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# A BILL FOR AN ACT

RELATING TO THE PERMITTED TRANSFERS IN TRUST ACT.

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

1           SECTION 1. Hawaii relies heavily on the travel industry as  
2 an economic engine. Because of instabilities in that industry,  
3 the State must seek out other sources of revenue to help  
4 stabilize the current budget crisis and fuel future economic  
5 growth. Hawaii can build on proven domestic and international  
6 estate and financial planning methodologies to amend its laws  
7 for the purpose of attracting foreign-source capital.

8           The intent of this Act is to offer incentives to high  
9 net-worth individuals throughout the United States and  
10 throughout the world to transfer a portion of their liquid net  
11 worth into this State for asset and trust management. This Act  
12 is designed to increase the assets under management by Hawaii's  
13 private financial sector, increase state tax revenues, and  
14 position the State as a world-class financial management  
15 jurisdiction.

16           SECTION 2. The Hawaii Revised Statutes is amended by  
17 adding a new chapter to be appropriately designated and to read  
18 as follows:



1 "CHAPTER

2 PERMITTED TRANSFERS IN TRUST

3 § -1 Short title. This chapter shall be known and may  
4 be cited as the Permitted Transfers in Trust Act.

5 § -2 Definitions. As used in this chapter:

6 "Cash" means United States currency.

7 "Claim" means a right to payment, whether or not the right  
8 is reduced to judgment, liquidated, unliquidated, fixed,  
9 contingent, matured, unmatured, disputed, undisputed, legal,  
10 equitable, secured, or unsecured.

11 "Creditor" means, with respect to a transferor, a person  
12 who has a claim.

13 "Debt" means liability on a claim.

14 "Former spouse" means a person to whom the transferor was  
15 married where the marriage was dissolved before the time of the  
16 permitted transfer.

17 "Grantor trust" means a trust described in sections 671  
18 through 679 of the Internal Revenue Code of 1986, as amended.

19 "Marketable securities" means securities that are:

- 20 (1) Exchanged on a governmentally regulated exchange  
21 within the United States including, common stocks,  
22 bonds, mutual funds, or exchange traded funds; and



1 (2) Permitted to be held by a fiduciary under Hawaii state  
2 law;

3 provided that "marketable securities" does not include real  
4 estate or any interests in corporations, partnerships, and  
5 limited liability companies that are not publicly traded.

6 "Non-grantor trust" shall refer to any trust that is not a  
7 "grantor trust" as defined in this chapter.

8 "Permitted property" means cash, marketable securities,  
9 life insurance contracts, and non-private annuities.

10 "Permitted transfer" means a transfer of permitted property  
11 by or from a transferor to a permitted trustee by means of a  
12 trust instrument, regardless of whether consideration is  
13 exchanged.

14 "Permitted trustee" means a person, other than the  
15 transferor, who is a resident of this State, or a bank or trust  
16 company authorized to do business in this State that possesses  
17 and exercises trust powers and has its principal place of  
18 business in this State.

19 "Person" means a natural person.

20 "Spouse" means a person to whom the transferor is married  
21 at the time of the permitted transfer.



1 "Transfer" means the disposition, conveyance, or assignment  
2 of permitted property to a permitted trustee or the exercise of  
3 a power that causes the disposition, conveyance, or assignment  
4 of permitted property to a permitted trustee.

5 "Transfer tax" means the tax described in section -12.

6 "Transferor" means an owner of permitted property; a holder  
7 of a power of appointment that authorizes the holder to appoint  
8 in favor of the holder, the holder's creditors, the holder's  
9 estate, or the creditors of the holder's estate; or a trustee  
10 who directly or indirectly makes a disposition of permitted  
11 property.

12 "Trust instrument" means an irrevocable instrument  
13 appointing a permitted trustee for the permitted property that  
14 is the subject of a disposition.

15 § -3 **Completed transfers.** The transfer of permitted  
16 property under this chapter shall be deemed completed following  
17 the completion of all of the following:

- 18 (1) The delivery of permitted property by the transferor  
19 to the permitted trustee and the written acceptance of  
20 the permitted property by the permitted trustee;
- 21 (2) The delivery by the transferor to the permitted  
22 trustee of a signed and notarized certificate of



1            solvency that states that the amount of the transfer  
2            is equal to or less than twenty-five per cent of the  
3            transferor's net worth and that the transfer will not  
4            result in delay, defrauding, or hindrance of a  
5            creditor who is known or knowable to the transferor at  
6            the time of the permitted transfer with a claim  
7            against the property that is subject to the transfer;  
8            and

- 9            (3) The filing of the appropriate form by the transferor  
10           with the department of taxation and payment of the  
11           attendant transfer tax.

12           § -4 **Permitted trustees.** (a) A permitted trustee means  
13 a person, other than the transferor, who is a resident of this  
14 State, or a bank or trust company authorized to do business in  
15 this State that possesses and exercises trust powers and has its  
16 principal place of business in this State.

17           (b) If a permitted trustee of a trust ceases to meet the  
18 requirements of subsection (a) and there remains no trustee that  
19 meets the requirements, the permitted trustee shall be deemed to  
20 have resigned as of the time that the trustee no longer meets  
21 the requirements of subsection (a). At that time, the successor  
22 permitted trustee provided for in the trust instrument shall



1 become the permitted trustee of the trust. In the absence of  
2 any successor permitted trustee provided for in the trust  
3 instrument, a trust advisor or protector provided for in the  
4 trust instrument shall appoint a successor permitted trustee.  
5 In the absence of an appointed trust advisor or protector, a  
6 Hawaii court of competent jurisdiction shall, upon application  
7 of any interested party, appoint a successor permitted trustee.

8 (c) A permitted trustee may appoint an investment advisor  
9 to manage the assets of the trust fund; provided that  
10 administrative and non-administrative fiduciary responsibility  
11 shall remain vested, as against beneficiaries of the trust, with  
12 the permitted trustee.

13 § -5 Trust instrument. (a) A trust instrument shall be  
14 irrevocable and shall expressly incorporate the laws of this  
15 State governing the validity, construction, and administration  
16 of the trust.

17 (b) The trustee, in its discretion, may terminate any  
18 trust if and when its fair market value has declined to the  
19 extent that would make it uneconomical, imprudent, or unwise to  
20 continue to retain the trust, and shall pay and distribute the  
21 trust to the persons entitled to mandatory or discretionary



1 income distributions as the trustee in the trustee's absolute  
2 discretion shall decide.

3 (c) A trust instrument shall not be deemed revocable on  
4 account of the inclusion of:

5 (1) A transferor's power to veto a distribution from the  
6 trust;

7 (2) A power of appointment other than a power to appoint  
8 to the transferor, the transferor's creditors, the  
9 transferor's estate, or the creditors of the  
10 transferor's estate that may be exercised by will or  
11 other written instrument of the transferor effective  
12 only upon the transferor's death;

13 (3) The transferor's potential or actual receipt of  
14 income, including rights to income retained in the  
15 trust instrument;

16 (4) The transferor's annual receipt of a percentage not to  
17 exceed five per cent of the initial value of the trust  
18 assets or its value determined from time to time  
19 pursuant to the trust instrument or of a fixed amount  
20 that on an annual basis does not exceed five per cent  
21 of the initial value of the trust assets;



- 1 (5) The transferor's potential or actual receipt or use of  
2 the trust's principal due to the discretionary action  
3 of a permitted trustee or to a provision in the trust  
4 instrument that governs the distribution of principal;  
5 provided that any included provision shall not confer  
6 upon the transferor a substantially unfettered right  
7 to the receipt or use of the principal;
- 8 (6) The transferor's right to remove a permitted trustee  
9 or advisor and to appoint a new permitted trustee or  
10 advisor;
- 11 (7) The transferor's potential or actual receipt of income  
12 or principal to pay income taxes due on income of the  
13 trust if the trust instrument includes a provision  
14 allowing or directing the use of trust funds to pay  
15 income taxes due, or if the permitted trustee acts in  
16 the trustee's discretion to allow payment of income  
17 taxes due on the trust income; or
- 18 (8) A permitted trustee's authority pursuant to  
19 discretion, direction, or the transferor's exercise of  
20 a testamentary power of appointment to pay all or any  
21 part of the transferor's debts outstanding at the time  
22 of the transferor's death, the expenses of





1 administering the transferor's estate, or any estate  
2 or inheritance tax imposed on or with respect to the  
3 transferor's estate.

4 (d) A trust instrument may provide that the interest of a  
5 beneficiary of the trust, including a beneficiary who is the  
6 transferor of the trust, may not be transferred, assigned,  
7 pledged, or mortgaged, whether voluntarily or involuntarily,  
8 before the permitted trustee actually distributes the property  
9 or income to the beneficiary. Any provision of this type  
10 contained in the trust instrument shall be deemed to be a  
11 restriction on the transfer of the transferor's beneficial  
12 interest in the trust that is enforceable under applicable  
13 nonbankruptcy law within the meaning of 11 United States Code  
14 Section 541(c)(2) of the Bankruptcy Code or any successor  
15 provision.

16 (e) A transferor may appoint, through the trust  
17 instrument, one or more advisors or protectors, including the  
18 following:

19 (1) Advisors who have authority under the terms of the  
20 trust to remove and appoint permitted trustees,  
21 advisors, or protectors;



1 (2) Advisors who have authority under the terms of the  
2 trust to direct, consent to, or disapprove of  
3 distributions from the trust; and

4 (3) Advisors, including the transferor beneficiary of the  
5 trust, who serve as investment advisors to the trust.

6 (f) Whenever there shall be a dispute, deadlock, or  
7 difference of opinion between a permitted trustee and an  
8 advisor, the transferor may direct that the determination of the  
9 advisor shall be binding upon the permitted trustee, but that  
10 the permitted trustee shall bear no liability or accountability  
11 for any act or transaction entered into as a result of the  
12 enforcement of the advisor's privilege if the permitted trustee  
13 dissents in writing.

14 (g) If a trustee of a trust existing prior to the  
15 enactment of this chapter proposes to make a permitted transfer,  
16 but the trust instrument does not contain a power of appointment  
17 that conforms to section -5(c)(2), the trustee may deliver an  
18 irrevocable written election to have section -5(c)(2) apply  
19 to the trust, and the nonconforming powers of appointment shall  
20 be deemed modified to the extent necessary to conform with  
21 section -5(c)(2). The irrevocable written election shall  
22 include a description of the original transferor's powers of



1 appointment as modified, and the original transferor's written  
2 consent to the modification. Consent of the original transferor  
3 to a modification of powers of appointment shall not be  
4 considered to be a permitted transfer.

5 (h) If, in any action brought against a trustee of a trust  
6 that results from a permitted transfer, a court declines to  
7 apply the law of this State in determining the validity,  
8 construction, or administration of the trust, or the effect of a  
9 spendthrift provision of the trust, the trustee, immediately  
10 upon the court's action and without the further order of any  
11 court, shall cease to be trustee of the trust and a successor  
12 trustee shall thereupon succeed as trustee in accordance with  
13 the terms of the trust instrument. If the trust instrument does  
14 not provide for a successor trustee or does not provide for an  
15 advisor or protector with powers to appoint successor trustees,  
16 a Hawaii court of competent jurisdiction shall appoint a  
17 successor permitted trustee upon the application of any  
18 beneficiary of the trust under any terms and conditions that the  
19 court determines to be consistent with the purposes of the trust  
20 and with this chapter. Upon the removal of a trustee pursuant  
21 to this section, the trustee who has been removed shall have no



1 power or authority other than to convey the trust property to  
2 the successor trustee.

3       §   -6 **Investments.** Nothing in this chapter shall  
4 prohibit a permitted trustee from diversifying trust assets;  
5 provided that a permitted trustee shall be authorized to invest  
6 only in permitted property, as defined in this chapter.

7       §   -7 **Retained interests of transferor.** (a) A permitted  
8 transfer shall be subject to this chapter notwithstanding a  
9 transferor's retention of any or all of the powers and rights  
10 described in section   -5(c) and notwithstanding the  
11 transferor's service as investment advisor pursuant to  
12 section   -5(e)(3).

13       (b) The transferor shall have only the powers and rights  
14 specifically conferred by the trust instrument. Except as  
15 permitted by sections   -5(c) and   -5(e), a transferor shall  
16 have no rights or authority with respect to the property that is  
17 the subject of a permitted transfer or to the income from  
18 property that is the subject of a permitted transfer. Any  
19 agreement or understanding purporting to grant or permit the  
20 retention of any greater rights or authority shall be void.

21       §   -8 **Avoidance of permitted transfers in trust.** (a) No  
22 claim, including an action to enforce a judgment entered by a



1 court or other body having adjudicative authority, by a creditor  
2 against property that is subject to a permitted transfer that  
3 arises after a permitted transfer and no claim by a creditor to  
4 avoid a permitted transfer shall be brought at law or in equity  
5 for attachment or other provisional remedy unless the permitted  
6 transfer was made with actual intent to defraud, hinder, or  
7 delay the creditor.

8 (b) An allowable claim under subsection (a) of this  
9 section shall be extinguished unless:

10 (1) The creditor's claim arose before the permitted  
11 transfer was made and the action is brought on the  
12 latter of the date of the permitted transfer or the  
13 date of the enactment of this section; or

14 (2) The creditor's claim arose concurrent with or  
15 subsequent to the permitted transfer, and the action  
16 is brought within two years after the permitted  
17 transfer is made.

18 (c) In any action described in subsection (a), the burden  
19 to prove intent to defraud, hinder, or delay by clear and  
20 convincing evidence shall be upon the creditor.

21 (d) For purposes of this section, a permitted transfer  
22 that is made by a transferor who is a trustee shall be deemed to



1 have been made as of the date that the property that is the  
2 subject of the permitted transfer was originally transferred via  
3 a trust instrument that meets the requirements of this chapter  
4 to the transferor or the transferor's predecessor in interest.

5 (e) Notwithstanding any law to the contrary, a creditor or  
6 other person who purports to have a claim against property that  
7 is the subject of a permitted transfer shall have only the  
8 rights, with respect to a permitted transfer, as are provided in  
9 this section and sections -9 and -10.

10 (f) No creditor or any other person shall have any claim  
11 or cause of action, including an action to enforce a judgment  
12 entered by a court or other body having adjudicative authority,  
13 against a trustee or advisor described in section -4(c) or  
14 against any person involved in drafting, preparing, executing,  
15 or funding a trust or in counseling the parties to a trust that  
16 is the subject of a permitted transfer if, as of the date of the  
17 action, the action would be barred under this section.

18 § -9 **Limitations on permitted transfers.** The  
19 limitations contained in section -8 on actions by creditors  
20 to avoid permitted transfers shall not apply to:

21 (1) Any person to whom the transferor is indebted on  
22 account of a family court-supervised agreement or



1 family court order for the payment of support or  
2 alimony to the transferor's spouse, former spouse, or  
3 children, or for a division or distribution of  
4 property to the transferor's spouse or former spouse,  
5 but only to the extent of the debt and not to any  
6 claim for forced heirship, legitime, or elective  
7 share;

8 (2) Any person who suffers death, personal injury, or  
9 property damage on or before the date of a permitted  
10 transfer; provided that the death, personal injury, or  
11 property damage is determined to have been caused in  
12 whole or in part by the tortious act or omission of  
13 either the transferor or another person for whom the  
14 transferor is or was vicariously liable to the extent  
15 of the transferor's liability or vicarious liability;

16 (3) Any lender who extends a secured or collateralized  
17 loan to the transferor based on the transferor's or  
18 the transferor's agent's express or implied  
19 representation that the assets of a trust established  
20 under this chapter would be available as security  
21 against the loan in the event of the transferor's  
22 default thereon; or



1           (4) The State of Hawaii to the extent that a transfer  
2           results in the transferor being unable to meet the  
3           transferor's tax liabilities, but only to the extent  
4           necessary to extinguish the outstanding tax  
5           liabilities.

6           § -10 **Effect of avoidance of permitted transfers.** (a)

7           A creditor may avoid a permitted transfer pursuant to  
8           section -8 only to the extent necessary to satisfy the  
9           transferor's debt to the creditor at whose instance the transfer  
10          has been avoided, together with costs, including attorney's  
11          fees, as allowed by a court.

12          (b) In an action pursuant to subsection (a) to avoid a  
13          permitted transfer:

14          (1) If a court finds that a trustee has not acted with  
15          intent to defraud, hinder, or delay the creditor in  
16          accepting or administering the property that is the  
17          subject of the permitted transfer:

18               (A) The trustee shall have a first and paramount lien  
19               against the property that is the subject of the  
20               permitted transfer in an amount equal to the  
21               entire cost, including attorney's fees, properly  
22               incurred by the trustee in the defense of the





1                   action or proceedings to avoid the permitted  
2                   transfer; and

3                   (B) The permitted transfer shall be avoided, subject  
4                   to payment of proper fees, costs, preexisting  
5                   rights, claims, and interests of the trustee and  
6                   of any predecessor trustee who has not acted with  
7                   intent to defraud, hinder, or delay the creditor;  
8                   and

9                   (2) If the court is satisfied that a beneficiary of the  
10                  trust has not acted with intent to defraud, hinder, or  
11                  delay the creditor, the permitted transfer shall be  
12                  avoided subject to the beneficiary's right to retain  
13                  any distribution made prior to the creditor's  
14                  commencement of an action to avoid the permitted  
15                  transfer. For purposes of this paragraph, it shall be  
16                  presumed that a beneficiary did not act with intent to  
17                  defraud, hinder, or delay the creditor merely by  
18                  creating the trust or by accepting a distribution made  
19                  in accordance with the terms of the trust.

20                  (c) A creditor who brings an action pursuant to  
21                  section -8 to avoid a permitted trust shall have the burden  
22                  of proving by clear and convincing evidence that a trustee or



1 beneficiary acted with intent to defraud, hinder, or delay the  
2 creditor; provided that in the case of a beneficiary who is also  
3 the transferor, the burden on the creditor shall be to prove by  
4 a preponderance of the evidence that the transferor-beneficiary  
5 acted with intent to defraud, hinder, or delay the creditor.  
6 Mere acceptance of permitted property by a trustee shall not  
7 constitute evidence of intent to defraud, hinder, or delay a  
8 creditor.

9 (d) Notwithstanding any other provision of this chapter, a  
10 creditor shall have no right against the interest of a  
11 beneficiary to a trust based solely on the beneficiary's right  
12 to authorize or direct the trustee to use all or part of the  
13 trust property to pay:

14 (1) Estate or inheritance taxes imposed upon or due to the  
15 beneficiary's estate;

16 (2) Debts of the beneficiary's estate; or

17 (3) Expenses of administering the beneficiary's estate  
18 unless the beneficiary actually directs the payment of taxes,  
19 debts, or expenses and then only to the extent of that  
20 direction.

21 § -11 **Multiple transfers.** If more than one permitted  
22 transfer is made by means of the same trust instrument:



1 (1) The making of a subsequent permitted transfer shall be  
2 disregarded in determining whether a creditor's claim  
3 with respect to a prior permitted transfer is  
4 extinguished as provided in section -8; and

5 (2) Any distribution to a beneficiary shall be deemed to  
6 have been made from the latest permitted transfer.

7 § -12 Taxation. (a) The State shall levy a one-time  
8 one per cent excise tax on the fair market value of all  
9 permitted transfers. This one-time excise tax shall be  
10 administered by the department of taxation with all of its  
11 authorities under title 14, including all rights relating to the  
12 assessment, collection, and enforcement of the tax laws. The  
13 department of taxation shall be authorized to implement the tax  
14 under this section, including the timing, collection, and appeal  
15 rights of persons affected, by rule, including temporary rule.

16 (b) A non-grantor trust established under this chapter  
17 shall be subject to income tax in Hawaii; provided that to the  
18 extent that the beneficial interest in the non-grantor trust  
19 shall be held by a beneficiary or beneficiaries residing outside  
20 this State, any income or capital gains accumulated for the  
21 benefit of the non-resident beneficiary or beneficiaries shall  
22 be excluded from Hawaii income tax for that year.



1 (c) A trustee of a non-grantor trust established under  
2 this chapter shall not be required to track accumulated income  
3 or gains attributable to a nonresident beneficiary.

4 (d) Notwithstanding any discretionary distribution  
5 provisions to the contrary, where the percentage interests of  
6 the beneficiaries are indeterminable based on the provisions of  
7 the trust, the trustee shall allocate accumulated income and  
8 gains equally among all beneficiaries then entitled to  
9 distributions of income.

10 (e) Hawaii resident taxpayers who receive actual or  
11 constructive distributions of income or principal from trusts  
12 shall be subject to all applicable taxes on that income."

13 SECTION 3. Section 525-4, Hawaii Revised Statutes, is  
14 amended to read as follows:

15 "[~~§~~525-4~~]~~ **Exclusions from statutory rule against**  
16 **perpetuities.** Section 525-1 shall not apply to:

- 17 (1) A fiduciary's power to sell, lease, or mortgage  
18 property, and the power of a fiduciary to determine  
19 principal and income;
- 20 (2) A discretionary power of a trustee to distribute  
21 principal before termination of a trust;



- 1 (3) A nonvested property interest held by a charity,  
2 government, or governmental agency or subdivision, if  
3 the nonvested property interest is preceded by an  
4 interest held by another charity, government, or  
5 governmental agency or subdivision;
- 6 (4) A property interest in or a power of appointment with  
7 respect to a pension, profit-sharing, stock bonus,  
8 health, disability, death benefit, income deferral, or  
9 other current or deferred benefit plan for one or more  
10 employees, independent contractors, or their  
11 beneficiaries or spouses; [~~or~~]
- 12 (5) A property interest, power of appointment, or  
13 arrangement that was not subject to the common-law  
14 rule against perpetuities or is excluded by any other  
15 applicable law[~~];~~ or
- 16 (6) A trust described in chapter \_\_\_\_\_."

17 SECTION 4. Statutory material to be repealed is bracketed  
18 and stricken. New statutory material is underscored.

19 SECTION 5. This Act shall take effect on July 1, 2010;  
20 provided that section 2 shall apply to permitted transfers made  
21 after the effective date of this Act.

22



**Report Title:**

Permitted Transfers in Trust Act; Rule Against Perpetuities

**Description:**

Creates the Permitted Transfers in Trust Act to govern transfers of currency, bonds, and securities from a transferor to a trustee by means of an irrevocable trust instrument. Specifies that the rule against perpetuities does not apply to transfers pursuant to the Permitted Transfers in Trust Act. Effective July 1, 2010. (CD1)

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

