
A BILL FOR AN ACT

RELATING TO THE MANAGEMENT OF FINANCING AGREEMENTS.

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

1 SECTION 1. Chapter 37D, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "CHAPTER 37D

4 MANAGEMENT OF FINANCING AGREEMENTS

5 §37D-1 Definitions. Unless the context requires
6 otherwise, as used in this chapter:

7 "Agency" [~~or "participating agency"~~] means the judiciary,
8 any executive department, any independent commission, any board,
9 any authority, any bureau, any office, any other establishment
10 of the State (except the legislature and its agencies), or any
11 public corporation that is supported in whole or in part by
12 state funds, or any agent thereof, authorized by law to expend
13 available moneys; provided that the Hawaii health systems
14 corporation shall not be governed by this chapter for any
15 financing agreement unless it elects to do so.

16 "Attorney general" means the attorney general of the State
17 or any duly designated deputy attorney general.

1 "Available moneys" means moneys appropriated or otherwise
2 made available, from time to time, by the legislature to pay
3 amounts due under a financing agreement for the fiscal period in
4 which the payments are due, together with any unexpended
5 proceeds of the financing agreement, and any reserves or other
6 amounts that have been deposited in trust to pay amounts due
7 under the financing agreement. The legislature shall not be
8 obligated to appropriate or otherwise make moneys available.

9 "Certificate of participation" means any certificate
10 evidencing a participation right or a proportionate interest in
11 any financing agreement or the right to receive proportionate
12 payments from [~~the State or~~] an agency due under any financing
13 agreement.

14 "Credit enhancement agreement" means any agreement or
15 contractual relationship between the State, the department, or,
16 with the approval of the director, any agency, and any bank,
17 trust company, insurance company, surety bonding company,
18 pension fund, or other financial institution providing
19 additional credit on or security for a financing agreement or
20 certificates of participation authorized by this chapter.

21 "Department" means the department of budget and finance of
22 the State.

1 "Director" means the director of finance of the State or
2 any duly designated deputy director of finance.

3 "Financial institution" means any organization authorized
4 to do business under state or federal laws relating to financial
5 institutions, including, without limitation, banks, savings
6 banks, savings and loan companies or associations, financial
7 services loan companies, and credit unions.

8 "Financing agreement" means any lease purchase agreement,
9 installment sale agreement, loan agreement, line of credit, or
10 other agreement of the department or, with the approval of the
11 director and any agency, to finance the improvement, use, or
12 acquisition of real or personal property that is or will be
13 owned or operated by one or more agencies of the State, the
14 department, or any [~~participating~~] agency, or to refinance
15 previously executed financing agreements including certificates
16 of participation relating thereto.

17 "Line of credit" means an account at a financial
18 institution under which the financial institution agrees to lend
19 money to the department, or, an agency, with the approval of the
20 department and any agency, from time to time to finance one or
21 more projects that are authorized by this chapter.

1 "Personal property" means tangible personal property,
2 software, and fixtures.

3 "Project" means the real and personal property to be
4 acquired or improved by ~~[a participating agency]~~ the department
5 or an agency, with the proceeds of a financing agreement of the
6 department or the agency, respectively, or provided to the
7 ~~[participating]~~ agency, by the department.

8 "Property rights" means, with respect to personal property,
9 the rights of a secured party under chapter 490, and, with
10 respect to real property, the rights of a trustee or lender
11 under a lease authorized by section 37D-3(4).

12 "Software" includes software, training, and maintenance
13 contracts related to the operation of computer equipment.

14 **§37D-2 Financing agreements.** (a) There is hereby
15 established and authorized the financing agreement program of
16 the State. Any agency desiring to acquire or improve projects
17 through the financing agreement program established and
18 authorized by this chapter shall submit a written request to the
19 department providing such information as the department shall
20 require. Notwithstanding any other law to the contrary, and
21 except for the Hawaii health systems corporation, only with the
22 approval by the attorney general as to form and legality and

1 upon the written request of one or more [~~participating~~] agencies
2 may the department enter into a financing agreement in
3 accordance with this chapter, and only with the approval by the
4 attorney general as to form and legality and by the director as
5 to fiscal responsibility and upon the written request of an
6 agency, may the agency enter into a financing agreement in
7 accordance with this chapter, except that the board of regents
8 of the University of Hawaii may enter into a financing agreement
9 in accordance with this chapter without the approval of the
10 director and of the attorney general as to form and legality if
11 the principal amount of the financing agreement does not exceed
12 \$3,000,000. A financing agreement may be entered into by the
13 department on behalf of one or more [~~participating~~] agencies, or
14 by an agency, at any time (before or after commencement or
15 completion of any improvements or acquisitions to be financed)
16 and shall be upon terms and conditions the department finds to
17 be advantageous. In each case of a written request by the
18 judiciary to participate in the financing agreement program, the
19 department shall implement the request; provided that the
20 related financing agreement shall be upon terms and conditions
21 the department finds to be advantageous. Any financing
22 agreement entered into by the department without the approval,

1 or by an agency without the approvals required by this section
2 shall be void and of no effect. A single financing agreement
3 entered into by the department may finance a single item or
4 multiple items of property to be used by multiple agencies or
5 may finance a single item or multiple items of property to be
6 used by a single agency. [~~The~~] If the financing agreement is by
7 the department, the department shall bill any [~~participating~~]
8 agency that benefits from property acquired with the proceeds of
9 a financing agreement for such [~~participating~~] agency's pro rata
10 share of:

11 (1) The department's costs of administration of the
12 financing agreement program; and

13 (2) The financing costs, including the principal and
14 interest components of the financing agreement and
15 insurance premiums;

16 on a monthly or other periodic basis, and may deposit payments
17 received in connection with the billings with a trustee as
18 security for [~~a~~] the financing agreement. Any [~~participating~~]
19 agency receiving such a bill shall be authorized and shall pay
20 the amounts billed from the available moneys.

21 If a financing agreement is by an agency, the agency shall
22 deposit on a monthly or other periodic basis with the department

1 payments from the available moneys in respect of the agency's
2 financing costs, including the principal and interest components
3 of the financing agreement and insurance premiums, which
4 payments the department may deposit with a trustee as security
5 for the financing agreement. The department may bill an agency
6 for the department's costs of administering the agency's
7 payments and the agency receiving such a bill shall be
8 authorized and shall pay the amounts billed from available
9 moneys.

10 (b) Financing agreements shall be subject to the following
11 limitations:

12 (1) Amounts payable by [~~a participating~~] an agency to or
13 upon the direction of the department in respect to a
14 project and by the department or an agency under a
15 financing agreement shall be limited to available
16 moneys. In no circumstance shall the department or an
17 agency be obligated to pay amounts due under a
18 financing agreement from any source other than
19 available moneys. If, by reason of insufficient
20 available moneys or other reason, amounts due under a
21 financing agreement are not paid when due, the lender
22 may exercise any property right that the department or

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1 the agency has granted to it in the financing
2 agreement, against the property that was purchased
3 with the proceeds of the financing agreement, and
4 apply the amounts so received toward payments
5 scheduled to be made by the department or the agency
6 under the financing agreement;

7 (2) No property rights may be granted in property unless
8 the property is being acquired, is to be substantially
9 improved, is to be refinanced with the proceeds of a
10 financing agreement, or is land on which the property
11 is located;

12 (3) Notwithstanding any other law to the contrary, and
13 except for the Hawaii health systems corporation and
14 as otherwise provided in this section with respect to
15 the University of Hawaii, and except as provided in
16 chapter 323F as to the Hawaii health systems
17 corporation, an agency shall not have the power to
18 enter into a financing agreement, except [~~through the~~
19 ~~department~~] as authorized by this chapter, and nothing
20 in this chapter shall be construed to authorize the
21 sale, lease, or other disposition of property owned by
22 an agency;

1 (4) Except as otherwise provided in this section with
2 respect to the University of Hawaii, the sale,
3 assignment, or other disposition of any financing
4 agreements, including certificates of participation
5 relating thereto, shall require the approval of the
6 director; and

7 (5) The department or the agency proposing to enter into a
8 financing agreement shall not be subject to
9 chapter 103D and any and all other requirements of law
10 for competitive bidding for financing agreements.

11 **§37D-3 Related agreements.** With the approval of the
12 attorney general as to form and legality, the department may[+],
13 and with the approval of the attorney general as to form and
14 legality and of the director as to fiscal responsibility, an
15 agency may:

16 (1) Enter into agreements with trustees, within or without
17 the State, to hold financing agreement proceeds,
18 payments, and reserves as security for lenders to
19 accept assignments of rights in the financing
20 agreement from, and to enforce such rights of, the
21 lessor or other party thereto, and to issue
22 certificates of participation for the right to receive

1 payments due from the department or agency under a
2 financing agreement. A financing agreement by an
3 agency shall provide that all payments due from the
4 agency under the financing agreement shall be
5 deposited to or on the order of the department for
6 payment to or at the order of the lender in accordance
7 with the financing agreement. The sale of
8 certificates of participation shall be, at the option
9 of the director, by negotiation or by competitive
10 sale, in accordance with the procedures set out by
11 section 39-55. The interest component of the
12 certificates of participation shall be at such rate or
13 rates payable at such time or times as the financing
14 agreement may provide. The certificates of
15 participation may be in one or more series; may bear
16 such date or dates; may mature at such time or times
17 not exceeding the lesser of:
18 (A) The weighted average economic life of the related
19 project or projects; or
20 (B) Thirty years from their date;
21 may be payable in such medium of payment at such
22 place or places within or without the State; may

1 carry registration privileges; may be subject to
2 such terms of redemption, to tenders for purchase
3 or to purchase prior to their stated maturity at
4 the option of the [State] department or the
5 agency, or the holder, or both; and may contain
6 such terms, covenants, and conditions; and may be
7 in such form, either coupon or registered, as the
8 financing agreement may provide. Amounts held by
9 a trustee shall be invested by the trustee at the
10 direction of the department or the agency in such
11 investments as are permitted by state law and as
12 shall be specified in the agreement with the
13 trustee. Interest earned on any investment held
14 by a trustee as security for a financing agreement
15 may, at the option of the department, or the
16 agency be credited to the accounts held by the
17 trustee and applied in payment of sums due under
18 such financing agreement;

- 19 (2) Enter into credit enhancement agreements for financing
20 agreements or certificates of participation; provided
21 that the credit enhancement agreements shall be
22 payable solely from available moneys and amounts

1 received from the exercise of property rights granted
2 under such financing agreements;

3 (3) Use financing agreements to finance the costs of
4 acquiring or refinancing property, plus the costs of
5 reserves and credit enhancements and costs associated
6 with obtaining the financing;

7 (4) Grant leases of real property subject to
8 section 37D-2(b)(2). The leases may be for a term
9 that ends on the date on which all amounts due under a
10 financing agreement have been paid or provision for
11 payment has been made or ten years after the last
12 scheduled payment under a financing agreement,
13 whichever is later. The leases may grant the lessor
14 the right to evict the department or the
15 [~~participating~~] agency as the case may be, and exclude
16 it from possession of the real property for the term
17 of the lease, if the department or the [~~participating~~]
18 agency as the case may be, fails to appropriate or pay
19 when due the amounts scheduled to be paid under a
20 financing agreement or otherwise defaults under a
21 financing agreement. Upon failure to pay or default,
22 the lessor may sublease the land to third parties and

1 apply any rentals toward payments scheduled to be made
2 under a financing agreement;
3 (5) Grant security interests in personal property subject
4 to section 37D-2(b)(2). The security interests shall
5 attach and be perfected on the date the department or
6 the [~~participating~~] agency as the case may be, takes
7 possession of the personal property, or the date the
8 [~~lender~~] lessor advances money under a financing
9 agreement, whichever is later. A security interest
10 authorized by this section shall have, except as
11 otherwise provided by law, priority over all other
12 liens and claims. Upon failure to pay or default, the
13 secured party shall have the rights and remedies
14 available to a secured party under chapter 490 or a
15 first, perfected security interest in goods and
16 fixtures. No later than ten days after a security
17 interest authorized by this section attaches, the
18 department or the agency, as the case may be, shall
19 cause a financing statement for the security interest
20 to be filed with the bureau of conveyances in the same
21 manner as financing statements are filed for goods;

- 1 (6) Pledge any amounts that are deposited with a trustee
2 in accordance with a financing agreement. The pledge
3 shall be valid and binding from the time it is made,
4 the amounts so pledged shall immediately be subject to
5 the lien of the pledge without filing, physical
6 delivery, or other act, and the lien of the pledge
7 shall be superior to all other claims and liens of any
8 kind whatsoever;
- 9 (7) Purchase fire and extended coverage or other casualty
10 insurance, or liability, title, rental interruption,
11 or other insurance for property that is acquired or
12 refinanced with proceeds of a financing agreement,
13 assign the proceeds thereof to a lender or trustee to
14 the extent of its interest, and covenant to maintain
15 such insurance while the financing agreement is
16 unpaid, so long as available funds are sufficient to
17 purchase such insurance; and
- 18 (8) In connection with any financing agreement by which
19 the department, on behalf of an agency, leases or
20 purchases property from another party, notwithstanding
21 and without regard to chapter 171 or any other law,
22 the department or the agency may lease or sell, on

1 such terms as the department or the agency shall
2 determine, to that party the site or property to be
3 improved or otherwise to be leased or sold back to the
4 department [-] or the agency.

5 **§37D-4 Inclusion of budget request.** For each fiscal
6 period, there shall be included with respect to each
7 [~~participating~~] agency in the executive budget requests or, in
8 the case of the judiciary, the judiciary budget request, to the
9 legislature, amounts sufficient to permit the payment of all
10 amounts that will be due on unpaid financing agreements during
11 that fiscal period, including any expenses and replenishment of
12 any reserve funds up to the balances required by the respective
13 financing agreements. Amounts so included in the judiciary
14 budget request and so applied to the payment of such amounts due
15 with respect to a judiciary project shall be deemed to be at all
16 times for purposes of the judiciary budget act moneys of the
17 judiciary, and not moneys of the department or any other
18 executive department.

19 **§37D-5 Financing agreements not a general obligation of**
20 **State.** Financing agreements shall:

1 (1) Not be obligations for which the full faith and credit
2 of the State, the department, or any [~~participating~~]
3 agency are pledged; and

4 (2) Have no claim or lien on any revenues or other moneys
5 of the State, the department, or any [~~participating~~]
6 agency except moneys appropriated or otherwise held in
7 trust for such purpose.

8 Financing agreements entered into under this chapter shall not
9 constitute "bonds" within the meaning of section 12 of
10 article VII of the Constitution of the State. No holder or
11 holders of any financing agreement entered into under this
12 chapter shall have the right to compel any exercise of taxing
13 power of the State, the department, or any [~~participating~~]
14 agency to pay such financing agreements or the interest thereon
15 and no moneys other than amounts appropriated or otherwise held
16 in trust for such purpose shall be required to be applied to the
17 payment thereof. Each financing agreement issued under this
18 chapter shall recite in substance that such agreement, including
19 the interest component thereof, shall not be an obligation for
20 which the full faith and credit of the State, the department, or
21 any [~~participating~~] agency are pledged, and that such financing
22 agreement shall have no claim or lien on any revenues or other

1 moneys of the State, the department, or any [participating]
2 agency except moneys appropriated or otherwise held in trust for
3 such purpose.

4 **§37D-6 Federal tax-exempt status; preference; protection.**

5 (a) To the extent practicable, financing agreements issued
6 pursuant to this chapter shall be issued to comply with
7 requirements imposed by applicable federal law providing that
8 the interest on financing agreements shall be excluded from
9 gross income for federal income tax purposes, except as certain
10 minimum taxes or environmental taxes may apply. The director
11 and, with the approval of the director, the head of an agency
12 may:

- 13 (1) Enter into agreements;
- 14 (2) Establish funds or accounts;
- 15 (3) Make rebate payments to the federal government; and
- 16 (4) Take any action required to comply with applicable
17 federal tax law.

18 Nothing in this chapter shall prohibit the issuance of financing
19 agreements, the interest on which may be included in gross
20 income for federal income tax purposes.

21 (b) To ensure that interest on a financing agreement
22 issued pursuant to this chapter that is excluded from gross

1 income for federal income tax purposes, except as provided in
2 subsection (a), on the date of issuance shall continue to be
3 excluded, no state officer or employee shall authorize or allow
4 any change, amendment, or modification to a financing agreement
5 which would affect the exclusion of interest on such financing
6 agreement from gross income for federal income tax purposes
7 unless the change, amendment, or modification shall have
8 received the prior approval of the director. Failure to receive
9 the approval of the director shall render any change, amendment,
10 or modification void.

11 **§37D-7 Financing agreements legal investments.** All public
12 officers and agencies, all political subdivisions, all insurance
13 companies and associations, all banks, savings banks, and
14 savings institutions, including building or savings and loan
15 associations, all credit unions, all trust companies, all
16 personal representatives, guardians, trustees, and all other
17 persons and fiduciaries in the State who are regulated by law as
18 to the character of their investment, may legally invest moneys
19 within their control and available for investment in financing
20 agreements of the department [-] or any agency. The purpose of
21 this section is to authorize any person, firm, corporation,
22 association, political subdivision, body, or officer, public or

1 private, to use any funds or moneys owned or controlled by them,
2 including, without prejudice to the generality of the foregoing,
3 sinking, insurance, investment, retirement, compensation,
4 pension and trust funds, and moneys held on deposit, for the
5 purchase of any financing agreements of the department [-] or any
6 agency.

7 **§37D-8 Exemption from taxation.** All real and personal
8 property owned or operated by the State, the department, or any
9 [-] agency, and any interests created in or transfer or
10 recording of the property or any interest in the property, and
11 payments made under the financing agreements to which the
12 property is subject shall be exempt from all state, county, and
13 municipal taxation, and fees and charges of every kind.
14 Financing agreements issued pursuant to this chapter and the
15 income therefrom, including, without limitation, the interest
16 component of any lease payments, shall be exempt from all
17 taxation by the State or any county or other political
18 subdivision thereof, except inheritance, transfer, and estate
19 taxes.

20 **§37D-9 Line of credit.** The department, or, with the
21 approval of the director and an agency, may contract with a
22 financial institution for one or more lines of credit in such

1 amounts and for such periods as the legislature shall from time
2 to time determine. The department, an agency, or the
3 department, on behalf of a requesting agency, may borrow under a
4 line of credit and use the amount or amounts borrowed to pay the
5 cost of the improvements, use, or acquisition of real or
6 personal property comprising a project. Upon the execution and
7 delivery of a financing agreement to refinance the amount or
8 amounts borrowed under such line of credit, the department or
9 the agency that is party to the financing agreement shall apply
10 the proceeds thereof to the repayment of such amount or amounts.

11 **§37D-10 Litigation; jurisdiction; appeal.** The director
12 may petition the circuit court of the first circuit for an
13 opinion as to the validity of any financing or related agreement
14 entered into pursuant to this chapter. The petition shall
15 constitute a civil proceeding for purposes of section 603-
16 21.5(a)(3), and the circuit court of the first circuit shall
17 have exclusive and original jurisdiction to receive and
18 determine the question presented in the petition, irrespective
19 of an actual controversy or dispute regarding the agreement or
20 its validity. Any party aggrieved by the decision of the
21 circuit court may appeal in accordance with part I of
22 chapter 641 and the appeal shall be given priority."

JUSTIFICATION SHEET

DEPARTMENT: Budget and Finance

TITLE: A BILL FOR AN ACT RELATING TO THE MANAGEMENT OF FINANCING AGREEMENTS.

PURPOSE: To allow other departments and participating agencies, in addition to the Department of Budget and Finance (Department), to enter directly into financing agreements to finance the construction of facilities and the leasing or purchase of equipment.

MEANS: Amend chapter 37D, Hawaii Revised Statutes (HRS).

JUSTIFICATION: Chapter 37D, HRS, currently provides that financing agreements must be entered into by the Department, on behalf of the user agency. However, responsibility for the use, maintenance, and covenants of property being financed should, in certain instances, be with the department or agency financing the construction, lease or purchase. Under federal tax laws, property constructed, leased, or purchased under chapter 37D must be used in a manner consistent with federal guidelines to retain the tax-exemption. For example, the department or agency using chapter 37D to finance the construction of a building in which it will be residing will be in a better position than the Department to ensure compliance with federal requirements and make certain the building is appropriately maintained and insured. The proposed amendment will allow for the responsibility to be placed with the appropriate party.

Impact on the public: Not applicable.

Impact on the department and other agencies:
The Department will continue to have oversight responsibilities, the transaction will continue to be subject to Governor's

approval, and the financing documents will continue to be subject to approval by the Attorney General as to form and legality. Departments and agencies utilizing financing agreements on their own will assume direct responsibility for such transactions.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM
DESIGNATION: BUF-115.

OTHER AFFECTED
AGENCIES: Any department or agency entering in financing agreements that should serve as its own lessee rather than have the Department enter the lease on its behalf.

EFFECTIVE DATE: Upon approval.