
Evaluation of the Continuing Education Program for Real Estate Brokers and Salespersons

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

Report No. 94-25
December 1994

THE AUDITOR
STATE OF HAWAII

Evaluation of the Continuing Education Program for Real Estate Brokers and Salespersons

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Submitted by

THE AUDITOR
STATE OF HAWAII

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Foreword

Act 68, Regular Session of 1994 directed the State Auditor to evaluate the mandatory continuing education program for real estate brokers and salespersons in Section 467-11.5, Hawaii Revised Statutes. The continuing education requirement is scheduled for repeal on July 1, 1995. Act 68 asked us to assess whether the program has protected the public, whether it should be established pursuant to statute, and recommend necessary improvements. This report presents our findings and recommendations.

We acknowledge the cooperation of the Real Estate Commission, the Department of Commerce and Consumer Affairs, and others whom we contacted during the course of our evaluation.

Marion M. Higa
State Auditor

Table of Contents

Chapter 1 Introduction

| | |
|--|---|
| Background on Real Estate Agents | 1 |
| Regulatory Program | 1 |
| Objectives of the Evaluation | 3 |
| Scope and Methodology | 3 |

Chapter 2 Findings and Recommendations

| | |
|---|----|
| Summary of Findings | 5 |
| Mandatory Continuing Education for Real Estate Agents Is Unwarranted | 5 |
| Implementation of the Program Is Deficient | 10 |
| Conclusions | 12 |
| Recommendations | 13 |

| | |
|-------------|----|
| Notes | 15 |
|-------------|----|

| | |
|--|----|
| Responses of the Affected Agencies | 17 |
|--|----|

Chapter 1

Introduction

To renew their licenses in Hawaii, real estate brokers and real estate salespersons must complete ten hours of continuing education. This requirement is scheduled for repeal on July 1, 1995.

Act 68, Regular Session of 1994, directs the State Auditor to evaluate the continuing education program. The evaluation is to include an assessment of whether the program has improved protection of the public in real estate transactions, whether the program should be established pursuant to statute, and whether any recommendations, including proposed legislation, are necessary to improve the program. This report responds to the directive in Act 68.

Background on Real Estate Agents

The practice of real estate includes the marketing of real property interests and the negotiation of agreements to transfer these interests from one party to another. Real property includes land and anything affixed to it such as buildings and fences.

Real estate brokers and salespersons are involved in a wide variety of real property transactions, including the rental, lease, purchase, sale, and exchange of residential, commercial, industrial, and agricultural property. Brokers are individuals, partnerships, or corporations responsible for managing a real estate business. They are authorized to carry out all phases of a real estate transaction. Salespersons must be employed by brokers, or contract independently with them, to obtain property listings, locate interested parties, negotiate transfer terms, and draw up agreements.

As of February 1994, Hawaii had 5,325 real estate brokers with active licenses, all but 3 with Hawaii addresses. There were 929 brokers with inactive licenses, 169 with mainland addresses. The state had 6,994 real estate salespersons with active licenses; all but 1 of these lived in Hawaii. There were 7,386 salespersons with inactive licenses, 632 with mainland addresses.¹

Regulatory Program

Chapter 467, HRS, enacted in 1933, governs the regulatory program for real estate brokers and salespersons. Those wishing to engage in these occupations must be licensed by the Real Estate Commission, which is administratively attached to the Department of Commerce and Consumer Affairs (DCCA).

The commission consists of nine members, appointed by the governor, who serve without compensation. At least four members must be licensed real estate brokers, and two members must be public members. Of the nine members, four must be residents of the City and County of Honolulu. The counties of Hawaii, Maui, and Kauai must each be represented by one member.

Chapter 467 contains licensing, disciplinary, and other requirements. Among other things, the commission must maintain a Real Estate Recovery Fund to pay damages to consumers harmed by the fraud, misrepresentation, or deceit of a broker or salesperson. The interest on recovery fund investments supports a Real Estate Education Fund, which the commission may use for the benefit of the public, licensees, and the improvement of the real estate industry.

DCCA's Regulated Industries Complaints Office (RICO) mediates and resolves consumer complaints, pursues disciplinary action against licensees, and seeks court injunctions and fines against unlicensed parties. Final disciplinary decisions are made by the Real Estate Commission following a recommended decision from DCCA's Office of Administrative Hearings.

Initial licensure requirements

Chapter 467 requires applicants for either the real estate broker or real estate salesperson license to pass an examination appropriate to the license being sought. Generally, applicants for the *real estate broker* examination must have completed a course for brokers approved by the commission. They must be previously licensed as a salesperson, have worked in the real estate business full-time for two years, and have practical experience in the real estate field. Applicants for the *real estate salesperson* examination must have completed a course on real estate principles.

Partnerships and corporations can be licensed as brokers if they are directly managed by a licensed broker.

The commission also issues certificates of registration to real estate schools and instructors if they meet certain requirements.

Continuing education requirement

The continuing education law was enacted in 1987. Act 95, which became Section 467-11.5, HRS, requires that real estate brokers and salespersons attend ten hours of continuing education, or its equivalent as determined by the commission, during the two-year period preceding their application for license renewal. This requirement was first applied to license renewals for the biennium beginning January 1, 1991. The requirement is scheduled for repeal as of July 1, 1995.

Objectives of the Evaluation

This evaluation seeks to determine whether the continuing education requirement in Section 467-11.5 complies with policies for occupational licensing set forth in the Sunset Law, Chapter 26H, HRS. Specifically, the objectives were to:

1. Determine whether there is a reasonable need to require continuing education for real estate brokers and real estate salespersons to protect the health, safety, and welfare of the public;
2. Determine whether the current continuing education requirements are appropriate for protecting the public;
3. Determine whether the continuing education requirements are being implemented effectively and efficiently; and
4. Make recommendations based on findings in these areas.

Scope and Methodology

To accomplish these objectives, we reviewed literature on continuing education and the statutes and rules governing real estate continuing education in Hawaii. We also reviewed complaint data and other evidence of harm to consumers. We interviewed members of the Real Estate Commission, personnel from DCCA, the Real Estate Research and Education Center of the University of Hawaii, professional associations, and others. We also examined documents on board operations, licensing, enforcement, and correspondence.

Our work was performed from June 1994 through November 1994 in accordance with generally accepted government auditing standards.

Chapter 2

Findings and Recommendations

In this chapter we evaluate the mandatory continuing education program for real estate brokers and real estate salespersons under Section 467-11.5, Hawaii Revised Statutes. We conclude that the continuing education requirement should be repealed. If the program is continued, improvements should be made.

Summary of Findings

1. Mandatory continuing education for real estate brokers and salespersons is unwarranted and the statute should be repealed. Its value in protecting consumers has not been demonstrated. Better consumer protection could be achieved more simply through stronger penalties.
2. The Real Estate Commission has not implemented the continuing education requirement appropriately to ensure minimal competency. The program goes beyond efforts to maintain basic competency and appears primarily to benefit the real estate industry. Some requirements are burdensome and restrictive.

Mandatory Continuing Education for Real Estate Agents Is Unwarranted

Act 95 of 1987 requires that real estate agents (brokers and salespersons) obtain ten hours of continuing education every two years as a condition of license renewal. The Legislature's intent was to protect the public in their real estate transactions by helping to ensure the competency of licensees. We find insufficient evidence that mandatory continuing education has resulted in better consumer protection.

Therefore, the mandatory continuing education requirement conflicts with a fundamental legal principle embodied in the Sunset Law: the states may exercise their police power and impose occupational licensing requirements only if the requirements tend to promote public health, safety, or welfare. Even when regulation is necessary, it should not unreasonably restrict entry into the profession.

The value of mandatory continuing education for occupations is questionable and few of Hawaii's licensing programs require it. We found no demonstrated improvement in consumer protection due to mandatory continuing education for real estate agents in Hawaii. We also found the arguments in favor of the requirement unconvincing. Better ways exist to protect consumers.

General concept is questionable

Historically, continuing education of professionals has been purely voluntary. In the late 1960s and early 1970s, concern arose about “professional obsolescence” in the medical and allied health professions. Considerable controversy over the value of mandatory continuing education ensued. Proponents said it would keep practitioners’ skills current and enable them to serve consumers competently. Opponents argued that it would not guarantee learning or more competent practice.

According to a recent publication of the U.S. Department of Education, little evidence currently exists that mandatory continuing professional education ensures competence or learning.¹

In Hawaii, continuing education is required for only nine of the forty-five occupational regulatory programs administered by the Professional and Vocational Licensing Division of the Department of Commerce and Consumer Affairs (DCCA). Besides real estate agents, the other occupations are physicians, podiatrists, optometrists, emergency medical personnel, chiropractors, certified public accountants, real estate appraisers, and, beginning in 1995, electricians. In all but three of these, health and safety is an issue. Almost every state requires continuing education for real estate agents, but we believe this is not warranted.

Protection of Hawaii consumers is not demonstrated

The entire premise of the current continuing education requirements for real estate agents is questionable. Prior to Act 95, real estate agents in Hawaii participated in continuing education courses, seminars, and workshops on a voluntary basis. The Legislature passed Act 95 following several reports pointing to consumer problems with real estate agents, defining consumer protection as the purpose of a continuing education requirement, and proposing consumer complaints as an indicator of effectiveness. The reports contained little evidence that consumer complaints were caused by incompetence on the part of licensees or that continuing education would remove the specific incompetencies harming consumers. Instead, the reports suggested a possible relationship between consumer complaints and continuing education:

- A 1983 study prepared for the Real Estate Commission examined complaints filed at the Regulated Industries Complaints Office (RICO) against real estate licensees from 1977 through 1981 and found increasing consumer dissatisfaction with real estate agents.²
- A 1985 report to the Legislature by the Real Estate Commission concluded that the purpose of establishing mandatory continuing education would be to afford the public greater protection in its real estate transactions, and not to promote education for

education's sake. The commission called for follow-up studies to determine the impact of any mandatory program implemented.³

- A 1986 report to the commission from the Social Science Research Institute of the University of Hawaii (the SSRI study) observed that a decrease in complaints is “touted” as the clearest way to determine the effectiveness of continuing education.⁴
- A 1987 consultant's report (the Shern report) supported a ten-hour continuing education requirement. The report said measuring the impact of the program on competency would be difficult but the volume, nature, and trend of consumer complaints could be a significant indicator.⁵

In our review of complaint data, we found no clear relationship between continuing education and consumer complaints.

Complaint data inconclusive

We reviewed data on complaints filed at RICO against real estate agents from 1989 through 1993. We found that the total volume of complaints fluctuated considerably with no distinct trend and no indication that continuing education has added protection to consumers.

In 1989, 412 complaint cases were filed, and in 1990, with mandatory continuing education well under way, there were 473 cases. In 1991, the year following the first biennium of continuing education, 474 cases were filed. The number dropped to 328 in 1992, and rose to 367 in 1993.

Even strong proponents of mandatory continuing education acknowledge that the complaint data are inconclusive. The Hawaii Real Estate Research and Education Center at the University of Hawaii has been deeply involved in the Real Estate Commission's overall educational program for many years. The center strongly supports continuing education and receives funds from the commission to develop courses for the commission's approval. In 1991, the Real Estate Commission and the Research and Education Center issued an interim evaluation of the requirements.⁶

The interim report said it was difficult to determine a cause and effect relationship between continuing education and consumer complaints and that the number of complaints apparently was related to the number of real estate transactions. The report also pointed out that payouts from the Real Estate Recovery Fund were decreasing, but the relationship of decreasing payouts to continuing education was inconclusive.

In a subsequent 1993 assessment, the center reported that total complaints were declining as a percentage of real estate transactions, but not necessarily due to the mandatory continuing education requirement.⁷ Recovery fund payouts were still declining, but again the center judged this inconclusive because one or two cases could skew the figures. At most, the evidence from RICO and recovery fund cases “provided some evidence, albeit inconclusive, that continuing education *may* have improved consumer protection.”⁸

The 1993 report said that it was difficult to answer directly the question of whether mandatory continuing education had improved public protection. Instead, the center had only indirect indications of the program’s effectiveness based on conversations with brokers and salespersons. These indications included: more precise and voluminous documentation of real estate transactions; greater clarity in identifying who is being represented by whom; greater care to ascertain and disclose material facts; more awareness of tax and reporting laws governing foreign buyers and sellers; and greater knowledge by real estate agents about federal laws on fair housing, persons with disabilities, and the environment.

The center acknowledged that these measures are indirect. Furthermore, the center also acknowledged that some of these improvements may have resulted from a major education campaign by the commission prior to the continuing education requirement and from increased litigation against wrongdoers.

Other arguments by proponents are irrelevant

The 1987 Shern report said that mandatory continuing education was necessary because of the “ever-growing volume of new laws, rules, court decisions, and concerns with which licensees must become familiar if they are to give consumers adequate service.”⁹ This and the need to equalize the knowledge of real estate agents licensed at different times is the principal justification offered by proponents of mandatory continuing education.

However, the State should not use its regulatory powers to establish a mandatory continuing education program simply to make sure that real estate agents keep up-to-date on applicable laws. For example, Hawaii does not require continuing education for licensed attorneys even though they have the same need to keep up-to-date. Attorneys may take courses on a voluntary basis for a fee. Each licensee in every regulated program in this state should be responsible for keeping up with laws and regulations. In addition, the Real Estate Commission already provides information on legal developments in its monthly bulletin and annual report. The commission views these publications as part of its educational program and mails them to all licensees.

The Research and Education Center has argued in favor of mandatory continuing education for two additional reasons—evidence of learning and student satisfaction with continuing education. Neither argument has any bearing on consumer protection.

The center administered controlled pre-tests and post-tests to a sample of students taking continuing education finance courses and found that almost all passed the post-test. From this and other uncontrolled tests, the center concluded that continuing education is working and learning is occurring. The center also pointed to a survey of students which showed a high level of satisfaction with the courses. However, neither learning nor student satisfaction is necessarily related to protecting consumers from harm.

Harm more closely related to dishonest practices

We note that the allegations made in complaints appear more closely related to dishonest practices than the need for continuing education. Categories of complaints have changed little despite mandatory continuing education. The 1983 study revealed the following key categories of allegations: mishandling of funds; misrepresentation; unprofessional or unethical practices; and violation of licensing laws.

RICO recently reported that the most prevalent allegations from 1990 through 1993 involved similar types of allegations: mishandling of funds; misrepresentation; unethical practices; dishonest or fraudulent acts; failure to comply with laws and regulations; and failure to disclose pertinent information.

Stronger penalties may protect consumers better

To protect consumers against such misdeeds as mishandling of funds, misrepresentation, dishonest practices and violation of laws, tougher fines may be more immediate and effective than continuing education.

In 1993, real estate licensees received the second highest volume of complaints among the licensing programs within RICO's jurisdiction. Only contractors generated more complaints. In that year, the Real Estate Commission took a wide range of disciplinary action against licensees, including suspending and revoking the licenses of brokers and salespersons, imposing fines, ordering restitution, and requiring that licensees take a designated real estate course.

It appears that despite significant enforcement efforts many violations continue to occur. The commission already has many weapons at its disposal, but stronger penalties to discourage wrongdoing may be appropriate. For example, fines could be increased from the current \$1,000 for each violation of the law under Section 467-26, HRS. Increasing fines would send a clear message to real estate agents that any wrongdoing will have an immediate and significant consequence.

Implementation of the Program Is Deficient

We also find that implementation of the mandatory continuing education program is flawed in several respects. The program of courses is not limited to basic competency, it benefits the real estate industry more than consumers, and certain requirements are burdensome and restrictive.

Course program exceeds basic competency

The State's use of its police powers for the purpose of licensing is to ensure that practitioners meet a minimal standard of competence necessary to protect the health, safety, and welfare of consumers. The Sunset Law clearly states that the purpose of regulation is not to protect the regulated profession. By going far beyond the purpose of regulation, the current continuing education program violates this criterion.

Current program is inappropriate

Initially, the commission's rules required three set courses of 3 and 1/3 hours totaling ten hours: Law and Ethics, Finance, and Contracts, all with a "basic" focus. This program was explicitly designed to bring all agents up to a minimum level of competency. There were no electives.

Currently, the rules require one set core course and two electives. The new system is based on an approach used in California. The rationale for this more complex and advanced program is not based on protecting consumers. The Real Estate Research and Education Center acknowledged that most of the electives were developed in response to "market demand." Many of the courses help agents to polish their skills, handle more advanced transactions, enhance their professionalism, and increase their knowledge. They have little to do with basic competency. In addition, the commission ranks the courses at three levels of difficulty: beginning, intermediate, and advanced. This clearly demonstrates that the commission's view of continuing education is not geared to basic competency. This is further evidenced by the commission's rules and the courses offered.

Commission's rules conflict with Sunset Law

The commission's rules require continuing education to be related to consumer protection *and real estate professional development*. The rules also require courses to be developed for a difficulty level *beyond professional entry*; and they must be "at least 60% *beyond minimal competency level*" to be approved. To satisfy the requirement of ten hours of continuing education or its equivalent every two years, agents must take one set "core" course of 3 and 1/3 hours—Law and Ethics—and select two electives of 3 and 1/3 hours each from a list approved by the commission.

These provisions conflict with the principle embodied in the Sunset Law that regulation should be undertaken only where necessary to protect the health, safety, and welfare of consumers. The commission approves courses that go far beyond maintaining a basic level of competency and the “reasonable knowledge” required for licensure. Examples of such courses include Advanced Exchanging, How To Price A Small Business, and The Use and Marketing of Trusts In Real Estate. They constitute an inappropriate use of the State’s police power to regulate.

Industry is the main beneficiary

Continuing education requirements should exist solely to protect consumers. But the benefits for consumers are uncertain while the benefits for many of the key players in the real estate industry—licensees, the Research and Education Center, course providers, and course instructors—are quite clear:

- *Licensees* benefit through access to many courses that enhance their professional, personal, and career development. Licensees have regular input into the types of courses that should be offered. Popular courses include Contract Solutions, Residential Property Management, and How to Invest in Real Estate.
- The *Real Estate Research and Education Center* benefits from funds from the commission’s Real Estate Education Fund and Condominium and Cooperative Education Fund to research, develop, and update continuing education courses. The center received from the commission \$18,000 in FY1991-92, \$32,000 in FY1992-93, and \$8,266 in FY1993-94 for its work relating to continuing education. The center received \$376,945 in FY1993-94 for all of its work for the commission. (In addition, the center receives an estimated \$150,000 worth of in-kind support, such as office space, from the University of Hawaii.)
- A total of 16 *providers* are certified by the commission to offer courses at an average fee of \$55 per course.
- A total of 34 *instructors* are certified to teach the courses. In addition, licensees can teach courses for a fee to satisfy their own continuing education obligation.

The commission’s current objective is to integrate continuing education into a comprehensive educational program. This evolving program will serve a wide variety of industry interests, but not necessarily the interests of consumers.

Requirements for course providers and instructors are burdensome and restrictive

Requirements of the program appear to burden and restrict those they affect.

The requirements imposed on course providers are so burdensome that they may restrict free competition. They include surety bonds, an initial provider registration fee of \$200 (with a registration renewal fee of \$150 every two years), and \$300 to certify each course the provider develops (with a \$150 renewal fee). This would favor larger organizations with more resources.

The rules require course instructors to possess teaching ability and command knowledge of the subject matter. The rules also require instructors to pay an initial instructor certification fee of \$100 (with a certification renewal fee of \$30), \$20 for each course the instructor initially proposes to teach (with a \$20 course renewal fee), \$75 for each additional course which the instructor wants to teach, and, like providers, \$300 to certify each course the instructor develops (with a \$150 renewal fee). Instructors also must attend commission-approved instructor-development workshops after they become certified, at a fee of \$25-\$75.

Conclusions

Mandatory continuing education for real estate brokers and salespersons is not warranted. Implementation of the requirement has not resulted in any evidence of improved consumer protection. The primary justification of ensuring that real estate licensees keep up with new laws and court decisions can be met without mandatory continuing education. To better protect consumers, the Legislature may instead wish to consider establishing a stronger schedule of fines for violations of the law by real estate agents.

Furthermore, the Real Estate Commission has implemented the program in a manner that conflicts with the Sunset Law. The courses go beyond basic competency and appear to benefit primarily the real estate industry, providing further evidence that the program should be ended.

Should the Legislature choose to continue the program, it should require the commission to amend its rules to limit mandatory education courses to those necessary for insuring minimal competency. The commission should first establish the types of competencies that need to be addressed by its continuing education program. The Legislature may wish to require this by statute. In addition, the commission should amend its rules to reduce the financial burden on those who wish to become continuing education providers or instructors.

Recommendations

1. We recommend that the Legislature consider allowing Section 467-11.5, HRS to be repealed on July 1, 1995 as scheduled, in order to end the requirement of mandatory continuing education for real estate brokers and salespersons.
2. If the program is not repealed, the following improvements should be made:
 - a. The Legislature should consider amending Section 467-11.5, HRS to require that mandatory continuing education be limited to mandatory courses designed to ensure that licensees maintain a minimally acceptable level of competency.
 - b. The Real Estate Commission should identify the minimal competencies that need to be maintained through its continuing education program before adding elective courses.
 - c. The commission should amend its rules to remove burdensome and restrictive requirements for certification as a continuing education provider or instructor.

Notes

Chapter 1

1. Hawaii, Department of Commerce and Consumer Affairs, *Summary/ Geographic Report* (printout), February 4, 1994, pp. 38-40.

Chapter 2

1. Milton R. Stern and Donna S. Queeney, "The Scope of Continuing Professional Education: Providers, Consumers, Issues," in *Professional Workers as Learners: The Scope, Problem, and Accountability of Continuing Professional Education in the 1990s*, E. Stephen Hunt (ed.), Washington, D.C.: U.S. Department of Education, 1992, p. 26. See also Benjamin Shimberg, "Regulation in the Public Interest: Myth or Reality?" in *Resource Briefs*, no. 91-1, published by The Council on Licensure, Enforcement and Regulation (CLEAR). Shimberg says that professional groups have "created and fostered the myth that because we have mandatory continuing education the competence of licensees is assured."
2. *A Study of the Complaints File of the Hawaii Real Estate Commission: A Technical Report*, prepared by SMS Research, Honolulu, September 1983.
3. Hawaii, Real Estate Commission, Department of Commerce and Consumer Affairs, *A Review of Real Estate Commission Regulatory and Educational Functions (1984)*, Honolulu, January 1985, pp. 38-39.
4. University of Hawaii, Social Science Research Institute, *Report to the Real Estate Commission, State of Hawaii: Mandatory Continuing Education for Real Estate Licensees*, Honolulu, January 1986, p. 52.
5. Mary S. Shern, *Report to the Real Estate Commission, State of Hawaii: Mandatory Continuing Education for Real Estate Licensees*, Honolulu, 1987, pp. 13, 26, 27.
6. Hawaii, Real Estate Commission, Department of Commerce and Consumer Affairs, *Report to the Legislature on Mandatory Continuing Education Requirements for Real Estate License Renewal—Interim Evaluations and Recommendations*, prepared by Hawaii Real Estate Research and Education Center, University of Hawaii, Honolulu, December 1991.

7. Hawaii Real Estate Research and Education Center, University of Hawaii, *Report to the Legislature on How Continuing Education of Real Estate Licensees Protects the Public and Promotes Professional Excellence*, Honolulu, January 1993, pp. 32-33.
8. *Ibid.*, p. 65.
9. Shern, *Report to the Real Estate Commission*, p. 10.

Responses of the Affected Agencies

Comments on Agency Responses

We transmitted a draft of this report to the Real Estate Commission and to the Department of Commerce and Consumer Affairs on October 20, 1994. A copy of the transmittal letter to the commission is included as Attachment 1. A similar letter was sent to the department. The department's response is included as Attachment 2.

The commission's initial response of November 10, 1994 was nearly 170 pages long. We informed the commission by letter on November 17, 1994 that it was unfeasible to include the voluminous comments in our report but we would inform readers that the comments are on file at our office. We also invited the commission to submit comments of no more than two pages by November 25, 1994. Our letter of November 17 is included as Attachment 3. The commission's comments of November 25 are included as Attachment 4.

In its November 25 comments, the commission objects to our decision to omit its initial 170-page comment from our 16-page report. We disagree with the commission's position that we are required to include its comments regardless of volume. We considered a more concise response to be a better alternative. This was borne out by the commission's subsequent 4-page comment which we believe states its position more clearly and concisely.

The commission's November 25 letter makes several observations about our report. We respond to two of the main points.

The commission questions our finding that there is no distinct trend in complaints filed at the Regulated Industries Complaints Office against real estate agents and no indication that continuing education has added protection to consumers. The commission says that since the implementation of mandatory continuing education, complaints have leveled off, "appear to be on a downward trend," and the number of cases filed against the Real Estate Recovery Fund have declined.

We stand by our finding. The Legislature had asked us to assess whether the program had improved protection of consumers in real estate transactions. We believe that the value of the program in this regard has not been demonstrated. Many factors can affect complaints. No cause and effect relationship has been demonstrated for mandatory continuing education and consumer complaints. Furthermore, as our report points out, the general concept of using mandatory continuing

education to protect consumers is questionable and little evidence exists nationally that it ensures competence.

The commission disagrees with our finding that it has not appropriately implemented the continuing education requirement. We found that the commission's aim to develop courses 60 percent beyond minimal competency level goes beyond the purpose of licensing, which is to ensure a minimal standard of competence necessary to protect the health, safety, and welfare of consumers. The commission believes regulations are not limited to a minimum level of competency if the regulations are "reasonably necessary." However, licensing means ensuring minimal competency through "reasonably necessary" requirements. Regulation that goes beyond ensuring the minimal competency necessary to protect consumers is by definition not "reasonably necessary." A leading authority in occupational regulation has stated:

Licensing is a process by which an agency of government grants permission to an individual to engage in a given occupation upon a finding that the applicant has attained the minimal degree of competency required to ensure that the public health, safety, and welfare will be reasonably well protected. (Benjamin Shimberg, *Occupational Licensing: Questions a Legislator Should Ask*, Council of State Governments, Lexington, Kentucky, 1978, p. 1)

Furthermore, the *Real Estate Commission Reference Book* issued by the commission and the Department of Commerce and Consumer Affairs in 1994 says that "real estate licensure assures consumers of the licensee's minimal competency to practice real estate" (p. 42). In requiring courses for a difficulty level beyond professional entry and at least 60 percent beyond minimal competency level, we believe the commission's actions contradict the policy in its own manual.

Based on the commission's comments, we have made a few changes in the report such as adding real estate appraisers as one of the regulated occupations in Hawaii that require continuing education and incorporating recent revisions in the Hawaii Administrative Rules governing fees relating to boards and commissions.

In its response, the Department of Commerce and Consumer Affairs concurs with the commission. It says that no clear and convincing evidence shows that continuing education does not benefit consumers. We disagree. The Sunset Law requires regulation to be undertaken *only* when reasonably necessary to protect consumers. The law does not say that regulation shall be undertaken unless evidence shows consumers are not benefited.

STATE OF HAWAII
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawaii 96813-2917



ATTACHMENT 1

MARION M. HIGA
State Auditor

(808) 587-0800
FAX: (808) 587-0830

October 20, 1994

COPY

Mr. Marcus Nishikawa, Chair
Real Estate Commission
Kamamalu Building, Room 702
250 South King Street
Honolulu, Hawaii 96813

Dear Mr. Nishikawa:

Enclosed for your information are 10 copies, numbered 9 to 18 of our draft report, *Evaluation of the Continuing Education Program for Real Estate Brokers and Salespersons*. We ask that you telephone us by Monday, October 24, 1994, on whether or not you intend to comment on our recommendations. Please distribute the copies to the members of the commission. If you wish your comments to be included in the report, please submit them no later than Thursday, November 3, 1994.

The Department of Commerce and Consumer Affairs, 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,

Marion M. Higa
State Auditor

Enclosures

JOHN WAIHEE
GOVERNOR



CLIFFORD K. HIGA
DIRECTOR

LINDA CHU TAKAYAMA
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 10, 1994

RECEIVED

Nov 10 4 05 PM '94

OFC. OF THE AUDITOR
STATE OF HAWAII

Ms. Marion M. Higa
State Auditor
Office of the Legislative Auditor
465 South King Street, Room 500
Honolulu, HI 96813-2917

Dear Ms. Higa:

The Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to comment on the draft report, Evaluation of the Continuing Education Program for Real Estate Brokers and Salespersons.

We concur with the response submitted by the Real Estate Commission in response to this report. At this time it does not appear that clear and convincing evidence establishes the conclusion that mandatory continuing education does not benefit consumers. The factual statistics set forth in the Commission's response would tend to indicate that some of the findings and conclusions submitted by the Auditor are premature.

There also appear to be discrepancies with respect to earlier reports on continuing education and the conclusions reached in this study. At best, it is unclear why continuing education is warranted for professional accountants and real estate appraisers but not for real estate professionals. Like accountants and appraisers, realtors are also required to learn evolving state and federal laws and encounter issues that are similar to the accounting and appraisal professions.

The Department believes that at this time, given the tight economic restraints facing the state, that continuing education is a proactive approach which can reduce consumer frustration and complaints in the real estate profession. The record of complaints establishes distinct trends and conclusions which the Auditor's office may not have had the time to fully review and appreciate.

Ms. Marion M. Higa
November 10, 1994
Page 2

DCCA stands ready to work with the Real Estate Commission and the Legislature to improve continuing education for real estate licensees and ultimately the consumers who will need professional real estate advice and guidance.

Very truly yours,

A handwritten signature in cursive script that reads "Clifford K. Higa".

CLIFFORD K. HIGA
Director

ATTACHMENT 3

STATE OF HAWAII
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawaii 96813-2917



MARION M. HIGA
State Auditor
(808) 587-0800
FAX: (808) 587-0830

November 17, 1994

Mr. Marcus Nishikawa, Chair
Real Estate Commission
Kamamalu Building, Room 702
250 South King Street
Honolulu, Hawaii 96813

COPY

Dear Mr. Nishikawa:

We have received your comments of November 10, 1994 on our draft report, *Evaluation of the Continuing Education Program for Real Estate Brokers and Salespersons*. We note that your comments are nearly 170 pages in length, including a 55-page letter, an 87-page report, and several other appendixes.

It is unfeasible to include such voluminous comments in our report. Instead we will inform readers that your response is on file at our office. If you would like comments to be included in the report, please submit them in a letter no more than two pages long and no later than Friday, November 25, 1994. We ask that you telephone us by Monday, November 21, 1994, on whether or not you intend to submit such a letter.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Marion M. Higa'.

Marion M. Higa
State Auditor

c: The Honorable Clifford Higa

JOHN WAIHEE
GOVERNOR



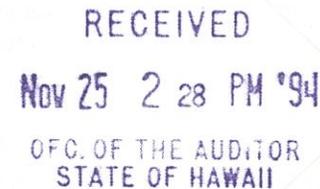
CLIFFORD K. HIGA
DIRECTOR

NOE NOE TOM
LICENSING ADMINISTRATOR

STATE OF HAWAII
REAL ESTATE BRANCH
PROFESSIONAL & VOCATIONAL LICENSING DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
250 SOUTH KING STREET, ROOM 702
HONOLULU, HAWAII 96813

November 25, 1994

Marion M. Higa, State Auditor
Office of the Auditor
465 S. King Street, Room 500
Honolulu, HI 96813-2917



Dear Mrs. Higa:

On October 20, 1994, your office transmitted to the Real Estate Commission ("Commission") your draft report, Evaluation of the Continuing Education Program for Real Estate Brokers and Salespersons. The cover letter stated as follows: "If you wish your comments to be included in the report, please submit them no later than Thursday, November 3, 1994." (emphasis added). The Commission was given initially only 14 days to comment on the draft report. Upon request by the Commission, your office granted a seven-day extension until Thursday, November 10, 1994.

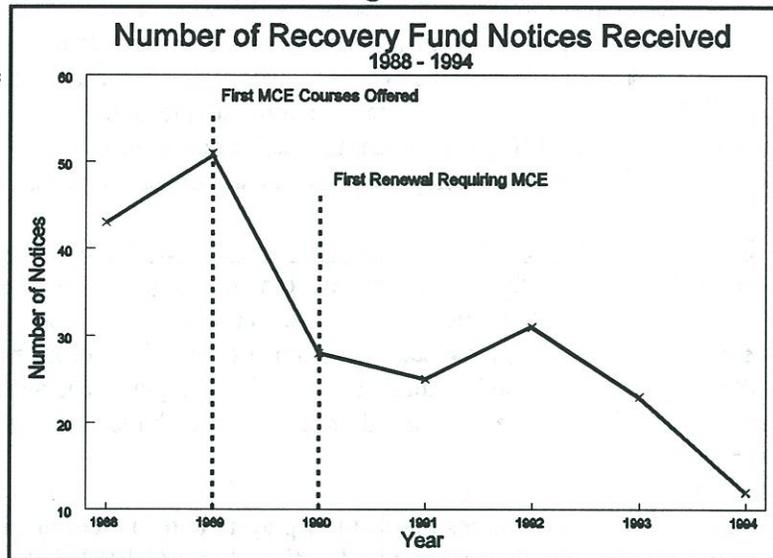
On November 10, 1994, the Commission submitted its comment to your office in a timely manner. Thereafter, by letter dated November 17, 1994, your office informed us that the submitted comment was "unfeasible [sic] to include . . . in our report", and that the comment must be submitted "in a letter no more than two pages long and no later than Friday, November 25, 1994." (emphasis added).

The Commission's detailed comment of November 10, 1994 included data and analysis to assist the Legislature in evaluating mandatory continuing education ("MCE"). The Commission is sorely disappointed to hear that its comment, although submitted in good faith, on short notice and in a timely manner, will not be included in the report. **No limitation or restriction on the length of the Commission's comment was made by your office prior to its submission. Accordingly, we protest the decision to omit our comment of November 10, 1994 and question the propriety of limiting the present comment to two pages.**

In the past, affected agencies have been afforded unrestricted comment on your reports. Comments have ranged in length from one page to well over ten pages. (See e.g., A Study of Curriculum, Budgets, and Repair and Maintenance of Hawaii's Public Schools (1992), DOE comment; Follow-Up on the Management and Financial Audit of the Judiciary (1990), Judiciary comment.) We know of no other instance in which an affected agency's comment was not included in its totality or limited to two pages. Imposition of such restrictions on the Commission goes against the spirit and directive of Hawaii Revised Statutes ("HRS") § 26H-5(d), wherein the legislative auditor ("Auditor"), in other instances in preparing evaluation reports, is mandated to append the written comments received from the Commission to each copy of the evaluation report prior to the submission to the legislature. **We stand on the merits of our November 10, 1994 comment and maintain that the comment in its entirety should have been incorporated herein and made a part of this report. We would have been willing to assist your office in incorporating our comments of November 10, 1994 had we been given the opportunity to do so.**

There has also been a concurrent decline in the number of cases filed against the Real Estate Recovery Fund to satisfy judgments for licensee misconduct. The number of cases filed against the Recovery Fund is significant because these cases are a direct reflection of lawsuits filed against real estate licensees in the circuit courts throughout the state. A search of over 650 Recovery Fund case files produced the results in Figure 2.

Figure 2



The trend is clearly downward, with marked decreases beginning in 1990 and 1991. The dates correspond directly with implementation of MCE, taking into consideration the delayed effects of the program. **The concurrent decline in cases filed against the Recovery Fund and decline in RICO complaints involving real estate licensees provide strong evidence linking the implementation of MCE to enhanced consumer protection. At a minimum, they call into serious question the report's findings of "no distinct trend and no indication that continuing education has added protection to consumers".**

4. It is both reasonable and desirable to have MCE to ensure that licensees keep up-to-date on applicable laws. The Commission concurs with the Auditor's findings for accountancy that MCE is reasonable and desirable, and a significant and important means of maintaining competency. The State has an interest in mandating MCE in auditing and accounting because of the potential economic harm that could result from substandard auditing or accounting practices. This premise applies with equal force to real estate licensees. In Hawaii, the potential for economic harm and financial loss from a single real estate transaction is immense because of the high cost of real estate and housing in general. And, because the business of real estate licensees is tied to housing, the potential for widespread harm is great.

5. Stronger penalties do not result in better consumer protection. The report proposes stronger penalties as a more immediate and effective cure for licensee misconduct, yet provides no affirmative support for this conclusion. The Commission's in-depth analysis of the effects of stronger penalties on contractor misconduct reveals that increasing penalties has not proven to have a deterrent affect on licensees nor does it provide a viable alternative for consumer protection. Notwithstanding substantial penalty increases for contractors in 1984, contractor complaints have increased steadily over the years. Tougher fines have not proven to be effective with contractors, and, given the panoply of government and private sanctions already available against real estate licensees (e.g., license suspension and revocation, civil litigation resulting in general and punitive damages), they are not likely to have much impact on real estate brokers or salespersons either.

6. The Commission's implementation of the MCE program is proper. The report alleges that the State's use of its police powers for the purpose of licensing is "to ensure that practitioners meet a minimal standard of competence necessary to protect the health, safety, and welfare of consumers." The report fails, however, to provide the statutory authority for this standard and to define what is meant by "minimal standard of competence". The Commission maintains that limitation of MCE to a minimum level of competency is inconsistent with legislative policies. In its efforts to regulate appropriately real estate brokers and salespersons, the Commission looks to the legislative policies concerning professional and vocational regulation of HRS 26H-2 and applies the standard of what is "reasonably necessary".