

ACT 196

S.B. NO. 2820

A Bill for an Act Relating to the Code of Financial Institutions.

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

SECTION 1. Chapter 412, Hawaii Revised Statutes, is amended by adding to part VI of article 2 a new section to be appropriately designated and to read as follows:

“§412:2- Imposition of administrative fines on persons who are not Hawaii financial institutions; assessment. (a) Any person, other than a Hawaii financial institution or an institution-affiliated party, who:

- (1) Commits a violation of any law or rule for which a penalty or fine is not expressly provided in this chapter;
- (2) Commits a violation of any order issued by the commissioner;
- (3) Commits a violation of any condition imposed in writing by the commissioner in connection with the grant of any application or other request by the person; or
- (4) Commits a violation of any written agreement between the commissioner and the person;

may be ordered by the commissioner to pay an administrative fine of not more than \$100,000 for each day during which the violation continues.

(b) Any administrative fine imposed under subsection (a) may be assessed and collected by the commissioner by service of written notice and order upon that person at the person’s last known home or office address by means of certified mail, return receipt requested. If, with respect to any such assessment, a hearing is not requested pursuant to section 412:2-610(c) within the period of time allowed under section 412:2-610(c), the assessment shall constitute a final and unappealable order.”

SECTION 2. Section 412:2-300, Hawaii Revised Statutes, is amended to read as follows:

“§412:2-300 Enforcement actions. In enforcing the provisions of this chapter [to ensure the safety and soundness of Hawaii financial institutions], the commissioner is authorized to use the powers [granted to the commissioner] in this part without limitation to direct the discontinuance of any violation of law, or any unsafe or unsound practice that is likely to cause insolvency or substantial dissipation of assets or earnings of the institution. The provisions of this chapter may be enforced by informal or formal actions. Informal actions include board resolutions, letter agreements, records of action, memoranda of understanding, or supervisory agreements. Formal actions include cease and desist orders (whether temporary or permanent), removal orders, suspension and revocation orders, divestiture orders, and orders enforcing statutory provisions. [In enforcing the provisions of this chapter, a Hawaii financial institution or any institution-affiliated party] Any person who is the subject of formal or informal enforcement action by the commissioner may consent to the entry of any formal order.”

SECTION 3. Section 412:2-302, Hawaii Revised Statutes, is amended to read as follows:

“§412:2-302 Cease and desist orders; grounds for issuance. (a) Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any:

- (1) Provision of this chapter;
- (2) Rule adopted or order issued under this chapter; or
- (3) Condition of an approval of request or application by the commissioner or a written agreement between such person and the commissioner,

the commissioner may, in the commissioner’s discretion, issue a temporary or permanent cease and desist order to enforce compliance with this chapter, with any rule adopted or order issued under this chapter, or with the conditions of such approval or written agreement.

The commissioner shall have the discretion to include in the order an assessment of an administrative penalty against any person who violates this chapter or who has knowingly violated a written agreement with, or a rule or order of, the commissioner made pursuant to this chapter.

(b) The commissioner may issue a temporary or permanent cease and desist order to any Hawaii financial institution [or], any institution-affiliated party, or any other person that the commissioner finds or has reasonable cause to believe:

- (1) Is violating, has violated, or is about to violate this chapter or any rules [issued] adopted pursuant to this chapter;
- (2) Is violating, has violated, or is about to violate any written condition imposed or order issued by the commissioner on such financial institution's or other person's authority to engage in business, or any condition of a written agreement between the financial institution or other person and the commissioner;
- (3) Is engaging, has engaged, or is about to engage in an illegal, unauthorized, unsafe, or unsound practice; or
- (4) Is failing to maintain books and records that are sufficiently complete and accurate so as to permit the commissioner to determine the financial condition of the institution named in the order."

SECTION 4. Section 412:2-303, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) The notice of charges and proposed permanent cease and desist order shall be in writing and shall be served upon the institution-affiliated party or the Hawaii financial institution at its principal office in this State[.] and upon any other affected party wherever that person can be located and served by the commissioner. The notice of charges shall state the alleged violations or wrongful practices and a summary of the facts in support of such allegations. The notice shall be accompanied by a proposed order which states the commissioner's intent to require discontinuance of such violation or practice and the immediate compliance with all requirements of any applicable agreement, conditions of approval, order, or law. The proposed order may also direct such affirmative action as may be necessary to prevent insolvency or to correct the alleged violation or wrongful practice. The notice of charges shall set forth a time and place for a hearing to determine whether the proposed order shall be issued."

SECTION 5. Section 412:2-304, Hawaii Revised Statutes, is amended by amending subsections (a) and (b) to read as follows:

"(a) [In order to] To act with the utmost speed, the commissioner may issue a temporary cease and desist order upon a determination that [(1)] one or more of the grounds specified in section 412:2-302 are present; [and (2)] provided that, in the case of a Hawaii financial institution or an institution-affiliated party, the commissioner shall not issue a temporary cease and desist order unless the commissioner has also made a determination that the violation [or], threatened violation, or unsafe or unsound practice is likely to [cause]:

- (1) Cause insolvency or substantial dissipation of assets; or [is likely to seriously]
- (2) Seriously weaken the condition of the institution; or [otherwise]
- (3) Otherwise seriously prejudice the interests of the depositors during the period in which a permanent cease and desist order can be obtained.

The order shall be accompanied by a notice of charges [which states] stating the alleged violation or wrongful practice,¹ [and] a summary of the facts in support

of [such] the allegation [and], and a time and place for a hearing to determine whether the temporary order shall be made permanent. The order may require discontinuance of a violation or practice[, and]; require the immediate compliance with all requirements of any applicable agreement, conditions of approval, order, or law[. The order may also direct such]; and direct affirmative action as may be necessary to prevent insolvency or to correct the alleged violation or wrongful practice. [The notice of charges shall set forth a time and place for a hearing to determine whether the temporary order shall be made permanent.]

(b) The order shall be effective upon service on the [Hawaii financial institution or institution-affiliated] affected party. The order shall remain in effect until a permanent cease and desist order is issued after a hearing, a permanent cease and desist order is consented to, or the charges are dismissed upon completion of a hearing. Any affected party contesting the issuance of the temporary cease and desist order may do so by applying to the circuit court for an injunction.”

SECTION 6. Section 412:2-305, Hawaii Revised Statutes, is amended to read as follows:

“§412:2-305 Consent cease and desist orders. Any [Hawaii financial institution or institution-affiliated] affected party may waive its rights to a hearing on any notice of charges by stipulating and consenting to [the]:

- (1) The issuance of a permanent cease and desist order [or by stipulating and consenting to the]; or
- (2) The conversion of a temporary cease and desist order into a permanent cease and desist order.

Any cease and desist order issued by consent shall be effective as of the date specified therein and shall remain effective until modified or terminated by the commissioner.”

SECTION 7. Section 412:2-601, Hawaii Revised Statutes, is amended to read as follows:

“§412:2-601 Violation of chapter. Any institution-affiliated party or any other person who wilfully violates any of the provisions of this chapter for which a penalty or administrative fine is not expressly provided [herein] in this chapter shall be guilty of a misdemeanor punishable pursuant to sections 706-663 and 706-640.”

SECTION 8. Section 412:2-609, Hawaii Revised Statutes, is amended by amending subsection (d) to read as follows:

“(d) Any administrative fine imposed under [subsections] subsection (a), (b), or (c) may be assessed and collected by the commissioner by service of written notice and order upon the Hawaii financial institution or institution-affiliated party[.] by means of certified mail, return receipt requested. If, with respect to any such assessment, a hearing is not requested pursuant to section 412:2-610(c) within the period of time allowed under section 412:2-610(c), the assessment shall constitute a final and unappealable order.”

SECTION 9. Section 412:2-610, Hawaii Revised Statutes, is amended to read as follows:

“§412:2-610 Compromise or modification of administrative fines; determining amount of fine; hearing. (a) The commissioner may compromise, modify, or suspend any administrative fine which may be assessed or which has

been assessed [pursuant to section 412:2-609.] under this chapter. The commissioner may also exempt violations of informal enforcement actions from the administrative fines and penalties set forth in [section 412:2-609.] this chapter.

(b) In determining the amount of any administrative fine imposed under [section 412:2-609,] this chapter, the commissioner shall take into account the appropriateness of the fine with respect to all of the following:

- (1) The size of financial resources and good faith of the financial institution or the person charged;
 - (2) The gravity of the violation, practice, or breach;
 - (3) The history of previous violations, unsafe or unsound practices, or breaches of fiduciary duty owed to the financial institution;
 - (4) The extent to which a federal agency has, by imposing a fine for similar conduct, mitigated the need for imposition of a particular level of administrative fine under [section 412:2-609;] this chapter; and
 - (5) Such other matters as justice may require.
- (c) The Hawaii financial institution or other person against whom any administrative fine is assessed under this [section] chapter shall be afforded a hearing in accordance with chapter 91 if the financial institution or person submits a written request for a hearing within twenty days after the service of the notice of assessment.”

SECTION 10. Section 412:2-611, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) If any Hawaii financial institution [or], institution-affiliated party, or other person fails to pay an assessment after any administrative fine assessed under this chapter has become final, the commissioner shall recover the amount assessed by action in circuit court, in which case the commissioner may request the court to award reasonable attorney’s fees and costs.”

SECTION 11. Statutory material to be repealed is bracketed. New statutory material is underscored.²

SECTION 12. This Act shall take effect upon its approval.

(Approved July 17, 1998.)

Notes

1. Comma should be underscored.
2. Edited pursuant to HRS §23G-16.5.