program Should Be With RICO

The OCP is responsible for enforcing the travel agency licensing law. This is an anomaly since all other occupational licensing statutes are enforced by RICO.

The statutes are confusing in this regard. In 1982, the Legislature established RICO within the DCCA to receive, investigate, arbitrate, and prosecute all complaints on behalf of the more than 40 boards, commissions, and programs under the department's jurisdiction. The only exception is the travel agency licensing program. The statutes assign responsibility for this program to OCP. The office must pursue claims against the recovery fund, investigate complaints against travel agencies, and enforce other licensing requirements, such as those relating to advertising. These activities more appropriately belong with RICO.

The OCP's primary mission is to implement general consumer protection laws. It is supposed to promote fair and honest business practices by investigating alleged violations of these laws, taking legal action to stop unfair or deceptive practices, and educating the consumer. The OCP should not be responsible for enforcing the travel agency licensing law. This responsiblity should be assigned to RICO.

Activity Desk Controversy Is a Business Dispute

The Legislature enacted Act 214 in 1990 to address a controversy between two kinds of businesses. The law governs some of the transactions between activity desks and activity providers, such as requiring activity desks to promptly pay providers for their services. Act 214 will be repealed on June 30, 1991, to allow the auditor time to determine whether activity desks should be regulated as part of this sunset review of travel agencies. Our

review finds that the controversy arises from a dispute between businesses and therefore does not fall within the consumer protection policies of the Sunset Law.

Activity desks are intermediaries between consumers and the businesses that provide specialized tours, excursions, and activities. Activity desks in hotels, for example, connect tourists with scuba diving operations and other recreational activities. Some activity providers on Maui have charged that activity desks have "overwhelming power and influence" over providers. They say that activity desks were refusing to book consumers with providers unless paid very high commissions; that they were failing to promptly transmit money paid by consumers; that they were covering the providers' phone numbers on brochures and substituting their own numbers while failing to identify themselves as activity desks. The providers have called for regulation of activity desks to correct these problems.

While the claims may be valid, the Sunset Law says that regulation is undertaken only when reasonably necessary to protect the health, safety, and welfare of *consumers*. Our review found evidence of a business dispute, but no direct evidence of consumer harm.

The DCCA files report no consumer complaints made directly against activity desks. The testimony in support of regulation came from providers, not consumers. Our interviews with providers and our review of written transmittals show that the major concern is equal bargaining power for both business parties, not consumer harm.

In opinion letters written to two legislators, the attorney general has stated that activity desks do not fall within the regulatory scope of Chapter 468K. Chapter 468K was enacted in response to substantial consumer fraud by some travel agencies. In contrast, the activity desks appeared not to have potential for great consumer harm.

We conclude from our review that Chapter 468K should not be amended to regulate activity desks. The department already has the authority under Chapter 468K to discipline any activity desk engaged in travel-related activities that cause consumer harm. In addition, the department has the authority to protect consumers against any unfair and deceptive practices by activity providers.

Should the practices of activity desks continue to be of concern, the providers have recourse to the Uniform Deceptive Trade Practice Act (Chapter 481A). The act prohibits such practices as passing off services as those of another, or causing confusion as to the source of

goods and services. Injunctive relief is available under this law for these practices.

Recommendations

Chapter 468K should be reenacted to continue the regulation of travel agencies and sales representatives. In reenacting the statute, the Legislature should consider making the following amendments:

1. Requiring travel agencies to post a $5,000 bond or letter of credit to the benefit of the State in order to be licensed. (Sales representatives would post $500.)

2. Removing the Office of Consumer Protection from the statute and assigning responsibility for implementing the chapter to the Department of Commerce and Consumer Affairs.

3. Raising to $10,000 the $8,000 per-licensee limit on restitution to consumers from the travel agency recovery fund.

4. Making the director of commerce and consumer affairs the trustee of the recovery fund.

5. Substituting an expedited administrative hearings process for the existing civil court process for seeking restitution from the fund.

Response of the Affected Agency

Comments on Agency Response

We transmitted a draft of this Sunset Evaluation Update to the Department of Commerce and Consumer Affairs on October 26, 1990. A copy of the transmittal letter to the department is included as Attachment 1 of this Appendix. The response from the department is included as Attachment 2. Trustees of the travel agency recovery fund and their attorney also commented on the draft. Their comments are included as Attachments 3 and 4 respectively.

The department supports the goals and general recommendations discussed in our report. It also offers other alternatives to address the issues raised by the report, and these alternatives provide additional perspectives for legislative consideration.

The trustees agree with our recommendation to raise the limit on recovery from $8,000 to $10,000. But they do not agree that the State should require a bond or letter of credit from all travel agencies and sales representatives. They say that agencies appointed by the Airlines Reporting Corporation (ARC) should be exempt from this requirement because ARC requires a bond or a letter of credit for at least $20,000. We disagree because the ARC requirements are designed primarily to protect the carriers. State bonding, on the other hand, would directly protect consumers. The trustees also do not agree that a $500 bond should be imposed on sales representatives.

Both the trustees and their attorney disagree with our recommendation that enforcement should be handled by the Regulated Industries Complaints Office instead of the Office of Consumer Protection. We continue to believe that the regulated industries office, which enforces all other occupational licensing statutes, is the proper enforcement agency.

Additionally, both the trustees and their attorney disagree that the director of commerce and consumer affairs be made the trustee of the recovery fund. The trustees say that travel agencies contribute to the fund and they should be represented on it. The attorney for the fund argues that making the director the trustee of the fund creates a potential conflict of interest. We acknowledge these concerns, but we believe that our recommendation for payment from the fund to be made by the director upon the final order of an administrative hearings officer minimizes the possible conflict of interest and

ensures that the fund will be perceived and function as a true consumer protection measure.

Finally, the trustees acknowledge that the existing recovery fund process is lengthy and they suggest, as did the department in its response, that arbitration might be preferable to administrative hearings in expediting payment.

STATE OF HAWAII
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawaii 96813

(808) 548-2450
FAX: (808) 548-2693

ATTACHMENT 1

October 26, 1990

The Honorable Robert A. Alm
Director
Department of Commerce and Consumer Affairs
Kamamalu Building
1010 Richards Street
Honolulu, HI 96813

Dear Mr. Alm:

Enclosed are three copies, numbers 6 to 8 of our draft report, *Sunset Evaluation Update: Travel Agencies.* We ask that you telephone us by October 31, 1990, on whether you intend to comment on our recommendations. If you wish your comments to be included in the report, please submit them no later than November 26, 1990.

The Board of Travel Agencies, Governor, and presiding officers of the two houses of the Legislature have also been provided copies of this draft report.

Since this report is not in final form and changes may be made to it, access to the report should be restricted to those assisting you in preparing your response. Public release of the report will be made solely by our office and only after the report is published in its final form.

Sincerely,

Newton Sue
Acting Legislative Auditor

Enclosures

ATTACHMENT 2

JOHN WAIHEE
GOVERNOR

ROBERT A. ALM
DIRECTOR
COMMISSIONER OF SECURITIES

SUSAN DOYLE
DEPUTY DIRECTOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
1010 RICHARDS STREET
P. O. BOX 541
HONOLULU, HAWAII 96809

November 26, 1990

RECEIVED
Nov 26 3 46 PM '90
OFC. OF THE AUDITOR
STATE OF HAWAII

The Honorable Newton Sue
Acting Legislative Auditor
Office of the Auditor
465 South King Street, Room 500
Honolulu, Hawaii 96813

Re: Sunset Evaluation Update:
Travel Agencies Draft Report

Dear Mr. Sue:

After reviewing the draft of the Sunset Evaluation Update: Travel Agencies report, the Department of Commerce and Consumer Affairs was considerably impressed with by the attention to detail of the report. Equally impressive, is the obvious efforts made by the auditor to be fair, accurate, objective, and solution-oriented in addressing the concerns raised in the report.

The Department certainly appreciates both the substance and tenor of the report, and the Department supports the goals and general recommendations discussed in the report.

There are just a few matters which were raised by the divisions of the Department that have been, and may become involved in the regulation of travel agencies, and with your indulgence, we would like to share these considerations with you.

A. Regulation of Travel Agencies

First, if the overall concern regarding the regulation of travel agencies is to ensure at least a minimum level of financial integrity for the protection of consumers, two additional suggestions are:

1) require a responsible managing employee (RME) for each travel agency who would be specifically responsible for seeing that statutory duties and obligations are complied with. This situation is similar to the RME requirements for contractors and time share operations, or the principal broker and/or broker-in-charge for real estate companies; and

2) have specific licensing requirements regarding the financial integrity of travel agencies, for obtaining and renewing registrations, including disclosure of past or pending litigation or judgments, and perhaps even requiring current credit reports.

B. Travel Agency Recovery Fund

Next, as to the recovery fund and the procedures for obtaining payouts from the recovery fund, some additional ideas to consider are:

1) requiring an annual financial audited report of the recovery fund be prepared and submitted to the Director, as the administrator of the program;

2) increasing the maximum amount payable from the fund to $15,000.00, without imposing a bond;

3) instead of an administrative hearing to determine fund liability, perhaps have a system for arbitration conducted by an entity outside of the Department, in order to avoid the appearance of conflict, but still retaining a less formal, and hopefully less expensive alternative to litigation; and

4) perhaps eliminating the legal counsel to represent the trustee(s) and the recovery fund, if an independent and impartial hearings process is developed.

C. Alternatives to the Travel Agency Recovery Fund

Lastly, my staff has also raised several possible alternatives to the travel agency recovery fund which include:

1) Eliminate the recovery fund altogether, and instead increase the amount of the bond to cover the suggested increase in the amount that can be recovered by the consumers. The bond could be payable either to the Department, or a cash bond which could be executed upon

by consumers upon a showing that the consumers had suffered losses because of the travel agencies or representatives; or

2. Eliminate the recovery fund and instead, require travel agencies and representatives maintain a $5,000.00 bond, and require travel agencies and representatives to place funds received from consumers for the purchase of travel services, into an escrow account, with escrow instructions which would allow for the expenditures of funds for specific authorized purposes. The escrow instructions could allow for the travel agencies and/or representatives to draw their commission or take their net proceeds, only after the travel services have been paid for out of the escrow fund. This procedure would be similar to the escrow procedures required of real estate licensees.

In summary, the Department concurs with the matters raised in the Sunset Evaluation Update: Travel Agencies Draft Report. The Department appreciates the substantial efforts which went into the preparation of the draft report, and should you require any further assistance from the Department, please let me know, and we will be happy to lend your Office any support that we can provide.

Very truly yours,

ROBERT A. ALM
Director

JOHN WAIHEE
GOVERNOR

ROBERT A. ALM
DIRECTOR

NOE NOE TOM
LICENSING ADMINISTRATOR

STATE OF HAWAII
PROFESSIONAL & VOCATIONAL LICENSING DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P. O. BOX 3469
HONOLULU, HAWAII 96801

November 23, 1990

RECEIVED
Nov 27 8 53 AM '90
OFC. OF THE AUDITOR
STATE OF HAWAII

Mr. Newton Sue, Acting Auditor
Office of the Legislative Auditor
State of Hawaii
465 South King Street, Room 500
Honolulu, HI 96813

Dear Mr. Sue:

Subject: Sunset Evaluation Update - Travel Agencies

The Trustees of the Travel Agencies Program thank you for the opportunity to comment on the Sunset Evaluation Update and make the following comments:

Recommendation 1. Requiring travel agencies to post a $5,000 bond or letter of credit to the benefit of the State in order to be licensed. (Sales representatives would post $500.)

Comment: The reason for this recommendation is to provide evidence of an agency's financial capability and commitment to do business. The Trustees recommend that a $5,000 bond be imposed only on agencies that are not appointed by the Airlines Reporting Corporation (ARC).

As pointed out in the report, ARC-appointed agencies are required to have either a bond or a letter of credit for a minimum of $20,000. Thus, the Trustees do not believe an additional bond of $5,000 should be imposed on ARC appointed agencies since they have already demonstrated their financial capability. Moreover, in our experience, only one ARC appointed agency has been involved in a claim against the recovery fund.

We do not agree with the recommendation to impose a $500 bond on sales representatives. Instead, we believe further clarification to the statutes be established to: (1) clearly clarify that an individual may represent only one agency; and (2) establishing that a responsible person be named for a travel agency entity.

Recommendation 2. Removing the Office of Consumer Protection (OCP) from the statute and assigning responsibility for implementing the chapter to the Department of Commerce and Consumer Affairs.

The Trustees do not agree with this recommendation as we believe the OCP has done an excellent job representing consumers and that they, at this time have the expertise to continue consumer representation.

Recommendation 3. Raising to $10,000 the $8,000 per-licensee limit on restitution to consumers from the travel agency recovery fund.

The Trustees are in agreement with this recommendation.

Recommendation 4. Making the Director of Commerce and Consumer Affairs the trustee of the recovery fund.

We do not agree with this recommendation. We believe agencies who contribute to the fund should have representation separate from the Department of Commerce and Consumer Affairs (which the Trustees have been able to provide).

Recommendation 5. Substituting an expedited administrative hearings process for the existing civil court process for seeking restitution from the fund.

We are also concerned that the present process is lengthy and desire a substituted expedited process. However, we are uncertain whether the administrative hearings process would be the solution as it is our understanding that the process could also be lengthy since any decision could be appealed to the courts. We would be interested in exploring the possibility of having disputes settled by binding arbitration.

In closing, we commend the legislative auditor for the professionalism of the sunset update report.

Very truly yours,

Ken Wilson

Ken Wilson
Chairman
Travel Agencies Trustees

ATTACHMENT 4

CLAYTON C. IKEI
CAROL GRELL

LAW OFFICE OF
CLAYTON C. IKEI
A LAW CORPORATION

FIRST INSURANCE CENTER
1100 WARD AVENUE, SUITE 1065
HONOLULU, HAWAII 96814

TELEPHONE (808) 533-3777
FACSIMILE (808) 521-7245

RECEIVED
Nov 14 1 19 PM '90
OFC. OF THE AUDITOR
STATE OF HAWAII

November 13, 1990

Mr. Newton Sue
Acting Legislative Auditor
Office of the Auditor
465 South King St., Room 500
Honolulu, HI 96813

Re: Draft Report: Sunset Evaluation Update: Travel Agencies

Dear Mr. Sue:

I am writing to comment on your Draft Report on Chapter 468K, dealing with the Travel Agency Recovery Fund. Please note that my comments are made in my own capacity and is not made with the authorization of the Trustees of the Travel Agency Recovery Fund. My comments are based upon my experience as the private counsel retained by the Trustee(s) of the Travel Agency Recovery Fund, since 1984.

Initially, may I state that I was greatly impressed by the thoroughness in which the Auditor's investigation was conducted. Equally impressive was the Auditor's ability to condense in a manageable report, the administrative experience of implementing the Act for a period of some five years.

Nevertheless, I feel compelled to disagree with two of your recommendations, specifically that of removing the Office of Consumer Protection from the enforcement of the Act and re-appointing the Director of the Department of Commerce and Consumer Affairs, the Trustee of the Travel Agency Recovery Fund.

Removal of the Office of Consumer Protection from Enforcement of Chapter 468K

The Office of Consumer Protection has in the past six years, vigorously represented consumers in not only revoking the licenses of fraudulent travel agencies, but has also aggressively sought recovery from the Travel Agency Recovery Fund. Although I am not cognizant of the workload or the time frame of bringing enforcement proceedings by the Regulated Industries Complaints Office, I would surmise that given the experience in bringing such claims, that the Office of Consumer Protection's experience should mitigate towards retention of that agency in continuing to enforce Chapter 468K.

On page 11 of your report, it is stated that in 1985, the law was amended to transfer trusteeship of the Recovery Fund to three trustees appointed by the Director. The stated purpose was to avoid potential conflict of interest if the Office of Consumer Protection had to file an action against the Director of Commerce and Consumer Affairs. It is clear that this statement, which is factually correct, would be equally applicable if trusteeship over the Recovery Fund were returned to the Director within the framework of the present enforcement of the act, which is statutorily delegated to the Director of the Department of Commerce and Consumer Affairs. The anomaly is clear. The same individual charged with enforcing Chapter 468K Hawaii Revised Statutes is the same individual who is required to act as the trustee of a recovery fund made up entirely of monies contributed by travel agents.

Of significance is the statement that amendments in 1987 permitted the trustees to intervene in court actions and it was these amendments which created a cumbersome process. Your research is flawed.

Section 468K-8, Hawaii Revised Statutes, which permits intervention by the trustee(s) was enacted in the original statute in 1980 and later amended in 1985 to reflect the change of trusteeship. As the attorney for the initial trustee, Russel Nagata, and later counsel for the successor trustees, I can represent to you that the trustee(s) have always had the right of intervention in any court actions involving possible recovery from the Travel Agency Recovery Fund. A simple reference to Vol. 8 of Hawaii Revised Statutes would clearly indicate that §468K-8, Hawaii Revised Statutes, which permits such intervention was enacted in 1980 and amended subsequently in 1985; it has not been amended since 1985. (See 1980 Session Laws, Act 290 at p. 553; 1985 Session Laws, Act 46 at p. 77)

Returning the Trusteeship of the Recovery Fund to the Director of the Department of Commerce and Consumer Affairs

As I stated above, it is my opinion that a return of the trusteeship over the Travel Agency Recovery Fund would create and indeed exacerbate a potential conflict of interest problem which existed in the original statute.

Further, and most importantly, I believe that maintaining the present statutory scheme of trusteeship would override all other concerns in instances in which the trust corpus consists entirely

of contributions from licensed travel agents--that of independence. Although there may be merit in a recommendation that at least one trustee be a member of the general public, I believe that the presence of knowledgeable and dedicated travel agents has enhanced substantially the efforts to safeguard the trust corpus.

In the past six years that I have had the privilege of advising the trustees, I have never encountered a situation in which it could be perceived that the trustees have favored travel agents. Indeed, in one specific case, the trustees objected to an action brought on behalf of travel agents, who had suffered personal/business losses when their "discounted familiarization" tour agent failed to deliver purchased tickets and absconded from the State of Hawaii.

A majority of the recovery actions initiated by the Office of Consumer Protection have not been contested by the trustees. In instances in which the trustees have objected to payment from the Recovery Fund, these cases have fallen within two major categories, non-compliance with the procedural requirements enacted by the Legislature and as incorporated in §468K-5, Hawaii Revised Statutes, and disputes involving whether a particular transaction fell within the confines of "travel services" as defined in §468K-1, Hawaii Revised Statutes. The Trustees have successfully argued the loss of camera equipment, rental of apartment units, and monies expended for business cards were not "travel services;" the Trustees have unsuccessfully argued that telephone toll charges, taxi fares and familiarization tours by travel agents were not "travel services."

Admittedly, some of the litigation has been, from time-to-time heated and vigorous, but the independence of the Trustees has never been challenged. Finally, I would be remiss if I did not point out that in one instance in which the Office of Consumer Protection took the position that Hawaiian Airlines was not in part responsible for the losses of consumers as a result of clear CAB violations by Hawaiian Airlines, the independence of the Trustees led to a claim of indemnification against Hawaiian Airlines and a subsequent favorable settlement with Hawaiian Airlines. But much more than the monetary settlement was the demonstrated willingness of the Trustees, all travel agents, to seek a change of policy of Hawaiian Airlines in its charter flight operations.

Should you have any questions relating to the above, please so advise.

Again, thank you for the opportunity for allowing my comments relative to the above-reference report.

With kindest personal regards.

Very truly yours,

Clayton C. Ikei

CCI:rkh/0479

cc: Ms. June Kamioka
Trustees of the Travel Agency
Recovery Fund

THE SENATE
SIXTEENTH LEGISLATURE, 1991
STATE OF HAWAII

S.B. NO.

A BILL FOR AN ACT

RELATING TO TRAVEL AGENCIES.

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

SECTION 1. Chapter 468K, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§468K- Bond. (a) Each travel agency shall file and maintain with the director a bond in the amount of $5,000. Each sales representative shall file and maintain with the director a bond in the amount of $500. All bonds required by this section shall be issued by a surety company authorized to do business in the State, and shall run to the State. All bonds shall be conditioned that the travel agency or the sales representative will comply with all requirements of this chapter or any other statute now in force or hereafter enacted with respect to the duties, conduct, obligations, and liabilities of travel agencies or sales representatives.

(b) In addition to any other remedy, the director or any person claiming to have sustained damage by reason of any breach of the conditions to a bond may bring action on the bond for the recovery of any damages sustained therefrom. The liability of the surety shall not exceed the amount of the bond issued.

(c) In lieu of the bond required by this section, an irrevocable letter of credit in a form approved by the director drawn upon a bank or savings and loan association in the amount of the bond, may be substituted. The director shall be the beneficiary of the letter of credit."

SECTION 2. Section 26H-4, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The following chapters are hereby repealed effective December 31, 1991:

(1) Chapter 458 (Board of Dispensing Opticians)

(2) Chapter 460J (Pest Control Board)

(3) Chapter 462A (Pilotage)

[(4) Chapter 468K (Travel Agencies)]"

SECTION 3. Section 26H-4, Hawaii Revised Statutes, is amended by amending subsection (h) to read as follows:

"(h) The following chapters are hereby repealed effective December 31, 1997:

(1) Chapter 438 (Board of Barbers)

(2) Chapter 448 (Board of Dental Examiners)

(3) Chapter 455 (Board of Examiners in Naturopathy)

(4) Chapter 459 (Board of Examiners in Optometry)

(5) Chapter 471 (Board of Veterinary Examiners)

(6) Chapter 468K (Travel Agencies)"

SECTION 4. Section 468K-1, Hawaii Revised Statutes, is amended by deleting the definition of "trustees".

[""Trustees" means trustees of the travel agency recovery fund appointed pursuant to the provisions of this chapter."]

SECTION 5. Section 468K-3, Hawaii Revised Statutes, is amended to read as follows:

"**§468K-3 Travel agency recovery fund; use of fund; fees.** (a) There shall be established and maintained a travel agency recovery fund from which any person aggrieved by an act, omission of material fact, representation, transaction, or conduct of a licensee, that is in violation of this chapter or its adopted rules, or which constitutes an unfair or deceptive act or practice in violation of section 480-2, may recover, by order of a [court of competent jurisdiction within the State,] hearings officer designated by the director, an amount of not more than [$8,000] $10,000 for damages sustained as a result of the act, representation, transaction, or conduct of each licensee. Recovery from the fund shall be limited to the actual damages suffered by the claimant[, including court costs and fees as set by law, and reasonable attorneys' fees as determined by the court].

[The director shall appoint three trustees, all of whom shall be licensed under this chapter, to maintain the travel agency recovery fund. The terms of the trustees shall be four years; provided that the terms of the initial trustees shall be two, three, and four years, respectively. The director may remove any trustee for good cause.]

(b) Every travel agency shall pay at the time of original licensure a nonrefundable fee of $50 for deposit in the travel agency recovery fund. Every sales representative shall pay at the time of original licensure a nonrefundable fee of $25 for deposit in the travel agency recovery fund."

SECTION 6. Section 468K-4, Hawaii Revised Statutes, is amended to read as follows:

"**§468K-4 Additional payments to fund.** If, on December 31 of any year, the balance remaining in the travel agency recovery fund is less than $30,000, the [trustees] director shall order that every travel agency and sales representative be assessed the appropriate fee for deposit in the travel agency recovery fund."

SECTION 7. Section 468K-5, Hawaii Revised Statutes, is amended to read as follows:

"**§468K-5 Statute of limitations; recovery from fund.** (a) No action [for a judgment or proceeding for a consent judgment

under section 480-22 which] that may subsequently result in an order for collection from the travel agency recovery fund shall be commenced later than six years from the accrual of the cause of action.

[(b) When any person aggrieved commences an action for a judgment which may result in collection from the travel agency recovery fund, the person aggrieved shall notify the trustees in writing to that effect at the commencement of the action. The trustees shall have the right to intervene in and defend any action.

(c) When any person aggrieved recovers a valid judgment in a court of competent jurisdiction within the State against any licensee for any act, omission of a material fact, representation, transaction, or conduct which is in violation of this chapter or its adopted rules, or which constitutes an unfair or deceptive act or practice in violation of section 480-2, which occurred after January 1, 1981, the person aggrieved may, upon the termination of all proceedings, including reviews and appeals in connection with the judgment, apply to the court in which the judgment was entered for an order directing payment out of the travel agency recovery fund, of the amount unpaid upon the judgment, subject to the limitations stated in this section;

provided that the trustees must be given ten days' written notice of the hearing on the application.

(d) When the office of consumer protection obtains a consent judgment pursuant to section 480-22, in any circuit court where the violation occurred, against any licensee for any act, omission of a material fact, representation, transaction, or conduct which is in violation of this chapter or its adopted rules, or which constitutes an unfair or deceptive act or practice in violation of section 480-2, which occurred after January 1, 1981, the office of consumer protection upon the finality of the consent judgment under section 480-22, may apply to the court in which the consent judgment was entered for an order directing payment out of the travel agency recovery fund, of the amount unpaid upon the consent judgment, subject to the limitations stated in this section; provided that the trustees must be given ten days' written notice of the hearing on the application. The trustees shall have the right to intervene in and defend any application to the court for an order directing payment out of the travel agency recovery fund.]

(b) Upon receipt of a written complaint by a person aggrieved or an investigative report generated by the department on its own motion, against any licensee for any act, omission of

a material fact, representation, transaction, or conduct that is in violation of this chapter or its adopted rules, or that constitutes an unfair or deceptive act or practice in violation of section 480-2, that occurred after January 1, 1981, the department shall notify the licensee of the charge against the licensee. A hearings officer designated by the director shall conduct a hearing in conformity with chapter 91 to determine recovery, if any, from the travel agency recovery fund. If the hearings officer finds that the charge constitutes a violation and that the licensee caused actual damages suffered by the person aggrieved, the hearings officer may determine the amount of damages and issue a final decision ordering payment out of the travel agency recovery fund.

[(e) The court shall proceed upon the application for an order directing payment out of the travel agency recovery fund in a summary manner, and, upon the hearing of the application,] (c) In order to recover payment from the travel agency recovery fund, the person aggrieved shall be required to show that the person:

(1) Is not a spouse of the [judgment debtor,] licensee, or the personal representative of the [judgment debtor's] licensee's spouse; and

(2) Has complied with all the requirements of this

section[;

(3) Has obtained a judgment as set out in subsections (c), (d), or (g), stating the amount of the judgment and the amount owing on the judgment at the date of the application;

(4) Has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets liable to be sold or applied in satisfaction of the judgment; and

(5) By the search required by this section, has discovered no personal or real property or other assets at the time of the application liable to be sold or applied, or has discovered certain of them, describing them, owned by the judgment debtor and liable to be so applied and has taken all necessary action and proceedings for the realization thereof, and that the amount thereby realized was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application of the amount realized].

[(f) The court shall make an order directed to the trustees requiring payment from the travel agency recovery fund of

whatever sum it shall find to be payable upon the claim, pursuant to the provisions of and in accordance with the limitations contained in this section, if the court is satisfied, upon the hearing of the truth of all matters required to be shown by the person aggrieved by subsection (e), that the person aggrieved has fully pursued and exhausted all remedies for recovering the amount awarded by the judgment of the court. Upon a showing that the licensee is a debtor under the United States Bankruptcy Code (11 U.S.C. §101, et seq.), as amended, the person aggrieved shall have complied with the requirements stated in subsection (e)(4) and (5) and shall be deemed to have fully pursued and exhausted all remedies available to the person aggrieved for recovering the amount which may be awarded by the court.

(g) For purposes of this chapter, an order for restitution obtained by the office of consumer protection on behalf of a person aggrieved against a licensee shall be the judgment obtained by the person aggrieved against the licensee. For purposes of this chapter, any written notification to the trustees as required by subsection (b) by the office of consumer protection or any acts to recover restitution on behalf of the person aggrieved by the office of consumer protection shall be the acts of the person aggrieved.

(h) Subject to the limitations and requirements of this chapter, the office of consumer protection may apply to the court for an order directing payment out of the travel agency recovery fund on behalf of a person aggrieved; provided that the office of consumer protection obtains a court order directing the payment of restitution to the person aggrieved. The office of consumer protection shall not receive costs or attorney fees from the travel agency recovery fund.

(i)] (d) Upon the filing of an order for payment from the travel agency recovery fund to the [office of consumer protection,] department or [to any] the person aggrieved, [which is based upon a consent judgment obtained by the office of consumer protection pursuant to section 480-22, the trustees] the director may defer payment from the fund for six months, at the end of which period the [trustees] director may discharge the [trustees'] director's obligations under the order and any other order for payment from the fund obtained by any person aggrieved prior to and at any time during the six-month period, by disbursing the money from the fund, up to the maximum allowed under this chapter, to all of the persons aggrieved, including those persons aggrieved in whose behalf the [office of consumer protection] department obtained its order, on a pro rata basis;

provided that prior to the disbursement of the money, the [trustees file] director files an affidavit with the [court] hearings officer stating how the money is to be disbursed. The [trustees] director may apply to the [court] hearings officer for an extension of the six-month period upon good cause, but in no case shall payment to the [office of consumer protection] department or any person aggrieved be deferred for more than one year except as provided in subsection [(k).] (f).

[(j)] (e) Should the [trustees] director pay from the travel agency recovery fund any amount in settlement of a claim [or toward satisfaction of a judgment] against a licensee, the license shall be automatically terminated upon the issuance of [a court] an order by the hearings officer authorizing payment from the travel agency recovery fund. The former licensee shall not be eligible to obtain a new license until the fund is repaid in full, plus interest at the rate of ten per cent a year, the amount paid from the travel agency recovery fund on the account of the former licensee. A discharge in bankruptcy shall not relieve a person from the penalties and disabilities provided in this subsection.

[(k)] (f) If, at any time, the money deposited in the travel agency recovery fund is insufficient to satisfy any duly

authorized claim or portion thereof, the [trustees shall,] director, when sufficient money has been deposited in the travel agency recovery fund, shall satisfy the unpaid claims or portions thereof, in the order that the claims or portions thereof were originally filed or in accordance with subsection [(i).] (d)."

SECTION 8. Section 468K-6, Hawaii Revised Statutes, is amended to read as follows:

"**§468K-6 Management of fund.** The sums received for deposit in the travel agency recovery fund shall be held by the [trustees] director in trust for carrying out the purposes of the travel agency recovery fund. The [trustees] director, as trustee of the recovery fund, may retain private legal counsel to represent the [trustees] director in any action which may result in collection from the travel agency recovery fund. These funds may be invested and reinvested in the same manner as funds of the state employees' retirement system, and the interest from these investments shall be deposited to the credit of the travel agency education fund, which is hereby created, and which shall be available to the [trustees] director for educational purposes."

SECTION 9. Section 468K-8, Hawaii Revised Statutes, is repealed.

"**§468K-8 [The trustees have] Director as trustee; standing**

in court. [When the trustees receive notice, as provided in section 468K-5, the trustees] In any action for recovery from the travel agency recovery fund, the director, in the director's capacity as trustee, may enter an appearance, file an answer, appear at [the] any court hearing, defend the action or take whatever other action [they may deem] the director deems appropriate. The [trustees] director or the legal representative of the [trustees] director shall be served with all pleadings in an action which may result in a recovery from the travel agency recovery fund.

Settlement of any claim against the travel agency recovery fund shall be made only by agreement of the [trustees] director and attorney general that settlement is in the best interest of the travel agency recovery fund."

SECTION 10. Section 468K-9, Hawaii Revised Statutes, is amended to read as follows:

"**§468K-9 Subrogation to rights of [creditor.] aggrieved person.** When, upon the order of [the court, the trustees have] a hearings officer, the director has paid from the travel agency recovery fund any sum to the [judgment creditor, the trustees] aggrieved person, the director shall be subrogated to the rights of the [judgment creditor] aggrieved person to the extent of the

amount of the payment, and the [judgment creditor] aggrieved person shall assign the [judgment creditor's] aggrieved person's right, title, and interest in [the] any judgment recovered by the aggrieved person from the licensee to the [trustees] director in the amount of that payment from the [trustees.] director. Any amount and interest so recovered by the [trustees] director on the judgment shall be deposited to the credit of the travel agency recovery fund."

SECTION 11. Section 468K-11, Hawaii Revised Statutes, is amended to read as follows:

"**§468K-11 Maximum liability.** Notwithstanding any other provision, the liability of the travel agency recovery fund shall not exceed [$8,000] $10,000 for any travel agency or sales representative."

SECTION 12. Section 468K-15, Hawaii Revised Statutes, is amended to read as follows:

"**§468K-15 Penalties.** Any person who engages in an act or practice which violates any provision of this chapter or rules adopted pursuant thereto shall be fined a sum of not less than $500 nor more than $2,500 for each act or practice, which sum shall be collected in a civil suit brought by the [office of consumer protection.] director."

S.B. NO.

SECTION 13. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 14. This Act shall take effect upon its approval.

INTRODUCED BY: _____