

ACT 205

S.B. NO. 3288

A Bill for an Act Relating to Escrow Depositories.

Be It Enacted by the Legislature of the State of Hawaii:

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

“§449- Applicability of chapter. This chapter shall apply to all escrow depositories and to any other corporations that, by violating any of the provisions of this chapter, shall be subject to the penalties and fines provided in this chapter.

§449- Name of escrow depository. The name of every escrow depository licensed to engage in business in this State shall be subject to the approval of the commissioner, and shall have the following characteristics:

- (1) It shall be unique;
- (2) It shall not be confusing or likely to mislead the public into believing that the escrow depository is related to or part of another company, if it is not so related;
- (3) It shall contain the words “escrow” or “escrow depository”; and
- (4) It may but need not contain the words “Corporation,” “Incorporated,” “Corp.,” “Inc.,” “Limited” or “Ltd.”

This section shall not apply to escrow depositories which were licensed on January 1, 1992. Where an escrow depository that is not required to comply with this section is subsequently sold or acquired, the commissioner may require the acquired company to comply with this section.

§449- Indicia of escrow depository prohibited. Unless licensed under this chapter to engage in the business of an escrow depository, no person may use the word “escrow” or words of similar import, or translations of those words, as a facetious or fanciful name, or in a manner that might suggest or tend to lead others into believing that the person is an escrow depository.

§449- Grant of approval. (a) Following the hearing on the application, if any, the commissioner shall issue a written decision and order. If the commissioner decides in favor of the application, the commissioner shall issue a license to act as an escrow depository pursuant to section 449-8.

(b) Approval shall be granted only if the commissioner finds that the character, financial responsibility, experience, ability, and general fitness of the officers and directors are such as to command the confidence of the community in the State and to warrant the beliefs that the officers and directors are competent to successfully manage an escrow business and the applicant will be an honest and efficient escrow depository.

(c) In granting approval, the commissioner may impose such conditions and restrictions as shall be in the public interest, including without limitation requiring an applicant to fulfill representations contained in its application and agreements made during the application process.

§449- Denial of license. If the commissioner is not satisfied that an applicant meets all the criteria set forth for approval, the commissioner shall issue a written decision denying the applicant’s application. An applicant who is denied approval may request a hearing before the commissioner in accordance with

chapter 91. Any final decision of the commissioner denying a license may be appealed to the circuit court as provided in chapter 91.

§449- Sale or transfer of license or change in control. (a) No escrow depository license shall be transferred.

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

(c) If the licensee is a corporation, any intended transfer of its voting stock which may result in the acquisition of control of the licensee may be considered a transfer of license. Any intended transfer of the voting stock which may result in the acquisition of control shall be reported to the commissioner in writing. Upon determination by the commissioner that the intended transfer will result in the acquisition of control, the transferee of the stock shall file an application for approval to act as an escrow depository and shall not acquire control of an escrow depository until the transferee has been approved by the commissioner.

§449- Relocation of office. No escrow depository may relocate its offices without first obtaining prior written approval from the commissioner. The application shall set forth the reasons for the relocation and other information that may be required by the commissioner.

§449- Branch offices. No escrow depository may establish a branch office without first obtaining prior written approval from the commissioner. The application shall set forth the reasons for the branch office and other information that may be required by the commissioner.

§449- Maintenance of books and records. (a) Every escrow depository shall keep in a safe and secure place within this State those books and records that directly relate to any escrow business conducted within this State, and such other books and records as may be necessary for the commissioner to ensure full compliance with the laws of this State.

(b) All books and records may be maintained as originals or photocopies, on microfilm or microfiche, on computer disks or tapes, or similar forms, provided that they are readily accessible and may be easily examined.

(c) All records, statements, and reports required or authorized by this chapter shall be made in writing in the English language.

(d) Every escrow depository shall preserve all of its records for a minimum of six years or for such greater or lesser period as the commissioner may prescribe.

§449- Examinations. (a) The commissioner may conduct examinations of escrow depositories as often as the commissioner deems necessary for the purpose of assuring that the escrow depository is in compliance with all laws, rules, or orders issued by the commissioner.

(b) The commissioner shall have full access to the vaults, books, and papers of the escrow depository and may make such inquiries as may be necessary to ascertain the condition of the corporation. All directors, incorporators, officers, employees, and agents of an institution being examined shall cooperate fully with the commissioner and the commissioner's examiners, and shall answer

all inquiries and furnish all information pertaining to the same, to the best of their knowledge and ability.

(c) The licensee shall bear the expenses of any examination or investigation by the commissioner.

§449- Removal of officers or directors. (a) The commissioner may order the removal of any officer or director from office or employment with an escrow depository and prohibit the person's affiliation or participation in the affairs of the escrow depository if the commissioner determines that any of the following circumstances exist:

- (1) The person has violated a state law regulating escrow depositories, violated a cease and desist order, engaged or participated in an unsafe or unsound practice in connection with the escrow depository, or breached a fiduciary duty;
- (2) As a result of a statutory violation or breach the escrow depository has suffered or will probably suffer financial loss or other damage, the interests of the escrow depository's clients have been or may be prejudiced, or the person has received financial gain as a result of such violation or breach; or
- (3) The violation or breach involves the person's personal dishonesty, or demonstrates the person's wilful or continuing disregard for the safety or soundness of the escrow depository.

(b) The commissioner shall serve the officer or director and the board of directors of the escrow depository with written notice containing the alleged violations or breaches, a summary of the facts upon which the allegations are based, and a statement of the commissioner's intention to remove the person from office or prohibit the person's affiliation with the escrow depository, or both. If the commissioner deems it necessary for the protection of the escrow depository or its clients, the notice may also suspend the officer or director from office or prohibit the party from further participation in any manner in the conduct of the affairs of the escrow depository, or both.

(c) Upon request of the person made within ten days after service of notice, the commissioner shall hold a hearing at which any pertinent evidence may be presented and after which the commissioner shall issue findings and a determination. If no hearing is timely requested, the commissioner may proceed to issue orders of removal or prohibition, or both, on the basis of the facts set forth in the written notice.

(d) No officer or director whose removal or prohibition has been ordered pursuant to this section shall thereafter participate in any manner in the conduct of the affairs of the affiliated escrow depository as long as the order remains in effect. Any violation of the order shall constitute a violation of law, and shall be sufficient for the issuance of a cease and desist order to the escrow depository."

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

(1) By adding a new definition to be appropriately inserted and to read:

"Acquisition of control" means acquisition by a person or persons acting in concert of the power to vote fifty-one per cent or more of any voting securities of a licensee."

(2) By amending the definition of "escrow depository" to read:

"Escrow depository" means the [person who,] corporation which, in an

escrow, and for compensation, receives, holds, and delivers the money, other consideration, or instrument affecting title to real property.”

(3) By amending the definition of “financial institution” to read:

““Financial institution” means any bank, savings and loan association, [finance company] financial services loan company, or credit union doing business in the State whose accounts are insured by [either] the Federal Deposit Insurance Corporation, [the Federal Savings and Loan Insurance Corporation,] the National Credit Union Share Insurance Fund or other similar or successor program of federal insurance.”

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

“§449-2 **Rules [and regulations]**. Subject to chapter 91, the commissioner may adopt such rules [and regulations] as the commissioner deems necessary for the effective administration and enforcement of this chapter.”

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

“§449-3 **Excepted from this chapter**. This chapter does not apply to any of the following when acting as escrow depositories:

- (1) Banks, trust companies, [building and loan associations,] savings and loan associations, and insurance companies, authorized under any law of this State or of the United States to do business in the State[.];
- (2) Any person licensed as a real estate broker in the State who is the broker for a party to the escrow, provided the person does not charge any escrow fee[.]; and
- (3) Any person licensed to practice law in the State who, in escrow, is not acting as the employee of a corporation, provided the person does not charge any escrow fee.”

SECTION 5. Section 449-4, Hawaii Revised Statutes, is amended to read as follows:

“§449-4 **[Penalty]**. Any person who violates any provision of this chapter shall be fined not more than \$5,000 or imprisoned not more than six months, or both.] **Administrative penalty**. Any person who wilfully violates any of the provisions of this chapter, shall be subject to an administrative fine of \$5,000 for each violation. No licensee shall be subject to this penalty for a violation of [subsections] section 449-16(b) or (c) if the violation was not intentional or resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid that error. Examples of bona fide errors include, but are not limited to, clerical miscalculations, computer malfunction, printing errors,¹ and computer programming errors.”

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

“§449-6 **Application for license**. (a) Any corporation desiring to be licensed as an escrow depository shall file an application [with and pay a fee for

investigation thereof to the commissioner,] upon forms to be furnished by the commissioner [which shall state:]. The application shall be accompanied by a filing fee no part of which shall be refundable.

(b) The application shall contain the following information:

- (1) The corporate name, amount of capital, and office address of the applicant;
- (2) The names of the stockholders, officers, and directors of the applicant;
- (3) Evidence of the character, financial responsibility, experience, and ability of the officers and directors[.]; and
- (4) The names of the proposed escrow officers and their qualifications."

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

"§449-7 Investigation and ruling. The commissioner shall make an investigation into the information furnished by the applicant and may require the applicant to furnish additional information. If the commissioner is satisfied, with or without a hearing upon the application, that the [character, financial responsibility, experience, ability, and general fitness of the officers and directors are such as to command the confidence of the business community in the State and to warrant the beliefs that the officers and directors are competent to successfully manage an escrow business and that the applicant will be an honest and efficient escrow depository,] applicant has met all the criteria set forth for approval, the commissioner shall approve the application. [The commissioner shall not disapprove an application without giving the applicant a hearing thereupon. Any decision of the commissioner adverse to the applicant shall be reviewable upon appeal to the circuit court of the first judicial circuit as provided in chapter 91.]"

SECTION 8. Section 449-7.5, Hawaii Revised Statutes, is amended to read as follows:

"§449-7.5 Licensing requirements. (a) Every corporation desiring to be licensed as an escrow depository shall be incorporated in this State and have and maintain a principal place of business in the State for the transaction of its escrow depository business.

[(b) Every such licensee shall notify the commissioner in writing of the relocation of its offices, setting forth the proposed relocation and the reason for the relocation and other information as may be required by the commissioner.

(c) An escrow depository may establish a branch office provided notice thereof is given the commissioner in writing within thirty days after establishment of such branch office.

(d)] (b) A license issued under this chapter shall be prominently displayed in the place or places of business of the escrow depository.

[(e)] (c) The escrow depository business shall be under the direct management of an officer, or an employee, designated by its board of directors as escrow officer for the corporation and if the designated escrow officer terminates [his or her] the escrow officer's employment with the escrow depository, the licensee shall notify the commissioner in writing at least fifteen days before the termination date of the designated escrow officer. [Licensee] The licensee shall also inform the commissioner in writing of the new escrow officer for the corporation designated by its board of directors before the present escrow officer terminates the present escrow officer's employment with the company, setting forth the

experience, integrity, and competency of the new designated escrow officer in handling escrow transactions, and such other information as required by the commissioner.”

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

“§449-8 Issuance and renewal of license. After approval of the application, and payment of the license fee, the commissioner shall issue to the applicant a license to act as an escrow depository. The license shall be effective only upon the applicant’s filing with the commissioner an escrow depository’s bond and evidence that fidelity bonds and errors and omissions insurance, or cash or securities deposits permitted in lieu thereof, have been obtained, all as provided in sections 449-9, 449-11, and 449-12. The license shall be renewed annually, as of July 1, upon payment of the annual renewal fee and the finding of the commissioner, from the information contained in the annual corporate exhibit of the licensee or investigation or hearing, that the licensee continues to meet the qualifications for licensing and has continued in force the bonds and insurance or the cash or securities deposits permitted in lieu thereof. [An escrow depository’s license may not be transferred.]”

SECTION 10. Section 449-9, Hawaii Revised Statutes, is amended to read as follows:

“§449-9 Escrow depository’s bond. Before an escrow depository’s license becomes effective, the escrow depository shall give a bond to the commissioner in the penal sum of not less than \$100,000 executed by a surety insurer authorized in this State, conditioned:

- (1) That the escrow depository will honestly, faithfully, and with diligence apply all funds, other consideration, or property and instruments affecting title in accordance with the instructions under which the same were deposited with it, and will promptly account for the same;² and
- (2) That the escrow depository will satisfy all judgments and decrees which may be recovered against it in any action or proceeding brought under this chapter.

The aggregate liability of the surety for all breaches of the conditions of the bond shall, in no event, exceed the penal sum of the bond. In lieu of the bond, an escrow depository may deposit cash, a letter of credit, or securities acceptable to the commissioner.”

SECTION 11. Section 449-10, Hawaii Revised Statutes, is amended to read as follows:

“§449-10 Suit on bond. The commissioner, or any person claiming to have sustained damage by reason of the failure of the escrow depository to comply with its bond, may bring an action on the bond to recover the damage therefrom. The commissioner may deposit with a court of competent jurisdiction all or any part of the sum of the bond.”

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

“§449-12 Errors and omissions insurance; deposit. A licensed escrow depository shall at all times either:

- (1) Maintain a policy of errors and omissions insurance executed by an insurer authorized to do business in the State in an amount of not less than \$50,000, and not more than \$100,000, with a deductible thereunder not to exceed \$10,000 per occurrence, to be approved by the commissioner; or
- (2) Deposit an equivalent amount of cash or securities under such terms and conditions as are acceptable to the commissioner.”

SECTION 13. Section 449-14, Hawaii Revised Statutes, is amended to read as follows:

“§449-14 Fees. The following fees shall be paid by licensed escrow depositories to the commissioner and into the general fund:

- (1) For filing and investigation of an escrow depository’s application for license, [~~\$200.~~] \$2,000;
- (2) For initial issuance and annual renewal of an escrow depository’s license, [~~\$25.~~] \$100;
- (3) For initial issuance and annual renewal of a branch office license, [~~\$5.~~] \$50; and
- (4) For reissuance of a license or endorsement on the license for the change in the business address of its office, [~~\$3.~~] \$25.

An escrow depository that fails to make a payment required by this section shall be subject to an administrative penalty of not more than \$200 per day for each day it is in violation of this section.”

SECTION 14. Section 449-15, Hawaii Revised Statutes, is amended to read as follows:

“§449-15 Audited statements. (a) Each escrow depository [shall], at its own expense, shall submit to the commissioner within ninety days after the close of its fiscal year [a certified audit of its books and records made by an independent certified public accountant. The audit shall include a direct verification of all deposits of money made with or by the escrow depository.] its annual financial statements accompanied by a report of an independent certified public accountant who has prepared or examined those statements. For good cause, the commissioner may grant a licensee an extension of an additional thirty days to file the reports required by this section.

(b) The audited financial statements shall be prepared in accordance with generally accepted accounting principles and the examination by the independent certified public accountant shall be performed in accordance with generally accepted auditing standards. The financial statements and the independent certified public accountant’s report shall include but not be limited to the following:

- (1) An unqualified opinion on the fair presentation of the financial statements taken as a whole. To the extent that this is not possible, then a detailed footnote explaining the reason why an unqualified opinion could not be given shall suffice;
- (2) A direct verification of escrow funds and escrow liabilities. If less than a one hundred per cent verification is performed, there shall be a separate letter from the independent certified public accountant indicating: the number of accounts verified; the percentage of the

verification; the basis for determining the sample size; the method used in selecting the sample items to verify; a description of the sampling technique used; the discrepancies noted; and how the discrepancies were resolved;

- (3) Footnotes to the audited financial statement showing the escrow funds and escrow liabilities and, to the extent that these amounts differ, a reconciliation of the amounts; and
- (4) A statement as to whether the escrow depository is in compliance with this chapter. If the independent certified public accountant reports any incident involving noncompliance, the statement shall address whether the noncompliance may have a material adverse impact on the ongoing operations of the company.

(c)³ Except with the written approval of the commissioner, an escrow depository shall not be deemed in compliance with this section if the independent certified public accountant expresses a qualified or adverse opinion or a disclaimer of opinion. A request for approval shall be filed by the escrow depository concurrently with the filing of the audited financial statements and the independent certified public accountant's report. The request shall be in letter form and shall contain the arguments as to why the audited financial statements and the independent certified public accountant's report should be considered acceptable. Failure to comply with this section shall be grounds for the suspension or revocation of the escrow depository's license in accordance with [the provisions of] section 449-17. Failure to comply with this section shall authorize the commissioner to order an independent audit at the expense of the escrow depository [and shall also authorize the commissioner to impose an administrative fine of \$100 per day for each day that the audit is overdue].

(d)³ Failure to furnish any report or information as and when required under this section shall be grounds for the commissioner to impose an administrative penalty of \$200 per day for each day that the audit is overdue. In addition, if the report or information is not filed within thirty days of the required deadline, the commissioner may prohibit the escrow depository from accepting new business until the report or information is filed."

SECTION 15. Section 449-18, Hawaii Revised Statutes, is repealed.

SECTION 16. All acts passed by the legislature during this regular session of 1992, whether enacted before or after the effective date of this Act, shall be amended to conform to this Act unless such acts specifically provide that this Act is being amended.

SECTION 17. This Act shall not affect rights and duties that matured, penalties that were incurred, proceedings that were begun, and the validity of any transaction lawfully entered into, on or before its effective date.

SECTION 18. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

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SECTION 19. The revisor of statutes shall coordinate with the commissioner of financial institutions in amending the section references in the Hawaii Revised Statutes affected by this Act.

SECTION 20. Statutory material to be repealed is bracketed. New statutory material is underscored.⁴

SECTION 21. This Act shall take effect upon its approval.

(Approved June 12, 1992.)

Notes

1. Comma should be underscored.
2. Prior to amendment “,” appeared here.
3. Paragraph redesignated.
4. Edited pursuant to HRS §23G-16.5.