HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

Committee: Committee on Labor
Bill Number: H.B. 290
Hearing Date/Time: February 7, 2017, 11:00 a.m.
Re: Testimony of the Hawaii State Ethics Commission in **SUPPORT** of H.B. No. 290, Relating to Ethics

Dear Chair Johanson and Committee Members:

The Hawaii State Ethics Commission ("Commission") supports H.B. 290, the State Ethics Commission package, which amends numerous sections of the Ethics Code (Hawaii Revised Statutes chapter 84) and the Lobbyists Law (Hawaii Revised Statutes chapter 97).

Each section of the bill is addressed in turn.

Section 2: amendments to HRS § 28-8.3
Ethics Commission's ability to hire attorneys

This section amends HRS § 28-8.3 to make clear that the Commission can hire attorneys. Currently, HRS § 28-8.3 prohibits any state agency from hiring attorneys, except for the agencies listed in that statute; the Commission's omission from this list appears to have been an oversight. This section also makes clear that the Commission's attorneys, like those in most other legislative and executive agencies, are not considered Deputy Attorneys General.

Sections 3 and 4: amendments to HRS §§ 84-13 and 84-14
Applicability of fair treatment and conflict of interest laws to Task Force members; protections for legislators' "legislative functions"

These sections amend HRS §§ 84-13 and 84-14 to clarify the Ethics Code's applicability to Task Force members and to legislators. The intent of these sections is twofold: (1) to ensure that Task Force members are exempted from certain Ethics Code requirements, in alignment with the Legislature's intent in enacting Act 208 of 2012; and (2) to restore pre-2012 language regarding legislators' constitutionally protected "legislative functions."

1. **Task Force members and the Ethics Code**

In 2012, the Legislature enacted Act 208 (HB 2175) to exempt Task Force members from certain provisions of the Ethics Code. The legislative history of this measure indicates the Legislature's clear intention to ensure that Task Force members

could offer their expertise in a limited capacity without being held to the same standards as state officials.

In so doing, however, the Legislature appears to have inadvertently created additional burdens for Task Force members. Specifically, Act 208 of 2012 required Task Force members to "file a full and complete public disclosure" of potential conflicts, and further suggested that Task Force members may be required to file financial disclosure statements (as required for many state officials in HRS § 84-17). In other words, in attempting to exempt Task Force members from some provisions of the Ethics Code, the Legislature appears to have subjected Task Force members to additional provisions of the Ethics Code (specifically, the provision requiring the filing of financial disclosures).

The Commission recognizes that Task Force members are often selected because of their positions within the community, and that these community ties should not prevent experts from serving on Task Forces. As such, the Commission respectfully suggests amendments to both HRS §§ 84-13 and 84-14 to make clear that Task Force members need not file financial disclosures, and that the Ethics Code should not be a barrier to Task Force members serving on Task Forces.

That said, the Legislature has indicated it wishes both Task Force members and legislators to disclose conflicts of interest in some manner. As such, the Commission respectfully proposes that it develop administrative rules to provide for this public disclosure for both Task Force members and for legislators. The Legislature may wish to establish these rules itself, particularly for its own members; the Commission does not object if this Committee wishes to change the phrase "state ethics commission" (page 11, line 20 and page 12, line 10) to "legislature" in one or both instances.

2. "Legislative functions" and "official action"

In enacting Act 208 in 2012, the Legislature also changed the way the Ethics Code applies to legislators themselves. Language that existed prior to 2012 made clear that the Ethics Code would not interfere with a legislator's "legislative functions," which are protected by Article III, section 7 of the Hawaii Constitution.[1] In other words, the language prior to 2012 made clear that the Ethics Code did not supersede legislators' constitutional right to exercise their "legislative functions." The 2012 amendment, however, changed the phrase "legislative functions" (which derives from the constitution) to "official action" (which is defined by HRS § 84-3).

In reviewing the legislative history of Act 208 of 2012, the Ethics Commission does not believe that the Legislature intended to create a large exemption from the

[1] In relevant part, Article III, section 7 of the Hawaii Constitution provides: "No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of the member's legislative functions. . . ."

Ethics Code for its members; this issue is not mentioned anywhere in the legislative history, and the change may have been inadvertent. As such, the Commission respectfully suggests that the Legislature restore the pre-2012 exemption for "legislative functions" to demonstrate that the Legislature holds its members to high ethical standards.

Section 5: amendments to HRS § 84-17[2]
Procedures and fines for late filing of financial disclosures

This section amends HRS § 84-17, regarding the late filing of financial disclosures. It removes the requirement that the Ethics Commission send fine notices by "registered mail, return receipt requested"; increases the fines for those who miss the filing deadline; and requires publication of a list of those who fail to file their financial disclosures on time.

1. Postage costs

Currently, HRS § 84-17 requires the Commission to impose a fine of $50 for individuals who fail to file their financial disclosures by the May 31 deadline. However, HRS § 84-17 also requires that the Commission send notices of those fines by "registered mail, return receipt requested. In 2016, for each of these fine notices, the Commission paid $14.87 in postage. In 2016, more than 300 individuals failed to file their financial disclosures on time; Commission staff convinced many of those individuals to file the statements (late) through e-mail and phone calls, but the Commission still spent approximately $1,000 to mail dozens of letters as required by statute. The Commission believes that it can send these notices via e-mail and first-class U.S. mail and achieve the same result at a substantially reduced cost, and respectfully requests a statutory amendment to do so.

2. Fines for failure to file; published list of late filers

The current fines for failure to file a financial disclosure ($50) and candidate financial disclosure ($25) were last set in 1995. The Commission respectfully requests that the fines be increased to $75 and $50, respectively, to account for inflation.

The Commission also believes that publishing a list of those who fail to file their disclosures on time will help to incentivize state officials to complete their filings on time. As such, the Commission respectfully requests an amendment to HRS § 84-17 to require publication of a list of late filers.

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[2] HB 852, also being heard on today's agenda, contains the identical language contained in Section 5 of this measure.

Section 6: amendments to HRS § 84-31
Powers and duties of the Commission

This section amends HRS § 84-31, which sets forth the powers and duties of the Commission and its staff. The intent of this section is to memorialize long-standing practices of the Commission: that the Commission can settle cases; that Commission staff can issue confidential ethics advice; and that the Commission can issue non-binding guidance without promulgating administrative rules. This section also extends the deadline for the Commission to issue Advisory Opinions, in line with the similar process used by the Campaign Spending Commission.

1. Authority to settle cases

The Commission believes it has statutory authority to settle cases without having a full contested case hearing, but the Commission believes it prudent to have explicit statutory authority for this practice.

2. Authority for Commission and its staff to issue guidance

This section codifies the existing practice of the Commission staff to offer informal, confidential advice. Providing confidential ethics guidance to state officials, lobbyists, and others – often the same day – is one of the Commission's core functions, and is vital to the Commission's dedication to providing ethics education and preventing ethics violations from occurring in the first place. Pursuant to these proposed amendments, any interested individual can continue to request a formal Advisory Opinion or Declaratory Order; the proposed amendments simply memorialize longstanding practices of having staff give quick, informal advice. Again, the Commission believes that this authority is already implied by statute, but believes it prudent to make that authority explicit.

This bill also makes clear that the Commission and its staff can issue non-binding guidance on ethics questions without promulgating administrative rules. While the Commission believes that this authority is already clear (from chapter 84's requirement that the Commission provide educational services to the public), a recent court decision suggested that the Commission can provide guidance to multiple state officials through rulemaking only. Often, the Commission and its staff receive the same ethics question from multiple sources; the Commission often finds that it can best fulfill its educational mission (and can best prevent ethics violations) by issuing general guidance memoranda to help answer these questions. The Commission is aware that these memoranda do not have the force and effect of law – the Commission may only issue binding pronouncements through formal means such as rulemaking and Advisory Opinions – but the Commission believes it can best fulfill its mission by providing fast, informal guidance in most instances.

3. Time frame to issue formal Advisory Opinions

This section extends the time frame in which the Ethics Commission issues formal Advisory Opinions. Currently, HRS § 84-31 requires the Commission to issue Advisory Opinions within thirty days; by contrast, the Campaign Spending Commission has ninety days in which to issue its advisory opinions. See HRS § 11-315. Given the requirements of HRS chapter 92 (requiring certain items to be posted on a public agenda at least six days in advance), and the fact that the Commission typically meets only once a month, the thirty-day requirement may prevent the Commission from providing a thorough and accurate response to requests for formal ethics opinions. As such, the Commission respectfully requests that the deadline be extended either to sixty or ninety days.

Section 7: amendments to HRS § 84-39
Penalty amounts/process for violations of the Ethics Code

This section raises the maximum administrative penalty from $500 to $1,000. The penalty amount was last set in 1992; adjusting for inflation, that penalty would be approximately $858 today. This proposed bill would also make clear that the Commission can negotiate an administrative penalty (and/or restitution) as part of any negotiated settlement; again, the Commission believes that it already has statutory authority to engage in this long-standing practice, but believes it prudent to make that authority explicit.

Section 8: amendments to HRS § 97-1
Amends definitions of "lobbyist" and "lobbying"

This section makes several changes to the Lobbyists Law.

The Commission believes that the current standards for determining who must register as a lobbyist are both under- and over-inclusive. Currently, an individual must register as a lobbyist if s/he spends five or more hours lobbying in a month (for pay), or if the lobbyist spends $750 or more in a reporting period. Some individuals may seek to influence many pieces of legislation through short meetings with lawmakers (thus claiming that they spend fewer than five hours a month lobbying); conversely, some individuals may have to register as lobbyists – even if they have no direct contact with lawmakers – if they spend more than five hours in a month preparing a Grant In Aid ("GIA") application.

This section changes the definitions of "lobbyist" and "lobbying" to better effectuate the Legislature's original intent in enacting the Lobbyist Law: to ensure transparency in the legislative process and to give the public information about who is spending money to influence legislation. This section provides that individuals who assist in preparing GIA applications – but who otherwise do not engage in "lobbying" –

need not register as lobbyists. This section also provides several additional clear and objective thresholds – in addition to the five-hour threshold (which remains) – for determining who must register as a lobbyist.

Additionally, this section clarifies statutory language that, in the Commission's experience, has led to confusion for those reporting their lobbying expenses. It is the Commission's intention to propose administrative rules to make clear that purely administrative expenses need not be reported as lobbying expenditures, and that those engaged in purely administrative functions need not register as lobbyists.

Section 9: amendments to HRS § 97-2
Allowing organizations to terminate their lobbyists' registrations

Under current law, if a lobbyist stops lobbying on behalf of a client, the lobbyist must file a termination notice with the Commission within ten days. The lobbyist must do this personally – the organization cannot do this on behalf of the lobbyist. This is problematic in situations where an organization fires its lobbyist or where the lobbyist quits working, because if the lobbyist fails to file a notice of termination, the organization represented by the lobbyist must still file expenditure reports with the Commission. The proposed changes to this section will allow organizations to terminate their lobbyists' registrations when necessary.

Section 10: amendments to HRS § 97-3
Lobbyist expenditure statements

This section contains additional language (consistent with Section 8, above) making clear that the mere preparation of a GIA application does not constitute "lobbying," such that no expenditure reports or registration statements are necessary for this activity. Lobbying in support of a GIA application, however, would still be reportable activity.

This section adjusts the reporting requirements for lobbying expenditures. It increases the threshold for reporting lobbying expenditures from $750 to $1,000; it clarifies that inter-state transportation costs must be reported (and, by implication, that intra-state transportation costs need not be reported); and it makes clear that lobbyists and their clients are only required to file reports for a Special Session of the Legislature if they engaged in lobbying activities during that Special Session.

<u>Section 11: amendments to HRS § 97-4.5</u>
Publication of list of lobbyists

This section amends the requirement (enacted in 1980) that the Ethics Commission publish a list of lobbyists; the Commission currently publishes all lobbyist registration statements on its website, such that this extra publication is unnecessary.

<u>Section 12: amendments to HRS § 97-6</u>
Powers and duties of the Commission

This section contains amendments nearly identical to those in Section 6, above (amending HRS § 84-31), regarding the powers and duties of the Commission. The Commission adminsters both the Ethics Code (HRS chapter 84) and the Lobbyists Law (HRS chapter 97), and the powers and duties of the Commission are spelled out separately in HRS § 84-31 and HRS § 97-6. As described more thoroughly above, this section provides explicit statutory authority for the Commission's practices of settling cases and allowing staff to provide confidential advice.

<u>Section 13: amendments to HRS § 97-7</u>
Standard of proof, and penalties, for violations of Lobbyists Law

This section removes the <u>mens rea</u> requirement from HRS § 97-7. This requirement is held over from a time when the violation of the Lobbyists Law was a criminal offense. The penalties have been civil, rather than criminal, for quite some time, but the criminal law state-of-mind requirement remains. The Commission respectfully asks that this be amended accordingly.

This section also raises the maximum administrative penalty from $500 to $1,000. The penalty amount was last set in 1995.

Thank you for your continuing support of the Commission's work and for considering the Commission's testimony on H.B. No. 290.

Very truly yours,

Daniel Gluck
Executive Director and General Counsel