

HAWAII ADMINISTRATIVE RULES

TITLE 16

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

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SUBCHAPTER 1

GENERAL PROVISIONS

§16-28-1 Objectives. The objectives of this chapter are to implement the requirements of chapter 449, Hawaii Revised Statutes, and set forth procedures regarding escrow depositories. [Eff 8/13/87; comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §449-2)

§16-28-2 Definitions. As used in this chapter:

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

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

"Foreign financial institution" means a person, other than a Hawaii financial institution or a federal financial institution whose operations are principally conducted in this State, which is authorized to engage under the laws of its jurisdiction of organization, or does engage, in the business of accepting deposits or making loans or engaging in the trust business. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-1, 449-2)

§16-28-3 Public review of escrow depository applications and records; exceptions. (a) Subject to other provisions of this chapter, all applications and supporting documents that are filed by a proposed escrow depository shall be available for public review as provided by law following receipt of a written request to review the records.

(b) Subject to other provisions of this chapter, all applications, supporting documents, and records filed by an escrow depository, including audited statements and records relating to bonding and insurance, shall be available for public review as provided by law following receipt of a written request to review the records.

(c) Information claimed by an applicant or escrow depository to be confidential shall be submitted on separate pages which can be detached from the rest of the application or filing and shall be identified by the words "Submitted as Confidential" printed on the top of each page. Information submitted as being confidential shall be accompanied by a separate statement requesting confidential treatment and providing reasons and authority for maintaining confidentiality. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-5, 449-5.5, 449-6, 449-7.5, 449-8, 449-9, 449-11, 449-12, 449-13, 449-15, 449-19, 449-20)

§16-28-4 Confidential portion of application or records. No material contained in any application or record shall be made available to the public if it is determined by the commissioner to be confidential. Information that may be considered confidential includes, but is not limited to the following:

- (1) Commercial or financial information, the disclosure of which would, or would be likely to, result in substantial competitive harm to the applicant or escrow depository;

- (2) Information, the disclosure of which could seriously affect the financial condition of the applicant or escrow depository; or
- (3) Personal information, the release of which would, or would be likely to, constitute an unwarranted invasion of privacy. [Eff 8/13/87; comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-5, 449-5.5, 449-6, 449-7.5, 449-8, 449-9, 449-11, 449-12, 449-13, 449-15, 449-19, 449-20)

## SUBCHAPTER 2

### APPLICATION FORMS AND FEES

§16-28-8 General procedures. Any person desiring to obtain the approval of the commissioner shall:

- (1) File an application in the form prescribed by this chapter;
- (2) File the appropriate application fee, if any; and
- (3) Provide, if applicable, public notice of the filing of the application, as prescribed by this chapter. [Eff and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-8, 449-14, 449-19, 449-20)

§16-28-9 Application forms; fees. (a) Each application referred to in this chapter shall be made by the completion and submittal to the commissioner, in duplicate, of:

- (1) The application form prescribed by the commissioner, copies of which may be obtained by request from the division; or
- (2) The application in letter form, if no application form has been prescribed by the commissioner. The application in letter form shall state in detail the nature and scope of the requested consent or approval and all information reasonably required for the commissioner's review and consideration of the application.

(b) An application fee shall be paid by check made payable to the "Department of Commerce and Consumer Affairs, State of Hawaii", concurrently with the filing of the application. The fee shall be nonrefundable. [Eff and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-8, 449-14, 449-19, 449-20)

§16-28-10 Application for license. (a) Any person desiring to obtain an escrow depository license shall file an application in a form prescribed by the commissioner together with the required application fee.

(b) The applicant shall provide public notice and an opportunity to comment on the application, as prescribed by subchapter 3.

(c) The application shall be subject to standards of review and decisions, as prescribed by subchapter 4. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-5, 449-6, 449-7, 449-7.5, 449-8, 449-14)

§16-28-11 Establishment of branch office. An application for approval to establish a branch office, together with the application fee, shall be filed with the commissioner in letter form and shall contain the following information:

- (1) The exact location of the proposed site, including street address;
- (2) The name and qualifications of the designated escrow officer or other principal officer who will manage the office; and
- (3) The reasons for establishing the branch office. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-7.5, 449-14, 449-20)

§16-28-12 Relocation of existing office or branch. (a) An application for approval to relocate an existing office or branch, together with the application fee, shall be filed with the commissioner prior to the proposed relocation. The application shall be in letter form and shall contain the following information:

- (1) The location and the identity of the existing office or branch that will be relocated;
- (2) The exact location of the proposed site, including street address;
- (3) Details of the proposed location, including lease terms, rent, and size; and
- (4) The reasons for the relocation.

(b) Upon approval of the proposed location by the commissioner, the escrow depository shall notify the division by letter that the relocation to the new location has been accomplished. The escrow depository license noting the prior location shall be returned with the letter and the division shall reissue a new license noting the new location. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-7.5, 449-14, 449-19)

§16-28-13 Renewal of license. An escrow depository license and each branch license are subject to annual renewal. In order to obtain renewal of the

§16-28-13

escrow depository license and any branch office license, an application to renew the escrow depository license and each branch license, together with the applicable fee for each license to be renewed, shall be filed with the commissioner at least three weeks prior to July 1 of each year. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-8, 449-14)

§16-28-14 Repealed. [R 1/27/01]

### SUBCHAPTER 3

#### NOTICE AND COMMENT PROCEDURES

§16-28-18 Scope. This subchapter applies only to an application for a license to act as an escrow depository. [Eff 8/13/87; comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

§16-28-19 Notice by publication of application; opportunity to comment and provide information. (a) Upon the filing of an application, the applicant shall publish notice of the proposed transaction in a newspaper of general circulation in the State. The published notice shall include the name of the applicant, the subject matter of the application, and the location or locations at which the applicant proposes to engage in business. A copy of the notice shall be filed with the division.

(b) In order to apprise the public of an opportunity to comment on an application, the notice shall include a statement describing the opportunity to comment on or protest the granting of, or request an informational and comment proceeding on the application. The notice shall include the following statement:

"Any person wishing to comment on the application may file comments in writing with the Commissioner of Financial Institutions (by mail to P.O. Box 2054, Honolulu, Hawaii 96805; or delivered to 335 Merchant Street, Room 221, Honolulu, Hawaii 96813) within fifteen days of the date of this notice. The comments may include a statement protesting or supporting the application.

You may at the same time request that an informational and comment proceeding be held on the application. If this proceeding is requested, you should include a brief statement of your interest in the application, the matters you wish to discuss, and the reasons why a written presentation would not suffice in lieu of the proceeding.

The nonconfidential portion of the application and related documents will be available for inspection within one working day following a request for the application and documents. The application and documents may be inspected at the Division of Financial Institutions during regular business hours." [Eff 8/13/87; am and comp 1/27/01; am and comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

§16-28-20 Comments on application; request for informational and comment proceeding. (a) Any person may file with the commissioner written comments on an application within fifteen days of the publication of notice. The comment period may be extended by the commissioner for good cause.

(b) Any person who files a written comment may at the same time request that an informational and comment proceeding be held on the application. A request for the proceeding shall be accompanied by a brief statement of the person's interest in the application, the matters the person wishes to discuss at the proceeding, and the reasons why a written presentation would not suffice in lieu of the proceeding. [Eff 8/13/87; comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

§16-28-21 Informational and comment proceeding. (a) The purpose of the informational and comment proceeding shall be to receive information and comments from interested persons on an application.

(b) If the commissioner decides to hold an informational and comment proceeding, the commissioner shall notify the applicant and each person who requested a proceeding of the date, time, and location of the proceeding, not less than ten days prior to the proceeding. The commissioner may also decide not to hold an informational and comment proceeding, in which case the commissioner shall so advise the applicant and each person who requested the proceeding.

(c) The informational and comment proceeding shall involve a meeting with division representatives at which the participants shall be asked to present their views orally. Separate meetings with each of the participants may be conducted where deemed advisable.

(d) There is no proof to be made during an informational and comment proceeding. Witness statements are unsworn, voluntary, and not subject to any restriction, except that they pertain to the application. The proceeding shall not be recorded or transcribed.

(e) The informational and comment proceeding shall be open to the public, except when the commissioner determines that the circumstances warrant

confidentiality. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

## SUBCHAPTER 4

### STANDARDS OF REVIEW; DECISIONS

§16-28-25 Scope. This subchapter applies only to an application for a license to act as an escrow depository. [Eff 8/13/87; comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

§16-28-26 Rights of applicants; obligations of commissioner. An applicant has a right to file an application and to obtain full consideration of the application by the commissioner in light of all relevant facts and without prejudice. If all of the relevant criteria are resolved favorably, the applicant is entitled to receive the requested authorization. In the event an application is disapproved, an applicant has a right to be informed by the commissioner of the reasons for disapproval. [Eff 8/13/87; comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

§16-28-27 Criteria for proposed escrow depositories. The criteria applied to license applications includes, but is not limited to:

- (1) General character of management. The quality of an escrow depository's management is vital and perhaps the single most important element in determining the applicant's acceptability as an escrow depository. When the management of a proposed escrow depository does not have an operating record as a functioning unit to assist in forming a judgment, the management review may require an evaluation of the individual officers, directors, and escrow officer. An evaluation of shareholders who are subscribing to five per cent or more of the aggregate par value of stock to be issued may also be appropriate in reviewing the general character of management.
  - (A) In evaluating each officer, director, and escrow officer, and each shareholder subscribing to more than five per cent of the stock to be issued, the division shall consider, among other things, the following factors:
    - (i) Their current and past business experiences, financial capacities, and financial interests;



- (ii) Their proposed duties and responsibilities as related to their business experience and capabilities;
  - (iii) Their familiarity with the community or trade area; and
  - (iv) Any financing arrangements to purchase stock of the proposed escrow depository.
- (B) The following information may also be evaluated in reviewing the proposed management:
  - (i) Arrangements such as buy-sell, voting trust or proxy agreements between various individuals or other entities; and
  - (ii) Plans for management changes prior to opening or after the commencement of operations.
- (2) Adequacy of capital structure. A proposed escrow depository shall have:
  - (A) A minimum net capital structure of the amount dictated by statute;
  - (B) Sufficient balances in shareholder equity accounts against which initial start-up costs and foreseeable contingencies can be charged; and
  - (C) An adequate capital structure as related to its proposed type and volume of business, projected growth, and projected level of earnings.
- (3) Financial history and condition. The pro forma statement of the proposed escrow depository as of the beginning of business, a schedule and appraisal of all assets with which the proposed escrow depository intends to begin business, and projected financial statements for the first three years of operation shall be considered in analyzing this factor. If pertinent, consideration may be given to the history of other escrow depositories presently and formerly operating in the trade area of the applicant.
- (4) Future earnings prospects. Detailed estimates of operating income and expenses for the first three years of operation and the assumptions used in determining the projections shall be analyzed. Information shall include the applicant's plans for payment of cash dividends, bonuses, director's fees, retainer fees, and the accounting method to be used. Regarding the accounting systems, the division requires use of the accrual method from the outset of operations.
- (5) Convenience and needs of the community. A clear definition of the proposed escrow depository's trade area, a description of the principal economic activities in the trade area, and population figures and

trends are essential factors to consider in determining the convenience and needs of the community. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

§16-28-28 Presumptive disqualification criteria. (a) Managerial resource test. The following factors shall give rise to a rebuttable presumption that the criterion regarding the general character of management has not been met, if the applicant, the individual officers or directors, or any controlling shareholder has:

- (1) Been convicted of, or has pleaded nolo contendere to, any crime involving an act of fraud or dishonesty;
- (2) Consented to or suffered a judgment in any civil or administrative action based upon conduct involving an act of fraud or dishonesty;
- (3) Consented to or suffered any indictment, formal investigation, examination, or civil or administrative proceedings that resulted in any agreement, undertaking, consent, or order issued by any federal or state court, any department, agency, or commission of the United States government, any state or municipality, any self-regulatory trade or professional organization, or any foreign government or governmental entity, which involves an act of fraud or dishonesty;
- (4) Consented to or suffered the suspension or revocation of any professional, occupational, or vocational license based upon conduct involving an act of fraud or dishonesty;
- (5) Knowingly made or caused to be made in any application or report filed with the commissioner or in any proceeding before the commissioner, any written or oral statement which was at the time and in light of the circumstances under which it was made false or misleading with respect to material fact, or has wilfully omitted to state in any application or report any material fact which was required to be stated therein;
- (6) Wilfully committed any violation of, or has wilfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of, any provision of state law or rule;
- (7) Been involved in the denial, withdrawal after receipt of formal or informal notice of an intent to deny, by the applicant or affiliates of the applicant, of:
  - (A) Any application relating to the organization of an escrow depository, a financial institution, a foreign financial institution, or a trust company;

- (B) An application to acquire any escrow depository, financial institution, foreign financial institution, trust company, or subsidiary or holding company thereof; or
  - (C) A notice relating to a change in control of any escrow depository, financial institution, foreign financial institution, trust company, or subsidiary or holding company thereof; or
- (8) Been placed in receivership or conservatorship during the preceding ten years, was a management official or director of an escrow depository, a financial institution, a foreign financial institution, or a trust company which entered into receivership or conservatorship, was placed in a management consignment program, or was liquidated during his or her tenure or within two years thereafter.
- (b) Financial resource and future prospects test. The following factors shall give rise to a rebuttable presumption that the applicant has not satisfied the financial resources and future prospects criteria:
- (1) Liability for amounts of debt which, in the opinion of the commissioner, create excessive risks of default and pressure on the escrow depository; or
  - (2) Failure to furnish a business plan or furnishing a business plan projecting activities which are inconsistent with the standards of the escrow industry.
- (c) Subsections (a) and (b) shall not be deemed an exclusive list of the grounds upon which the commissioner may find that the relevant criteria have not been met. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

§16-28-29 Action on application; denial of application. (a) Any complete application which is not approved or denied by the commissioner within a period of one year after the application is filed with the commissioner, shall be deemed approved by the commissioner as of the first day after the period of one year. For purposes of this section, an application is deemed to be filed with the commissioner at the time when the complete application, including any amendments or supplements, containing all of the information in the form required by the commissioner, is received and accepted by the commissioner.

(b) If the commissioner is satisfied that the applicant meets the relevant criteria, the commissioner shall issue a written final decision and order approving the application.

(c) If the commissioner is not satisfied that the applicant meets the statutory criteria, the commissioner shall issue a written decision denying the application, which shall include a statement of the reasons for the denial. [Eff

8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: Act 164, 1998 SLH, HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

§16-28-30 Decision denying application subject to administrative hearing; final decision and order. (a) Within fifteen days following receipt of a decision denying the application, the applicant may petition the commissioner for an administrative hearing which shall be held in accordance with chapter 91, HRS, and chapter 16-201.

(b) If a petition for an administrative hearing is not filed within the time specified, the commissioner's decision denying the application shall become a final decision and order denying the application.

(c) Upon the filing of a petition for an administrative hearing, and as expeditiously as possible, the commissioner shall assign the petition to a hearings officer for further proceedings pursuant to chapter 16-201. The commissioner shall issue a written final decision and order as expeditiously as possible, following the hearings officer's transmittal of the entire record together with the recommended decision, any timely filed exceptions, and any timely filed statements in support of the recommended decision. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §§449-6, 449-7, 449-7.4, 449-7.5, 449-8, 449-8.5)

## SUBCHAPTER 5

### BONDS AND INSURANCE

§16-28-35 Net capital bond. (a) In lieu of the net capital requirement of \$50,000, an escrow depository may file a bond for \$50,000, in a form prescribed by the commissioner, conditional upon its satisfactory performance of escrow conditions and satisfaction of escrow responsibilities. The escrow depository shall request the approval of the commissioner to file a \$50,000 bond, cash in the amount of \$50,000, or a combination of its net capital and bond totalling \$50,000.

(b) For cash bonds, the escrow depository shall file an agreement in a form prescribed by the commissioner. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: §449-5.5)

§16-28-36 Escrow depository's bond. (a) The escrow depository shall file and execute an escrow depository's bond in a form prescribed by the commissioner in an amount not less than \$100,000. No deductible amount shall be permitted.

(b) In lieu of the escrow depository's bond, the escrow depository may deposit \$100,000 in the form of a certificate of deposit, an unconditional and irrevocable letter of credit, or securities acceptable to the commissioner, together, in each instance, with an agreement in a form prescribed by the commissioner. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §449-9)

§16-28-37 Fidelity bond. (a) The escrow depository shall file a fidelity bond executed by a surety insurer authorized to do business in the State in an amount not less than \$25,000, provided that cash equivalent to any deductible amount in excess of \$5,000 is maintained, pursuant to an agreement in a form prescribed by the commissioner. The fidelity bond shall apply to all officers, directors, and employees of the escrow depository who have access to cash, negotiable instruments, or securities within the possession and control of the escrow depository.

(b) In lieu of the fidelity bond, the escrow depository may deposit \$25,000 in the form of a certificate of deposit, an unconditional and irrevocable letter of credit, or securities acceptable to the commissioner, together, in each instance, with an agreement in a form prescribed by the commissioner. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §449-11)

§16-28-38 Errors and omissions insurance. (a) The escrow depository shall maintain and file a policy of errors and omissions insurance in an amount not less than \$100,000, provided that cash equivalent to any deductible amount in excess of \$10,000 is maintained pursuant to an agreement in a form prescribed by the commissioner.

(b) In lieu of the policy of errors and omissions insurance, the escrow depository may file \$100,000 in the form of a certificate of deposit, an unconditional and irrevocable letter of credit, or securities acceptable to the commissioner, together, in each instance, with an agreement in a form prescribed by the commissioner. [Eff 8/13/87; am and comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §449-12)

§16-28-39 Repealed. [R 1/27/01]

§16-28-44

#### SUBCHAPTER 6

§16-28-44 Repealed. [R 1/27/01]

§16-28-45 Repealed. [R 1/27/01]

§16-28-46 Repealed. [R 1/27/01]

#### SUBCHAPTER 7

§16-28-51 [R 8/04/05]

#### SUBCHAPTER 8

##### ENFORCEMENT ACTION

§16-28-55 Suspension or revocation of escrow depository license.

(a) The commissioner may suspend or revoke the license of an escrow depository, based on any of the grounds set forth in section 449-17, HRS.

(b) The commissioner shall give the escrow depository notice and an opportunity for a hearing in conformity with chapter 91, HRS. The notice shall be given in writing by registered or certified mail at least twenty days before the hearing, with return receipt requested. [Eff 8/13/87; comp 1/27/01; comp 8/04/05] (Auth: HRS §449-2) (Imp: HRS §449-17)



DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

Amendment and Compilation of Chapter 16-28  
Hawaii Administrative Rules

June 30, 2005

SUMMARY

1. §16-28-19 is amended.
2. §16-28-51 is repealed.
3. Chapter 28 is compiled.

THIS MATERIAL CAN BE MADE AVAILABLE FOR INDIVIDUALS WITH SPECIAL NEEDS IN BRAILLE, LARGE PRINT OR AUDIO TAPE. PLEASE SUBMIT YOUR REQUEST TO THE COMMISSIONER OF FINANCIAL INSTITUTIONS AT (808) 586-2820.

Effective 8/04/05