

JAN 24 2013

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**A BILL FOR AN ACT**

RELATING TO ESCROW DEPOSITORIES.

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

1           SECTION 1. Chapter 449, Hawaii Revised Statutes, is  
2 amended by adding four new sections to be appropriately  
3 designated and to read as follows:

4           "§449- Powers of commissioner. In addition to any other  
5 powers provided by law, the commissioner may:

- 6           (1) Administer and enforce the provisions and requirements  
7           of this chapter;
- 8           (2) Adopt, amend, or repeal rules or declaratory rulings  
9           pursuant to chapter 91 to effectuate the purposes of  
10           this chapter;
- 11           (3) Issue informal nonbinding interpretations to  
12           effectuate the purposes of this chapter;
- 13           (4) Investigate and conduct hearings regarding any  
14           violation of this chapter or any rule or order of the  
15           commissioner;
- 16           (5) Contract with or employ qualified persons, including  
17           investigators, examiners, or auditors who shall be  
18           exempt from chapter 76 and who shall assist the

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1 commissioner in exercising the commissioner's powers  
2 and duties;

3 (6) Deposit all fees, fines, and charges collected by the  
4 commissioner under this chapter into the compliance  
5 resolution fund established pursuant to section 26-  
6 9(o);

7 (7) Process and investigate complaints, subpoena witnesses  
8 and documents, administer oaths, and receive  
9 affidavits and oral testimony, including through  
10 electronic means, and conduct contested case  
11 proceedings; and

12 (8) Require a licensee to comply with any rule, guidance,  
13 guideline, statement, supervisory policy, or any  
14 similar proclamation issued or adopted by the federal  
15 authority or in the alternative any policy position of  
16 the Consumer Financial Protection Bureau.

17 §449- Cease and desist orders; grounds for issuance.

18 (a) The commissioner may issue a permanent cease and desist  
19 order to any escrow depository that the commissioner finds or  
20 has reasonable cause to believe:

21 (1) Is violating, has violated, or is about to violate  
22 this chapter or any rules adopted pursuant to this  
23 chapter;

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1       (2) Is violating, has violated, or is about to violate any  
2       written condition imposed or order issued by the  
3       commissioner on such escrow depository's authority to  
4       engage in business, or any condition of a written  
5       agreement between the escrow depository and the  
6       commissioner;

7       (3) Is engaging, has engaged, or is about to engage in an  
8       illegal, unauthorized, unsafe, or unsound practice; or

9       (4) Is failing to maintain books and records that are  
10       sufficiently complete and accurate so as to permit the  
11       commissioner to determine the financial condition of  
12       the escrow depository named in the order.

13       §449-    Permanent cease and desist orders; procedure;

14       hearing; enforcement. (a) The notice of charges and proposed  
15       permanent cease and desist order shall be in writing and shall  
16       be served upon the escrow depository at its principal office in  
17       this State. The notice of charges shall state the alleged  
18       violations or wrongful practices and a summary of the facts in  
19       support of the allegations. The notice shall be accompanied by  
20       a proposed order which states the commissioner's intent to  
21       require discontinuance of such violation or practice and the  
22       immediate compliance with all requirements of any applicable  
23       agreement, conditions of approval, order, rule, or law. The

1 proposed order may also direct such affirmative action as may be  
2 necessary to prevent insolvency and to correct the alleged  
3 violation or wrongful practice. The notice of charges shall set  
4 forth a time and place for a hearing to determine whether the  
5 proposed order shall be issued.

6 (b) Within twenty days after service of a notice of  
7 charges, unless an earlier date or later date is set by the  
8 commissioner upon request of the escrow depository, the  
9 commissioner shall hold a hearing in accordance with chapter 91.  
10 If no appearance is made at the scheduled hearing by the escrow  
11 depository or its duly authorized representative, the escrow  
12 depository shall be deemed to have consented to the issuance of  
13 the cease and desist order and the commissioner may issue a  
14 permanent cease and desist order. Any cease and desist order  
15 issued after a hearing held in accordance with this subsection  
16 shall become effective after service upon the escrow depository  
17 and shall remain effective until modified or terminated by the  
18 commissioner. Any appeal of a permanent cease and desist order  
19 shall be made to the circuit court in accordance with chapter  
20 91.

21 (c) On or after the effective date of any permanent cease  
22 and desist order, the commissioner may apply for enforcement of  
23 the order to the circuit court. Such application may also

1 contain a petition for such other relief or remedies as may be  
2 appropriate in the circumstances. The application shall be  
3 given precedence over other cases pending in court, and shall in  
4 every way be expedited.

5 "§449- Temporary cease and desist orders; effective date;  
6 hearing; enforcement. (a) The commissioner may issue a  
7 temporary cease and desist order upon a determination that one  
8 or more of the grounds for issuance are present in section 449-  
9 ; provided that, in the case of an escrow depository, the  
10 commissioner shall not issue a temporary cease and desist order  
11 unless the commissioner has also made a determination that the  
12 violation, threatened violation, or unsafe or unsound practice  
13 is likely to:

- 14 (1) Cause insolvency or substantial dissipation of assets;  
15 or;  
16 (2) Seriously weaken the condition of the escrow  
17 depository; or  
18 (3) Otherwise seriously prejudice the interests of the  
19 consumers during the period in which a permanent cease  
20 and desist order can be obtained.

21 The order shall be accompanied by a notice of charges stating  
22 the alleged violation or wrongful practice, a summary of the  
23 facts in support of the allegation, and a time and place for a

1 hearing to determine whether the temporary order shall be made  
2 permanent. The order may require discontinuance of a violation  
3 or practice; require the immediate compliance with all  
4 requirements of any applicable agreement, conditions of  
5 approval, order, or law; and direct affirmative action as may be  
6 necessary to prevent insolvency or to correct the alleged  
7 violation or wrongful practice.

8 (b) The order shall be effective upon service on the  
9 escrow depository. The order shall remain in effect until a  
10 permanent cease and desist order is issued after a hearing, a  
11 permanent cease and desist order is consented to, or the charges  
12 are dismissed upon completion of a hearing. Any escrow  
13 depository contesting the issuance of the temporary cease and  
14 desist order may do so by applying to the circuit court for an  
15 injunction.

16 (c) Within ten days after service of a notice of charges,  
17 unless an earlier date or later date is set by the commissioner  
18 upon request of the affected party, the commissioner shall hold  
19 a hearing in accordance with chapter 91. If no appearance is  
20 made at the scheduled hearing by the escrow depository or its  
21 duly authorized representative, the escrow depository shall be  
22 deemed to have consented to the issuance of the cease and desist  
23 order and the commissioner may convert the temporary cease and

1 desist order into a permanent cease and desist order. Any  
2 permanent cease and desist order issued after a hearing held in  
3 accordance with this subsection shall become effective after  
4 service upon the escrow depository and shall remain effective  
5 until modified or terminated by the commissioner. Any appeal of  
6 a permanent cease and desist order shall be made to the circuit  
7 court in accordance with chapter 91.

8 (d) Any temporary cease and desist order may be enforced  
9 in the circuit court upon application by the commissioner. Any  
10 permanent cease and desist order issued in accordance with this  
11 section may be enforced in circuit court."

12 SECTION 2. Section 449-1, Hawaii Revised Statutes, is  
13 amended by adding two new definitions to be appropriately  
14 inserted and to read as follows:

15 "Branch manager" means an individual who is designated and  
16 employed by an escrow depository to be responsible for the  
17 activities in the conduct of business at a branch office of the  
18 licensed escrow depository.

19 "Branch office" means any location, separate from the  
20 principal place of business of the escrow depository, that is  
21 identified by any means to the public or customers as a location  
22 at which the licensee holds itself out as an escrow depository."

1 SECTION 3. Section 449-4, Hawaii Revised Statutes, is  
2 amended to read as follows:

3 "~~§449-4 Administrative penalty. [Any person who wilfully~~  
4 ~~violates any of the provisions of this chapter, shall be subject~~  
5 ~~to an administrative fine of \$5,000 for each violation.]~~ (a)

6 The commissioner may impose an administrative fine on a licensee  
7 or person subject to this chapter if the commissioner finds on  
8 the record after notice and opportunity for hearing that the  
9 licensee or person subject to this chapter has violated or  
10 failed to comply with any requirement of this chapter or any  
11 rule prescribed by the commissioner under this chapter or order  
12 issued under the authority of this chapter.

13 (b) The maximum fine for each act or omission described in  
14 subsection (a) shall be \$10,000.

15 (c) Each violation under this chapter or failure to comply  
16 with any directive or order of the commissioner shall be a  
17 separate and distinct violation.

18 (d) Notwithstanding section 480-13.5, any violation of  
19 this chapter that is directed toward, targets, or injures an  
20 elder, may be subject to an additional civil penalty not in  
21 excess of \$10,000 for each violation in addition to any other  
22 finances or penalties assessed for the violation.



1        (e) No licensee shall be subject to this penalty for a  
2 violation of section 449-16(b) or (c) if the violation was not  
3 intentional or resulted from a bona fide error, notwithstanding  
4 the maintenance of procedures reasonably adopted to avoid that  
5 error. Examples of bona fide errors include, but are not  
6 limited to, clerical miscalculations, computer malfunction,  
7 printing errors, and computer programming errors."

8        SECTION 4. Section 449-5.5, Hawaii Revised Statutes, is  
9 amended to read as follows:

10        "**§449-5.5 Net capital.** The net capital of any corporation  
11 engaging in the escrow depository business under this chapter  
12 shall not be less than [~~\$50,000. A corporation in lieu of the~~  
13 ~~net capital requirement may alternatively file a bond for~~  
14 ~~\$50,000 conditional upon its satisfactory performance of escrow~~  
15 ~~conditions and satisfaction of all escrow liabilities.]~~  
16 \$100,000. The amount of the minimum net capital of [~~\$50,000, or~~  
17 ~~the bond, or a combination of both net capital or bond totaling~~  
18 ~~\$50,000]~~ \$100,000 shall be maintained at all times by the  
19 licensee.

20        [~~Licensees in operation on May 24, 1973, pursuant to this~~  
21 ~~chapter with a net capital of less than \$50,000 shall increase~~  
22 ~~its net capital to \$50,000 or file a bond for \$50,000, or take~~

1 ~~action so that a combination of its net capital and bond totals~~  
2 ~~\$50,000, before May 24, 1978.]"~~

3 SECTION 5. Section 449-7.5, Hawaii Revised Statutes, is  
4 amended by amending subsection (c) to read as follows:

5 "(c) The escrow depository business shall be under the  
6 direct management of an officer, or an employee, designated by  
7 its board of directors as escrow officer for the corporation and  
8 if the designated escrow officer or the designated branch  
9 manager of a branch office terminates the escrow officer's  
10 employment with the escrow depository, the licensee shall notify  
11 the commissioner in writing at least fifteen days before the  
12 termination date of the designated escrow officer. The licensee  
13 shall also inform the commissioner in writing of the new escrow  
14 officer or branch manager for the corporation designated by its  
15 board of directors before the present escrow officer terminates  
16 the present escrow officer's employment with the company,  
17 setting forth the experience, integrity, and competency of the  
18 new designated escrow officer in handling escrow transactions,  
19 and such other information as required by the commissioner. The  
20 licensee shall inform the commissioner in writing of any change  
21 to the designated escrow officer for the corporation or branch  
22 manager at least fifteen days prior to the change, unless the

1 event occurs so unexpectedly that the licensee is unable to  
2 provide fifteen days prior notice."

3 SECTION 6. Section 449-8.6, Hawaii Revised Statutes, is  
4 amended to read as follows:

5 "~~§~~449-8.6~~+~~ **Sale or transfer of license or change in**  
6 **control.** (a) No escrow depository license shall be  
7 transferred.

8 (b) A bona fide sale of all or substantially all of the  
9 ongoing operations of a licensee shall not result in the  
10 assignment or transfer of the escrow depository license. The  
11 purchaser of all or substantially all of the ongoing operations  
12 of a licensee shall file an application for approval in  
13 accordance with this chapter and shall not act as an escrow  
14 depository unless it has been licensed by the commissioner.

15 (c) If the licensee is a corporation, any intended  
16 transfer of its voting stock which may result in the acquisition  
17 of control of the licensee may be considered a transfer of  
18 license. Any intended transfer of the voting stock which may  
19 result in the acquisition of control shall be reported to the  
20 commissioner in writing. Upon determination by the commissioner  
21 that the intended transfer will result in the acquisition of  
22 control, the transferee of the stock shall file an application  
23 for approval to act as an escrow depository and shall not

1 acquire control of an escrow depository until the transferee has  
2 been approved by the commissioner.

3 (d) The fee for the transfer and change in control of an  
4 escrow depository license shall be \$2,000."

5 SECTION 7. Section 449-11, Hawaii Revised Statutes, is  
6 amended to read as follows:

7 "§449-11 Fidelity bonds [,-deposit-]; insurance or other  
8 security devices. A licensed escrow depository shall at all  
9 times either:

- 10 (1) Maintain a fidelity bond executed by a surety insurer  
11 authorized to do business in the State in an amount  
12 not less than [~~\$25,000;~~] \$100,000; provided that any  
13 bond which is subject to a deductible thereunder in  
14 excess of [~~\$5,000~~] \$10,000 per occurrence shall  
15 require the prior approval of the commissioner, who  
16 may take into consideration, among other factors, the  
17 amount of the proposed bond; or
- 18 (2) Deposit an equivalent amount of cash or [~~securities~~]  
19 or other security device under such terms and  
20 conditions as are acceptable to the commissioner, upon  
21 all of its directors, officers, and employees who have  
22 access to money or negotiable securities or  
23 instruments in its possession or under its control.

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1           Notwithstanding the above provision, the escrow  
2           depository may carry bonds or deposit cash or  
3           securities above the amounts required by the  
4           commissioner."

5           SECTION 8. Section 449-12, Hawaii Revised Statutes, is  
6           amended to read as follows:

7           "**§449-12 Errors and omissions insurance** [~~;~~ ~~deposit.~~] or  
8           other security devices. A licensed escrow depository shall at  
9           all times either:

10           (1) Maintain a policy of errors and omissions insurance  
11           executed by an insurer authorized to do business in  
12           the State in an amount not less than [~~\$100,000;~~  
13           \$250,000; provided that any policy which is subject to  
14           a deductible thereunder in excess of [~~\$10,000;~~  
15           \$100,000, per occurrence, shall require the prior  
16           approval of the commissioner, who may take into  
17           consideration, among other factors, the amount of the  
18           proposed coverage; or

19           (2) Deposit an equivalent amount of cash or [~~securities~~]  
20           or other security device under such terms and  
21           conditions as are acceptable to the commissioner."

22           SECTION 9. Section 449-14, Hawaii Revised Statutes, is  
23           amended to read as follows:

1       "**§449-14 Fees.** (a) The following fees shall be paid by  
2 licensed escrow depositories to the commissioner and, together  
3 with any administrative penalty or other charge assessed under  
4 this chapter, shall be deposited into the compliance resolution  
5 fund established pursuant to section 26-9(o):

6       (1) For filing and investigation of an escrow depository's  
7 application for license, [~~\$2,000;~~] \$5,000;

8       (2) For an application for approval to establish a branch  
9 office[~~;~~], \$100;

10       (3) For an application for approval to relocate an  
11 existing office or branch [~~;~~], \$100;

12       (4) For [~~initial issuance and~~] annual renewal of an escrow  
13 depository's license, [~~\$100;~~] \$2,000;

14       (5) For initial issuance and annual renewal of a branch  
15 office license, [~~\$50;~~] \$100;

16       (6) For reissuance of a license for the change in the  
17 business address of its office, [~~\$25;~~] \$50; provided  
18 that, a reissuance caused by changes to the address by  
19 the United States Postal Service shall not require  
20 payment of a fee; and

21       (7) For an application for approval to cease business as  
22 an escrow depository[~~;~~], \$0.

23

1 (b) For all escrow depositories examined or investigated  
2 by the commissioner or the commissioner's staff, the  
3 commissioner:

4 (1) May charge an examination or investigation fee based  
5 upon the cost per hour per examiner. The hourly fee  
6 shall be [~~\$40~~] \$60;

7 (2) May charge additional amounts for travel, per diem,  
8 mileage, and other reasonable expenses incurred in  
9 connection with the examination[~~]~~ or investigation;  
10 and

11 (3) Shall bill the affected escrow depository for  
12 examination or investigation fees and expenses as soon  
13 as feasible after the close of the examination or  
14 investigation. The affected escrow depository shall  
15 pay the division within thirty days following the  
16 billing. All payments shall be deposited into the  
17 compliance resolution fund established pursuant to  
18 section 26-9(o). Any dispute by the affected escrow  
19 depository relating to these billings shall be  
20 reviewed by the commissioner who may modify, waive, or  
21 suspend any billing.

22 (c) An escrow depository that fails to make a payment  
23 required by this section shall be subject to an administrative

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1 penalty of not more than \$200 per day for each day it is in  
2 violation of this section.


3 (d) Any fee authorized by this section may be set or  
4 modified by the commissioner by rule adopted pursuant to chapter  
5 91."

6 SECTION 10. Statutory material to be repealed is bracketed  
7 and stricken. New statutory material is underscored.

8 SECTION 11. This Act, upon its approval, shall take effect  
9 on July 1, 2013; provided that sections 4, 7, and 8 of this Act  
10 shall take effect on January 1, 2014.

11

12

INTRODUCED BY: 

13

BY REQUEST



**Report Title:**

Escrow Depositories

**Description:**

Requires escrow depositories to report any change of their corporate designated escrow officer or branch manager to the Commissioner of Financial Institutions; establishes a statutory fee for the transfer or change in control of an escrow depository license; increases the fidelity bond maintained by escrow depositories to a minimum of \$100,000; increases the errors and omissions policy amount escrow depositories are required to carry to not less than \$250,000; increases fees; provides powers for the commissioner to supervise and regulate the industry; and empowers the commissioner to issue cease and desist orders; increases net capital requirement to \$100,000.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

JUSTIFICATION SHEET

DEPARTMENT: Commerce and Consumer Affairs

TITLE: A BILL FOR AN ACT RELATING TO ESCROW DEPOSITORIES

PURPOSE: Requires escrow depositories to report any change of their corporate designated escrow officer or branch manager to the Commissioner of Financial Institutions; establishes a statutory fee for the transfer or change in control of an escrow depository license; increases the fidelity bond maintained by escrow depositories to a minimum of \$100,000; increases the errors and omissions policy amount escrow depositories are required to carry to not less than \$250,000; increase fees; provides powers for the commissioner to supervise and regulate the industry; empowers the commissioner to issue cease and desist orders; and increases the net capital requirement to \$100,000.

MEANS: Add four new sections to chapter 449 and amend sections 449-1, 449-4, 449-5.5, 449-7.5(c), 449-8.6, 449-11, 449-12 and 449-14, Hawaii Revised Statutes (HRS).

JUSTIFICATION: This law has not been revised since 1987. The escrow depository industry has evolved over the last 30 years. The average mortgage transaction is now \$300,000. The federal government has passed laws on privacy, identity theft, business continuity planning, and has added additional regulatory requirements on escrow transactions. The Division of Financial Institutions ("DFI") has supervised, regulated, and examined escrow companies on these new

laws without the benefit of changes to Hawaii's laws.

This bill provides powers to the commissioner to supervise, regulate, and examine escrow depositories. These powers include the ability to administer and enforce the provisions of the chapter and rules promulgated thereunder; issue nonbinding interpretations of the law; develop requirements for licensure through rules, investigate and conduct hearings regarding violations of this chapter, and hire qualified persons to help with the implementation or investigation of any claims; and require all licensees to follow the laws and the policy positions provided by the Consumer Financial Protection Bureau.

This bill allows for administrative enforcements after a notice of charges to order the escrow company to cease and desist its operations if it is engaged in violations of law or materially aiding in the violation of the law.

The administrative penalty section has been amended to allow the commissioner to impose an administrative fine after a notice and hearing for any violation of the chapter or failure to comply with any order. The previous provision only allowed for the administrative penalty if the commissioner found that the violation was willful - a high standard that has impaired enforcement.

This bill changes the net capital requirement for all escrow companies to \$100,000 and removed the alternative bond requirement. At a minimum all companies should have at least \$100,000 in capital to cover expenses of the company.

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This bill requires a branch manager at each branch office to be designated and employed by an escrow depository to be responsible for the activities in the conduct of business of the licensed escrow depository branch office.

The fidelity bond (for fraudulent acts on the part of employees) and the errors and omissions bond (for acts of negligence) will be increased by this bill to reflect the serious nature of the bond and insurance requirements, but provides DFI with flexibility to allow a licensee to get a bond or other security device to satisfy this requirement.

The escrow industry agrees to the increased bonding requirements. Industry also is in agreement with the changes to the fee schedule proposed in this bill. Although DFI anticipates revenues from the industry of approximately \$17,000 annually, the true cost of the supervision and regulation is approximately \$48,000 annually (2011) and \$51,000 annually (projected 2012). Regulation of this industry will be subsidized by revenues paid by the financial institution industry's franchise tax.

Impact on the public: As DFI focuses supervisory, regulatory, and examination on state licensees, DFI expects the industry to be more responsive and compliant with state and federal laws and, in turn, consumers will be protected.

Impact on the department and other agencies: DFI, as a self-funded agency must cover its costs in the supervision, regulation, and examination of escrow depositories.

Due to the increased oversight, more examiner hours will be spent supervising this industry.

GENERAL FUND:

No impact.

OTHER FUNDS:

Add funds to the Compliance Resolution Fund for use by DFI to administer the provisions of this chapter.

PPBS PROGRAM

DESIGNATION:

CCA 104.

OTHER AGENCIES

Office of Administrative Hearings, DCCA, if an expedited hearing is required for an administrative enforcement hearing.

AFFECTED:

EFFECTIVE DATE:

July 1, 2013; provided that sections 4, 7 and 8 of the bill related to the increase bond requirements shall take effect on January 1, 2014, to allow the companies to comply with the bond requirements.