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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-    Disclosures involving personal property.    An  
5 escrow depository that receives, holds, or delivers money, other  
6 consideration, or any instrument affecting title to personal  
7 property shall disclose in writing to all parties involved in  
8 the transaction that the transaction is not covered by this  
9 chapter.

10          §449-    Submission of security breach information.    Upon  
11 discovery or notification that a security breach, as defined in  
12 chapter 487N, has occurred or is reasonably believed to have  
13 occurred, the escrow depository shall provide notice of the  
14 security breach to the commissioner. The notice shall be made  
15 without unreasonable delay and shall be consistent with any  
16 measures necessary to determine the scope of the breach and to

1 restore the reasonable integrity, security, and confidentiality  
2 of the data system.

3 **§449- Temporary closures and relocations.** An escrow  
4 depository may temporarily close or relocate an office for up to  
5 one hundred eighty days, or longer if determined to be necessary  
6 by the commissioner, in the event of an emergency or for other  
7 good cause. For purposes of this section, an "emergency" means  
8 a situation of unusual or compelling urgency that creates a  
9 threat to life, public health, welfare, or safety by reason of  
10 major natural disaster, epidemic, riot, fire, flood, or as  
11 determined by the commissioner. Written notice of a temporary  
12 closure or relocation shall be provided to the commissioner as  
13 soon as practicable. Notice shall also be provided to the  
14 escrow depository's customers in the form of a sign posted in a  
15 safe, conspicuous location on or in proximity to the primary  
16 public entrance of the office that has been or will be  
17 temporarily closed or relocated. The written notices provided  
18 to the commissioner and to the escrow depository's customers  
19 shall state the reasons for the temporary closure or relocation,  
20 the expected date of reopening, and information regarding where  
21 and how customers of the closed or relocated office will be  
22 accommodated during the temporary closure or relocation. Notice

1 of the reopening of the office that was temporarily closed or  
2 relocated shall be provided to the commissioner within five days  
3 of the reopening.

4 §449- Education. Any trade association with a  
5 membership composed of escrow depositories licensed to do  
6 business in the State pursuant to chapter 449 shall provide its  
7 member escrow depositories with educational material, updated  
8 legislation, and any other industry-pertinent information or  
9 materials on a regular basis."

10 SECTION 2. Section 449-1, Hawaii Revised Statutes, is  
11 amended by:

12 1. Adding a new definition to read as follows:

13 "Tangible net worth" means the net worth of a company,  
14 corporation, partnership, limited liability corporation, limited  
15 liability partnership, or other business entity regardless of  
16 corporate designation exclusive of any value derived from  
17 goodwill and other intangible assets as defined by the financial  
18 accounting standards board."

19 2. Amending the definition of "escrow" to read as follows:

20 "Escrow" means any transaction affecting the title to real  
21 property, including leaseholds, proprietary leaseholds, and  
22 condominiums, in which a person not a party to the transaction

1 and neither having nor acquiring any interest in the title  
2 receives from one party to the transaction, holds until the  
3 happening of an event or performance of a condition and then  
4 delivers to another party to the transaction, any money or other  
5 consideration or any instrument affecting the title to that real  
6 property, all in accordance with the terms of the agreement  
7 between the parties to the transaction. For purposes of this  
8 chapter, "escrow" does not mean a transaction affecting title to  
9 personal property."

10 SECTION 3. Section 449-1.8, Hawaii Revised Statutes, is  
11 amended to read as follows:

12 "[+]§449-1.8[+] **Confidential portion of application or**  
13 **records[-]; consumer complaints, statistical data.** (a)

14 Information contained in any application or record shall be made  
15 available to the public unless that information may be withheld  
16 from public disclosure by the commissioner under chapter 92F.

17 (b) The commissioner may disclose statistical data  
18 regarding the number of consumer complaints filed against an  
19 escrow depository, the general nature of each complaint, and the  
20 resolution of each complaint."

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

1           "~~§449-4~~ **Administrative penalty.** Any person who [~~wilfully~~]  
2 violates any of the provisions of this chapter, shall be subject  
3 to an administrative fine of up to \$5,000 for each violation.  
4 [~~No licensee shall be subject to this penalty for a violation of~~  
5 ~~section 449-16(b) or (c) if the violation was not intentional or~~  
6 ~~resulted from a bona fide error, notwithstanding the maintenance~~  
7 ~~of procedures reasonably adopted to avoid that error. Examples~~  
8 ~~of bona fide errors include, but are not limited to, clerical~~  
9 ~~miscalculations, computer malfunction, printing errors, and~~  
10 ~~computer programming errors.]"~~

11           SECTION 5. Section 449-5.5, Hawaii Revised Statutes, is  
12 amended to read as follows:

13           "~~§449-5.5~~ [~~Net~~] **Tangible net capital.** The tangible net  
14 capital of any corporation, partnership, limited liability  
15 corporation, limited liability partnership, or other business  
16 entity regardless of corporate designation engaging in the  
17 escrow depository business under this chapter shall be not less  
18 than [~~\$50,000.~~] \$250,000. A corporation in lieu of the tangible  
19 net capital requirement may alternatively file a bond for  
20 [~~\$50,000~~] \$250,000 conditional upon its satisfactory performance  
21 of escrow conditions and satisfaction of all escrow liabilities.  
22 The amount of the minimum tangible net capital of [~~\$50,000,~~]

1 \$250,000, or the bond, or a combination of both tangible net  
2 capital or bond totalling [~~\$50,000~~] \$250,000 shall be maintained  
3 at all times by the licensee.

4 [~~Licensees in operation on May 24, 1973, pursuant to this~~  
5 ~~chapter with a net capital of less than \$50,000 shall increase~~  
6 ~~its net capital to \$50,000 or file a bond for \$50,000, or take~~  
7 ~~action so that a combination of its net capital and bond totals~~  
8 ~~\$50,000, before May 24, 1978.]"~~

9 SECTION 6. Section 449-6, Hawaii Revised Statutes, is  
10 amended by amending subsection (b) to read as follows:

11 "(b) The application shall contain the following  
12 information:

- 13 (1) The corporate name, amount of capital, and office  
14 address of the applicant;
- 15 (2) The names of the stockholders, officers, and directors  
16 of the applicant;
- 17 (3) Evidence of the character, financial responsibility,  
18 experience, and ability of the officers and directors;  
19 [and]
- 20 (4) The names of the proposed escrow officers and their  
21 qualifications[~~-~~]; and

1       (5) Information necessary to conduct a criminal history  
 2       record check in accordance with section 846-2.7 for  
 3       each of the proposed officers, directors, and escrow  
 4       officers of the applicant, accompanied by payment of  
 5       the applicable fee for each record check to be  
 6       conducted."

7       SECTION 7. Section 449-9, Hawaii Revised Statutes, is  
 8 amended to read as follows:

9       "**§449-9 Escrow depository's bond.** [~~Before an escrow~~  
 10 ~~depository's license becomes effective, the]~~ (a) An escrow  
 11 depository shall [~~give~~] maintain at all times a bond given to  
 12 the commissioner in the penal sum of not less than [~~\$100,000~~]  
 13 \$200,000, executed by a surety insurer authorized to do business  
 14 in this State, [~~conditioned:~~] with the following conditions:

15       (1) That the escrow depository will honestly, faithfully,  
 16 and with diligence apply all funds, other  
 17 consideration, or property and instruments affecting  
 18 title in accordance with the instructions under which  
 19 the same were deposited with it, and will promptly  
 20 account for the same; and

1           (2) That the escrow depository will satisfy all judgments  
2           and decrees which may be recovered against it in any  
3           action or proceeding brought under this chapter.

4           (b) The aggregate liability of the surety for all breaches  
5 of the conditions of the bond [~~shall~~], in no event, shall exceed  
6 the penal sum of the bond. In lieu of the bond, an escrow  
7 depository may deposit cash[~~, a~~] or an unconditional and  
8 irrevocable letter of credit[~~, or securities acceptable to the~~  
9 ~~commissioner~~]."

10           SECTION 8. Section 449-11, Hawaii Revised Statutes, is  
11 amended to read as follows:

12           "**§449-11 Fidelity bonds[+] or fidelity insurance;**  
13 **deposit.** [A] For all of its directors, officers, and employees  
14 who have access to money, negotiable securities, or instruments  
15 in their possession or under their control, a licensed escrow  
16 depository shall at all times either:

17           (1) Maintain a fidelity bond [~~executed~~] or fidelity  
18 insurance issued by a surety insurer authorized to do  
19 business in the State in an amount not less than  
20 [~~\$25,000; provided that any bond which is subject to a~~  
21 ~~deductible thereunder in excess of \$5,000 per~~  
22 ~~occurrence shall require the prior approval of the~~



1           ~~commissioner, who may take into consideration, among~~  
2           ~~other factors, the amount of the proposed bond;~~  
3           \$125,000; or

4           (2) Deposit an equivalent amount of cash or [~~securities~~  
5           ~~under such terms and conditions as are acceptable to~~  
6           ~~the commissioner, an unconditional and irrevocable~~  
7           ~~letter of credit~~

8           ~~upon all of its directors, officers, and employees who have~~  
9           ~~access to money or negotiable securities or instruments in its~~  
10          ~~possession or under its control. Notwithstanding the above~~  
11          ~~provision, the escrow depository may carry bonds or deposit cash~~  
12          ~~or securities above the amounts required by the commissioner.]~~  
13          an unconditional and irrevocable letter of credit."

14           SECTION 9. Section 449-12, Hawaii Revised Statutes, is  
15          amended to read as follows:

16           "**§449-12 Errors and omissions insurance; deposit.** A  
17          licensed escrow depository shall at all times either:

18           (1) Maintain a policy of errors and omissions insurance  
19           executed by an insurer authorized to do business in  
20           the State in an amount not less than [~~\$100,000;~~  
21           ~~provided that any policy which is subject to a~~  
22           ~~deductible thereunder in excess of \$10,000, per~~

1           ~~occurrence, shall require the prior approval of the~~  
2           ~~commissioner, who may take into consideration, among~~  
3           ~~other factors, the amount of the proposed coverage,]~~  
4           \$250,000; or

5           (2) Deposit an equivalent amount of cash or [~~securities~~  
6           ~~under such terms and conditions as are acceptable to~~  
7           ~~the commissioner.] an unconditional and irrevocable  
8           letter of credit."~~

9           SECTION 10. Section 449-15, Hawaii Revised Statutes, is  
10          amended by amending subsection (b) to read as follows:

11          "(b) The audited financial statements shall be prepared in  
12          accordance with generally accepted accounting principles and the  
13          examination by the independent certified public accountant shall  
14          be performed in accordance with generally accepted auditing  
15          standards. The financial statements and the independent  
16          certified public accountant's report shall include but not be  
17          limited to the following:

18                 (1) An unqualified opinion on the fair presentation of the  
19                         financial statements taken as a whole. To the extent  
20                         that this is not possible, then a detailed footnote  
21                         explaining the reason why an unqualified opinion could  
22                         not be given shall suffice;

- 1           (2) A direct verification of escrow funds and escrow  
2           liabilities. If less than a one hundred per cent  
3           verification is performed, there shall be a separate  
4           letter from the independent certified public  
5           accountant indicating: the number of accounts  
6           verified; the percentage of the verification; the  
7           basis for determining the sample size; the method used  
8           in selecting the sample items to verify; a description  
9           of the sampling technique used; the discrepancies  
10          noted; and how the discrepancies were resolved;
- 11          (3) Footnotes to the audited financial statement showing  
12          the escrow funds and escrow liabilities and, to the  
13          extent that these amounts differ, a reconciliation of  
14          the amounts; [~~and~~]
- 15          (4) A statement as to whether the escrow depository is in  
16          compliance with this chapter. If the independent  
17          certified public accountant reports any incident  
18          involving noncompliance, the statement shall address  
19          whether the noncompliance may have a material adverse  
20          impact on the ongoing operations of the company[~~-~~];  
21          and

1       (5) A statement as to whether the escrow depository is in  
2       compliance with chapter 523A."

3       SECTION 11. Section 449-16, Hawaii Revised Statutes, is  
4 amended to read as follows:

5       "**§449-16 Accounting for moneys, property, etc.** (a) Every  
6 licensee under this chapter shall have the responsibility of a  
7 trustee for all moneys, other consideration, or instruments  
8 received by it. No licensee shall [~~mingle~~] commingle any such  
9 moneys or other property with its own moneys or other property,  
10 or with moneys or other property held by it in any other  
11 capacity. All moneys held by a licensee in escrow as herein  
12 defined shall be deposited in financial institutions, payable on  
13 demand. Under this chapter, deposits in financial institutions  
14 are limited to sweep accounts as described in this section,  
15 checking accounts, money market deposit accounts, and savings  
16 accounts with no specified maturity date. Deposits at financial  
17 institutions may be held in sweep accounts, provided that:

18       (1) The licensee using the sweep account shall have a net  
19 worth of not less than \$1,000,000;

20       (2) The sweep account is a deposit account administered by  
21 a financial institution in which the moneys over a  
22 minimum balance are periodically transferred into a

1 money market mutual fund account invested only in  
2 obligations of:

3 (A) The United States government;

4 (B) Agencies backed by the full faith and credit of  
5 the United States government; or

6 (C) Agencies originally established or chartered by  
7 the United States government to serve public  
8 purposes; and

9 periodically recredited to the sweep account; and

10 (3) The licensee is liable for all moneys transferred to  
11 the money market mutual fund account under the sweep  
12 account, including any loss of value.

13 (b) No licensee shall ~~[disburse funds from an escrow~~  
14 ~~account until cash and or items sufficient to fund any~~  
15 ~~disbursements from the account have been received and deposited~~  
16 ~~to the account, and with respect to such items the licensee~~  
17 ~~complies with the provisions of either paragraphs (1) or (2)~~  
18 ~~hereof.~~

19 ~~(1) Where an item has been received and submitted for~~  
20 ~~collection, no licensee shall disburse funds from an~~  
21 ~~escrow account with respect to the item until final~~  
22 ~~settlement of the item has been received by the~~

1 ~~financial institution to which the item has been~~  
2 ~~submitted for collection.~~

3 ~~(2) No licensee shall disburse funds from the escrow~~  
4 ~~account with respect to an item drawn on a financial~~  
5 ~~institution until the licensee confirms that~~  
6 ~~sufficient collected funds are on deposit in the~~  
7 ~~drawer's account.~~

8 ~~(c) A licensee may deliver any money, consideration, or~~  
9 ~~instrument affecting the title to real property prior to funds~~  
10 ~~becoming available for disbursement under subsection (b) if it~~  
11 ~~has received the written consent of the parties to the~~  
12 ~~transaction.] make a disbursement on behalf of a specific escrow~~  
13 ~~account unless sufficient collected funds have been received for~~  
14 ~~that escrow."~~

15 SECTION 12. Section 846-2.7, Hawaii Revised Statutes, is  
16 amended by amending subsection (b) to read as follows:

17 "(b) Criminal history record checks may be conducted by:

18 (1) The department of health on operators of adult foster  
19 homes or developmental disabilities domiciliary homes  
20 and their employees, as provided by section 333F-22;

21 (2) The department of health on prospective employees,  
22 persons seeking to serve as providers, or

1 subcontractors in positions that place them in direct  
2 contact with clients when providing non-witnessed  
3 direct mental health services as provided by section  
4 321-171.5;

5 (3) The department of health on all applicants for  
6 licensure for, operators for, and prospective  
7 employees, and volunteers at one or more of the  
8 following: skilled nursing facility, intermediate  
9 care facility, adult residential care home, expanded  
10 adult residential care home, assisted living facility,  
11 home health agency, hospice, adult day health center,  
12 special treatment facility, therapeutic living  
13 program, intermediate care facility for the mentally  
14 retarded, hospital, rural health center and  
15 rehabilitation agency, and, in the case of any of the  
16 above-related facilities operating in a private  
17 residence, on any adult living in the facility other  
18 than the client as provided by section 321-15.2;

19 (4) The department of education on employees, prospective  
20 employees, and teacher trainees in any public school  
21 in positions that necessitate close proximity to  
22 children as provided by section 302A-601.5;

- 1 (5) The counties on employees and prospective employees  
2 who may be in positions that place them in close  
3 proximity to children in recreation or child care  
4 programs and services;
- 5 (6) The county liquor commissions on applicants for liquor  
6 licenses as provided by section 281-53.5;
- 7 (7) The department of human services on operators and  
8 employees of child caring institutions, child placing  
9 organizations, and foster boarding homes as provided  
10 by section 346-17;
- 11 (8) The department of human services on prospective  
12 adoptive parents as established under section 346-  
13 19.7;
- 14 (9) The department of human services on applicants to  
15 operate child care facilities, prospective employees  
16 of the applicant, and new employees of the provider  
17 after registration or licensure as provided by section  
18 346-154;
- 19 (10) The department of human services on persons exempt  
20 pursuant to section 346-152 to be eligible to provide  
21 child care and receive child care subsidies as  
22 provided by section 346-152.5;



- 1 (11) The department of human services on operators and  
2 employees of home and community-based case management  
3 agencies and operators and other adults, except for  
4 adults in care, residing in foster family homes as  
5 provided by section 346-335;
- 6 (12) The department of human services on staff members of  
7 the Hawaii youth correctional facility as provided by  
8 section 352-5.5;
- 9 (13) The department of human services on employees,  
10 prospective employees, and volunteers of contracted  
11 providers and subcontractors in positions that place  
12 them in close proximity to youth when providing  
13 services on behalf of the office or the Hawaii youth  
14 correctional facility as provided by section 352D-4.3;
- 15 (14) The judiciary on employees and applicants at detention  
16 and shelter facilities as provided by section 571-34;
- 17 (15) The department of public safety on employees and  
18 prospective employees who are directly involved with  
19 the treatment and care of persons committed to a  
20 correctional facility or who possess police powers  
21 including the power of arrest as provided by section  
22 353C-5;

- 1           (16) The department of commerce and consumer affairs on  
2                    applicants for private detective or private guard  
3                    licensure as provided by section 463-9;
- 4           (17) Private schools and designated organizations on  
5                    employees and prospective employees who may be in  
6                    positions that necessitate close proximity to  
7                    children; provided that private schools and designated  
8                    organizations receive only indications of the states  
9                    from which the national criminal history record  
10                  information was provided as provided by section 302C-  
11                  1;
- 12          (18) The public library system on employees and prospective  
13                  employees whose positions place them in close  
14                  proximity to children as provided by section 302A-  
15                  601.5;
- 16          (19) The State or any of its branches, political  
17                  subdivisions, or agencies on applicants and employees  
18                  holding a position that has the same type of contact  
19                  with children, vulnerable adults, or persons committed  
20                  to a correctional facility as other public employees  
21                  who hold positions that are authorized by law to

- 1           require criminal history record checks as a condition  
2           of employment as provided by section 78-2.7;
- 3       (20) The department of human services on licensed adult day  
4           care center operators, employees, new employees,  
5           subcontracted service providers and their employees,  
6           and adult volunteers as provided by section 346-97;
- 7       (21) The department of human services on purchase of  
8           service contracted and subcontracted service providers  
9           and their employees serving clients of the adult and  
10          community care services branch, as provided by section  
11          346-97;
- 12       (22) The department of human services on foster grandparent  
13          program, retired and senior volunteer program, senior  
14          companion program, and respite companion program  
15          participants as provided by section 346-97;
- 16       (23) The department of human services on contracted and  
17          subcontracted service providers and their current and  
18          prospective employees that provide home and community-  
19          based services under Section 1915(c) of the Social  
20          Security Act (Title 42 United States Code Section  
21          1396n(c)), or under any other applicable section or  
22          sections of the Social Security Act for the purposes

1 of providing home and community-based services, as  
2 provided by section 346-97;

3 (24) The department of commerce and consumer affairs on  
4 proposed directors and executive officers of a bank,  
5 savings bank, savings and loan association, trust  
6 company, and depository financial services loan  
7 company as provided by section 412:3-201;

8 (25) The department of commerce and consumer affairs on  
9 proposed directors and executive officers of a  
10 nondepository financial services loan company as  
11 provided by section 412:3-301;

12 (26) The department of commerce and consumer affairs on the  
13 original chartering applicants and proposed executive  
14 officers of a credit union as provided by section  
15 412:10-103;

16 [†] (27) [†] The department of commerce and consumer affairs on:

17 (A) Each principal of every non-corporate applicant  
18 for a money transmitter license; and

19 (B) The executive officers, key shareholders, and  
20 managers in charge of a money transmitter's  
21 activities of every corporate applicant for a  
22 money transmitter license,

1 as provided by section 489D-9; [~~and~~]  
2 (28) The department of commerce and consumer affairs on  
3 proposed officers, directors, and escrow officers of  
4 the applicant for a license as an escrow depository as  
5 provided by section 449-6; and  
6 [~~(28)~~] (29) Any other organization, entity, or the State,  
7 its branches, political subdivisions, or agencies as  
8 may be authorized by state law."

9 SECTION 13. Statutory material to be repealed is bracketed  
10 and stricken. New statutory material is underscored.

11 SECTION 14. This Act shall take effect upon its approval;  
12 provided that sections 6 and 12 shall take effect on July 2,  
13 2009, and sections 5, 7, 8, and 9 shall take effect on January  
14 1, 2010.

**Report Title:**

Escrow Depository Law

**Description:**

Revises the escrow depository law to: (1) clarify which escrow transactions are covered by the statute and which are not; (2) update the statute to adequately reflect the present day size of the transactions routinely handled by the industry; (3) provide for more flexibility in supervising and regulating the industry; and (4) ensure adequate protection for the consumer. (SD1)