

CHAPTER 449
ESCROW DEPOSITORIES

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Collection of special mortgage recording fee, see §431P-16.

" **§449-1 Definitions.** As used in this chapter:

"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.

"Branch office" means any location, separate from the principal place of business of the escrow depository, that is identified by any means to the public or customers as a location at which the licensee holds itself out as an escrow depository.

"Commissioner" means the commissioner of financial institutions of this State.

"Control", in the context of control of an applicant or licensee, means ownership of or the power to vote twenty-five per cent or more of the outstanding voting securities of a licensee or controlling person. For purposes of determining the percentage of a licensee controlled by any person, there shall be aggregated with the controlling person's interest the interest of any other person controlled by the person, or by any spouse, parent, or child of the person.

"Controlling person" means any person in control of a licensee or applicant.

"Division" means the division of financial institutions of the department of commerce and consumer affairs.

"Escrow" means any transaction affecting the title to real property, including leaseholds, proprietary leaseholds, and condominiums, in which a person not a party to the transaction and neither having nor acquiring any interest in the title receives from one party to the transaction, holds until the happening of an event or performance of a condition and then delivers to another party to the transaction, any money or other consideration or any instrument affecting the title to that real property, all in accordance with the terms of the agreement between the parties to the transaction.

"Escrow account" means any escrow depository account with a financial institution to which cash or items are deposited with respect to any escrow.

"Escrow depository" means the corporation which, in an escrow, and for compensation, receives, holds, and delivers the money, other consideration, or instrument affecting title to real property.

"Financial institution" means any bank, savings and loan association, financial services loan company, or credit union doing business in the State whose accounts are insured by the Federal Deposit Insurance Corporation, the National Credit Union

Share Insurance Fund or other similar or successor program of federal insurance.

"Item" means any check (including a cashier's or certified check), negotiable order of withdrawal, draft, traveler's check, or money order.

"NMLS" means a licensing system developed and maintained by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators for the state licensing and registration of state-licensed loan originators and other financial services providers, or any system provided by the Consumer Financial Protection Bureau.

"Person" means, in addition to the singular, persons, group of persons, cooperative association, company, firm, partnership, corporation, or other legal entity, and includes the agents and employees of any person.

"Principal" means a manager and anyone else who supervises or is in charge of the applicant or licensee. [L 1967, c 144, pt of §1; HRS §449-1; am L 1985, c 269, §49; am L 1986, c 331, §1; am L 1992, c 205, §2; am L 2001, c 184, §2; am L 2013, c 166, §2; am L 2016, c 224, §1]

" **[\$449-1.5] 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. [L 1992, c 205, pt of §1]

" **[\$449-1.6] 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. [L 1992, c 205, pt of §1]

" **[\$449-1.7] 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. [L 1992, c 205, pt of §1]

" **[\$449-1.8] Confidential portion of application or records.**

Information contained in any application or record shall be made available to the public unless that information may be withheld from public disclosure by the commissioner under chapter 92F. [L 2001, c 184, pt of §1]

" **§449-1.9 Powers of commissioner.** In addition to any other powers provided by law, the commissioner may:

- (1) Administer and enforce the provisions and requirements of this chapter;
- (2) Adopt, amend, or repeal rules or declaratory rulings pursuant to chapter 91 to effectuate the purposes of this chapter;
- (3) Issue informal nonbinding interpretations to effectuate the purposes of this chapter;
- (4) Investigate and conduct hearings regarding any violation of this chapter or any rule or order of the commissioner;
- (5) Contract with or employ qualified persons, including investigators, examiners, or auditors who shall be exempt from chapter 76 and who shall assist the commissioner in exercising the commissioner's powers and duties;
- (6) Deposit all fees, fines, and charges collected by the commissioner under this chapter into the compliance resolution fund established pursuant to section 26-9(o);
- (7) Process and investigate complaints, subpoena witnesses and documents, administer oaths, and receive affidavits and oral testimony, including through electronic means, and conduct contested case proceedings;
- (8) Report any violation of this chapter or violation of federal or state law to the United States Commissioner of Housing and Urban Development or any other federal agency having jurisdiction over the licensee; and
- (9) Enter into agreements or contracts with the operators of NMLS or other entities designated by NMLS to collect and maintain records and process transaction

fees or other fees related to licensees or other persons subject to this chapter; provided that:

- (A) For the purpose and the extent necessary to use NMLS, the commissioner may:
 - (i) Require all escrow depositories to register with NMLS; and
 - (ii) Waive or modify, in whole or in part, by rule or order, any or all of the requirements of this chapter and establish new requirements as reasonably necessary to participate in NMLS; and
- (B) In addition to other uses of NMLS, the commissioner may use NMLS as an agent for:
 - (i) Requesting information from and distributing information to the United States Department of Justice or any other governmental agency; and
 - (ii) Requesting and distributing information to and from any source directed by the commissioner. [L 2013, c 166, §1; am L 2016, c 224, §2]

" **§449-2 Rules.** Subject to chapter 91, the commissioner may adopt such rules as the commissioner deems necessary for the effective administration and enforcement of this chapter. [L 1967, c 144, pt of §1; HRS §449-2; am L 1985, c 269, §50; gen ch 1985; am L 1992, c 205, §3]

" **§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, and savings and loan associations, 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. [L 1967, c 144, pt of §1; HRS §449-3; am L 1973, c 173, §1; gen ch 1985; am L 1992, c 205, §4; am L 1996, c 27, §2]

" **§449-4 Administrative penalty.** (a) Any person who violates any of the provisions of this chapter, shall be subject

to an administrative fine of a maximum of \$5,000 for each violation. The commissioner may impose an administrative fine on a licensee or person subject to this chapter if the commissioner finds on the record after notice and opportunity for hearing that the licensee or person subject to this chapter has violated or failed to comply with any requirement of this chapter or any rule prescribed by the commissioner under this chapter or order issued under the authority of this chapter.

(b) Each violation under this chapter or failure to comply with any directive or order of the commissioner shall be a separate and distinct violation.

(c) Notwithstanding section 480-13.5, any violation of this chapter that is directed toward, targets, or injures an elder may be subject to an additional civil penalty not in excess of \$10,000 for each violation in addition to any other fines or penalties assessed for the violation.

(d) No licensee shall be subject to this penalty for a violation of 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, and computer programming errors. [L 1967, c 144, pt of §1; HRS §449-4; am L 1986, c 331, §2; am L 1992, c 205, §5; am L 2013, c 166, §3]

" **§449-5 License required to act as escrow depository.** (a) No person shall act as an escrow depository in this State unless it is a corporation licensed to do so by the commissioner.

No person subject to the provisions of this chapter not licensed or exempted under this chapter shall transact any business under any name, title or descriptive term which contains the words "escrow", "escrow depository", or any other word or phrase having the same or similar meaning.

(b) No person shall act as an escrow depository from an out-of-state location for property located in this State unless licensed to act as a Hawaii escrow depository by the commissioner. [L 1967, c 144, pt of §1; HRS §449-5; am L 1969, c 39, §1; am L 1985, c 269, §50; am L 2010, c 49, §1]

Cross References

Title insurers or insurers, see §431:20-106.5.

" **§449-5.5 Net capital.** The net capital of any corporation engaging in the escrow depository business under this chapter shall not be less than \$100,000. The amount of the minimum net

capital of \$100,000 shall be maintained at all times by the licensee. [L 1973, c 174, §§1, 2; am L 1976, c 101, §1; am L 2013, c 166, §4]

" **§449-6 Application for license.** (a) Any corporation desiring to be licensed as an escrow depository shall submit an application in writing and in a form prescribed by NMLS or by the commissioner. The application shall be accompanied by a filing fee no part of which shall be refundable.

(b) The application shall contain the following:

- (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;
- (4) The names of the proposed escrow officers and their qualifications;
- (5) The history of the applicant's material litigation and criminal convictions for the five-year period prior to the date of the application;
- (6) Information and authorizations necessary to conduct a criminal history record check in accordance with section 846-2.7 of each of the applicant's controlling persons, and each of the officers, directors, and principals who will be in charge of the escrow depository's activities upon licensure, accompanied by the appropriate payment of the applicable fee for each record check; and
- (7) Any other information the commissioner deems necessary to participate in NMLS. [L 1967, c 144, pt of §1; HRS §449-6; am L 1985, c 269, §50; am L 1992, c 205, §6; am L 2016, c 224, §3]

" **§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 applicant has met all the criteria set forth for approval, the commissioner shall approve the application. [L 1967, c 144, pt of §1; HRS §449-7; am L 1985, c 269, §50; gen ch 1985; am L 1987, c 6, §6; am L 1992, c 205, §7]

" **[§449-7.4] 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. [L 1992, c 205, pt of §1]

" **§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) A license issued under this chapter shall be prominently displayed in the place or places of business of the escrow depository.

(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. The licensee shall inform the commissioner in writing of any change to the designated escrow officer for the corporation at least fifteen days prior to the change, unless the change occurs so unexpectedly that the licensee is unable to provide fifteen days' prior notice; provided that when unexpected circumstances prevent prior notice, the licensee shall provide notice within five business days after the change. Within five business days of the designation of a new escrow officer by its board of directors, the licensee shall inform the commissioner in writing of the new escrow officer for the corporation, setting forth the experience, integrity, and competency of the new designated escrow officer in handling escrow transactions, and such other information as may be required by the commissioner. [L 1973, c 140, §1; am L 1985, c 269, §50; gen ch 1985; am L 1992, c 205, §8; am L 2013, c 166, §5]

" **§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 December 31, 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. [L 1967, c 144, pt of §1; HRS §449-8; am L 1970, c 72, §1; am L 1985, c 269, §50; am L 1992, c 205, §9; am L 2016, c 224, §4]

" **[§449-8.5] 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. [L 1992, c 205, pt of §1]

" **§449-8.6 Sale or transfer of license or change in control.**

(a) No escrow depository license shall be transferred except as provided in this section.

(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, until approved by the commissioner as provided in this section. The proposed purchaser of all or substantially all of the ongoing operations of a licensee shall file an application for approval of a proposed change in control of the licensee, accompanied by a nonrefundable application fee in accordance with this chapter, and shall not act as an escrow depository until the application has been approved by the commissioner.

(c) Any transfer of a licensee's voting stock which may result in the acquisition of control of the licensee may be considered a transfer of license under this chapter, and prior to the transfer 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 proposed purchaser or transferee of the stock shall file an application for approval of a proposed change in control of the licensee, accompanied by a nonrefundable application fee in accordance with this chapter, and shall not act as an escrow depository until the application has been approved by the commissioner.

(d) At the time of filing an application for approval of a proposed change in control of the licensee, the proposed purchaser or transferee shall provide to the commissioner the history of its material litigation and criminal convictions for the five-year period prior to the date of the application, and any other information requested by the commissioner which may include information similar to that required of an applicant for initial licensure or license renewal under this chapter. The proposed purchaser or transferee shall also provide any authorizations necessary for the commissioner to conduct criminal history record checks of each of the purchaser or transferee's controlling persons, and each of the officers, directors, and principals who will be in charge of the licensee's activities upon approval of the proposed application for change in control. The authorizations shall be accompanied by the appropriate payment of the applicable fee for each record check.

(e) Approval of the application for change in control of the licensee shall be granted only if the commissioner finds that following the change in control of the licensee, the character, financial responsibility, experience, ability, and general fitness of the controlling persons of the applicant for proposed change in control of the licensee, and each of the officers, directors, and principals who will be in charge of the licensee's activities upon approval of the proposed application for change in control, are such as to command the confidence of the community in the State and to warrant the beliefs that such persons are competent to successfully control and manage an escrow business and the applicant will be an honest and efficient escrow depository.

(f) In granting approval, the commissioner may impose such conditions and restrictions as shall be in the public interest, including without limitation requiring the proposed purchaser or transferee to fulfill representations contained in its application for approval of a proposed change in control of the licensee, and agreements made during the application process. [L 1992, c 205, pt of §1; am L 2013, c 166, §6; am L 2016, c 224, §5]

" **§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; 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. [L 1967, c 144, pt of §1; HRS §449-9; am L 1985, c 269, §50; am L 1992, c 205, §10]

" **§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. [L 1967, c 144, pt of §1; HRS §449-10; am L 1985, c 269, §50; am L 1992, c 205, §11]

" **§449-11 Fidelity bonds; insurance or other security devices.** [See Note below.] A licensed escrow depository shall at all times either:

- (1) Maintain a fidelity bond executed by a surety insurer authorized to do business in the State in an amount not less than \$100,000; provided that any bond which is subject to a deductible thereunder in excess of \$10,000 per occurrence shall require the prior approval of the commissioner, who may take into consideration, among other factors, the amount of the proposed bond; or
- (2) Deposit an equivalent amount of cash or other security device under such terms and conditions as are acceptable to the commissioner,

upon all of its directors, officers, and employees who have access to money or negotiable securities or instruments in its possession or under its control. Notwithstanding the above provision, the escrow depository may carry bonds or deposit cash or securities above the amounts required by the commissioner. [L 1967, c 144, pt of §1; HRS §449-11; am L 1970, c 72, §2; am L 1985, c 269, §50; am L 1996, c 41, §1; am L 2001, c 184, §3; am L 2013, c 166, §7]

Note

The 2013 amendment, with respect to licensees in operation on June 21, 2013, shall take effect on the date of the renewal of the security device, but not later than July 1, 2014. L 2013, c 166, §11.

" **§449-12 Errors and omissions insurance or other security devices.** [See Note below.] 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 not less than \$250,000; provided that any policy which is subject to a deductible thereunder in excess of \$100,000, per occurrence, shall require the prior approval of the commissioner, who may take into consideration, among other factors, the amount of the proposed coverage; or
- (2) Deposit an equivalent amount of cash or other security device under such terms and conditions as are acceptable to the commissioner. [L 1967, c 144, pt of §1; HRS §449-12; am L 1970, c 72, §3; am L 1985, c 269, §50; am L 1992, c 205, §12; am L 1996, c 41, §2; am L 2013, c 166, §8]

Note

The 2013 amendment, with respect to licensees in operation on June 21, 2013, shall take effect on the date of the renewal of the security device, but not later than July 1, 2014. L 2013, c 166, §11.

" **§449-13 Cancellation of bonds or insurance; withdrawal of deposits.** None of the bonds or insurance or deposits in lieu thereof required by this chapter shall be canceled or withdrawn as to future accruing liability except upon prior written notice to the commissioner: sixty days' notice for the bonds or deposits, and thirty days' notice for the insurance. The license of any licensee shall be suspended upon cancellation of any bond or insurance or upon withdrawal of any deposit in lieu thereof. [L 1967, c 144, pt of §1; HRS §449-13; am L 1969, c 67, §1; am L 1970, c 72, §4; am L 1976, c 101, §2; am L 1985, c 269, §50]

" **§449-14 Fees.** (a) The following fees shall be paid by licensed escrow depositories to the commissioner and, together with any administrative penalty or other charge assessed under this chapter, shall be deposited into the compliance resolution fund established pursuant to section 26-9(o):

- (1) For filing and investigation of an escrow depository's application for license, \$5,000;
 - (2) For initial issuance of an escrow depository license, \$2,000;
 - (3) For an application for approval to establish a branch office, \$100;
 - (4) For an application for approval to relocate an existing office or branch, \$100;
 - (5) For annual renewal of an escrow depository's license, \$2,000;
 - (6) For initial issuance and annual renewal of a branch office license, \$100;
 - (7) For reissuance of a license for the change in the business address of its office, \$50; provided that a reissuance caused by changes to the address by the United States Postal Service shall not require payment of a fee;
 - (8) For reissuance of a license for a change in the licensee's name, \$50;
 - (9) For an application for a proposed change in control of the licensee, \$5,000; and
 - (10) For an application for approval to cease business as an escrow depository, \$0.
- (b) For all escrow depositories examined by the commissioner or the commissioner's staff, the commissioner:
- (1) May charge an examination fee based upon the cost per hour per examiner. The hourly fee shall be \$60;
 - (2) May charge additional amounts for travel, per diem, mileage, and other reasonable expenses incurred in connection with the examination; and
 - (3) Shall bill the affected escrow depository for examination fees and expenses as soon as feasible after the close of the examination or investigation. The affected escrow depository shall pay the division within thirty days following the billing. All payments shall be deposited into the compliance resolution fund established pursuant to section 26-9(o). Any dispute by the affected escrow depository relating to these billings shall be reviewed by the commissioner who may modify, waive, or suspend any billing.
- (c) 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.
- (d) Any fee authorized by this section may be set or modified by the commissioner by rule adopted pursuant to chapter

91. [L 1967, c 144, pt of §1; HRS §449-14; am L 1973, c 141, §1; am L 1979, c 219, §4; am L 1985, c 269, §50; am L 1992, c 205, §13; am L 1996, c 41, §3; am L 1999, c 129, §18; am L 2001, c 184, §4; am L 2013, c 166, §9; am L 2016, c 224, §6]

" **§449-15 Audited statements.** (a) Each escrow depository, at its own expense, shall submit to the commissioner within ninety days after the close of its fiscal year 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) 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 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.

(d) 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. [L 1967, c 144, pt of §1; HRS §449-15; am L 1985, c 269, §50; am L 1989, c 248, §1; am L 1992, c 205, §14]

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

- (1) The licensee using the sweep account shall have a net worth of not less than \$1,000,000;
- (2) The sweep account is a deposit account administered by a financial institution in which the moneys over a minimum balance are periodically transferred into a money market mutual fund account invested only in obligations of:
 - (A) The United States government;
 - (B) Agencies backed by the full faith and credit of the United States government; or

- (C) Agencies originally established or chartered by the United States government to serve public purposes; and periodically recredited to the sweep account; and
- (3) The licensee is liable for all moneys transferred to the money market mutual fund account under the sweep account, including any loss of value.
- (b) No licensee shall disburse funds from an escrow account until cash and or items sufficient to fund any disbursements from the account have been received and deposited to the account, and with respect to such items the licensee complies with the provisions of either paragraphs (1) or (2) hereof.
- (1) Where an item has been received and submitted for collection, no licensee shall disburse funds from an escrow account with respect to the item until final settlement of the item has been received by the financial institution to which the item has been submitted for collection.
- (2) No licensee shall disburse funds from the escrow account with respect to an item drawn on a financial institution until the licensee confirms that sufficient collected funds are on deposit in the drawer's account.
- (c) A licensee may deliver any money, consideration, or instrument affecting the title to real property prior to funds becoming available for disbursement under subsection (b) if it has received the written consent of the parties to the transaction. [L 1967, c 144, pt of §1; HRS §449-16; am L 1985, c 269, §50; am L 1986, c 331, §3; am L 2001, c 184, §5]

Case Notes

Fiduciary duty of escrow depository owed only to escrow parties. 4 H. App. 41, 659 P.2d 759 (1983).

" **§449-16.5 Earnings on funds.** In all escrow agreements involving the purchase of real property or appurtenances thereon and in which an escrow depository acts as a fiduciary party holding the funds in escrow, any earnings on such funds during the holding thereof shall accrue to the credit of the purchaser in such transaction unless otherwise instructed in writing by the purchasers and sellers in the escrow. [L 1974, c 95, §2; am L 2001, c 184, §6]

Case Notes

Interest accrues only where funds are in hands of a third party and not where payment is made to the seller. 60 H. 467, 591 P.2d 1060 (1979).

" **§449-17 Revocation and suspension of licenses.** The commissioner may revoke any license issued hereunder, or suspend the right of the licensee to use the license, for any of the following causes:

- (1) Making any misrepresentation concerning any escrow transaction;
- (2) Making any false promises concerning any escrow transaction of a character likely to mislead another;
- (3) Pursuing a continued and flagrant course of misrepresentation, or making of false promises, through advertising or otherwise;
- (4) Without first having obtained the written consent so to do of both parties involved in any escrow transaction, acting for both parties in connection with such transaction, or collecting or attempting to collect commissions or other compensation for its services from both of the parties;
- (5) Failing, within a reasonable time, to account for any moneys belonging to others which may be in the possession or under the control of the licensee;
- (6) Any other conduct constituting fraudulent or dishonest dealings;
- (7) Violating any of the provisions of this chapter or the rules promulgated pursuant thereto;
- (8) Splitting fees with or otherwise compensating others not licensed hereunder for referring business;
- (9) Commingling the moneys or other property of others with its own;
- (10) Engaging in an unsafe or unsound practice that is likely to cause insolvency or substantial dissipation of assets or earnings of the licensee;
- (11) 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 licensee; and
- (12) Ceasing, for a period of six consecutive months or more, to engage in the business for which its license was granted.

No license shall be suspended for longer than five years and no corporation whose license has been revoked shall be eligible to apply for a new license until the expiration of five years. [L 1967, c 144, pt of §1; HRS §449-17; am L 1985, c 269, §50; am L 1998, c 69, §1]

" **§449-18 REPEALED.** L 1992, c 205, §15.

" **[§449-19] 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. [L 1992, c 205, pt of §1]

" **[§449-20] 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. [L 1992, c 205, pt of §1]

" **[§449-20.5] Closing branch office.** (a) An escrow depository shall give the commissioner notice of its intent to close any branch office at least thirty days prior to the closing. The notice shall:

- (1) State the intended date of closing;
- (2) Specify the reasons for the closing; and
- (3) Contain a certification by the secretary or other authorized officer of the escrow depository that the decision to close was duly approved by its board of directors.

(b) After closing a branch office, the escrow depository shall promptly thereafter surrender to the commissioner the branch office license for that location. [L 2001, c 184, pt of §1]

" **[§449-21] 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. [L 1992, c 205, pt of §1]

" **[\$449-22] 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. [L 1992, c 205, pt of §1]

" **[\$449-23] 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. [L 1992, c 205, pt of §1]

" **§449-24 Termination of escrow depository operations.** (a) A solvent escrow depository whose capital is not impaired and that has not received a notice of charges and proposed suspension or revocation order pursuant to section 449-17 may cease its business and surrender its license in the following manner:

- (1) The board of directors shall adopt a resolution approving a plan to cease activity for which a license to operate as an escrow depository is required. If applicable, the plan shall include provisions for the sale, exchange, or disposition of all outstanding escrow accounts or other business for which an escrow depository license is required by this chapter;
- (2) The escrow depository shall:
 - (A) Notify in writing all buyers and sellers whose accounts still contain outstanding balances of the termination of the escrow depository's operations and the specific arrangements to handle the particular transaction; and
 - (B) Submit to the commissioner, in writing, the name, address, and telephone number of a contact person who shall be responsible for answering questions and providing documents on closed accounts. This individual or the successor thereof shall continue to perform this task, and shall notify the commissioner of any changes in the information concerning the contact person, until

the applicable statutes of limitations have lapsed;

- (3) The escrow depository shall file an application with the commissioner in the prescribed form for approval to cease activity for which a license to operate as an escrow depository is required. The application shall be accompanied by:
 - (A) A copy of the plan to cease activity for which a license to operate as an escrow depository is required, certified by two executive officers of the escrow depository as having been duly adopted by the board;
 - (B) Any application that may be required pursuant to section 449-8.6, if applicable;
 - (C) A copy of the notice sent by the escrow depository to all buyers and sellers whose accounts still contain outstanding balances; and
 - (D) Any other information that the commissioner may require;
- (4) The commissioner may require that an audit report, prepared by a certified public accountant at the expense of the escrow depository, be submitted showing the final accounting of the company's operations, should circumstances so warrant;
- (5) The commissioner shall approve the application to cease activity for which a license to operate as an escrow depository is required if:
 - (A) The commissioner is satisfied with the plan;
 - (B) The conditions for approval contained in section 449-8.6 have been met, if applicable; and
 - (C) No other reason exists to deny the application; provided that the commissioner may impose any restrictions and conditions that the commissioner deems appropriate; and
- (6) Upon receipt of the commissioner's approval, an escrow depository that has filed:
 - (A) A plan attesting that the company does not retain any outstanding escrow accounts or other business for which an escrow depository license is required by this chapter, shall forthwith surrender to the commissioner all of its escrow depository licenses; or
 - (B) A plan that includes provisions for the sale, exchange, or disposition of outstanding escrow accounts or other business, upon receipt of the commissioner's approval, shall proceed with its plan to cease activity for which a license to

operate as an escrow depository is required. Upon completion of its plan, the escrow depository shall file a written notification with the commissioner, signed by its president and secretary, certifying that there are no outstanding escrow liabilities. Filing of the written notification shall be accompanied by the surrender of all escrow depository licenses.

(b) Nothing in this section shall preclude the commissioner at any time from seeking any relief or sanction from the courts that may otherwise be permitted by law. [L 2001, c 184, pt of §1; am L 2002, c 21, §1]