

HAWAII ADMINISTRATIVE RULES

TITLE 16

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

CHAPTER 38

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SUBCHAPTER 1

GENERAL PROVISIONS

§16-38-1 Definitions. As used in this chapter, and in the forms, instructions, and orders of the commissioner of securities, the following meanings shall apply to the extent that they are not inconsistent with the definitions provided in chapter 485, HRS.

"Affiliate" means a person who directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with another person.

"Amount" means the aggregate dollar value affixed to the shares. In the context of capitalization: number of shares x par or stated value = amount. In the context of an offering: number of shares x offering price per unit = amount.

"Applicant" means the issuer, dealer, investment adviser, or other person executing the application.

"Application" means the form prescribed by the commissioner, and includes any other paper, exhibit, amendment, or document filed pursuant to chapter 485, HRS, in connection with the registration of a security, dealer, salesperson, investment adviser, or investment adviser representative.

"Branch office" means any branch office, sales office, or office of supervisory jurisdiction that is listed on Schedule E to Form BD or on Schedule D to Form ADV or any location in this State that is held out to the public as a place of business of a dealer, investment adviser, or federal covered adviser.

"CFR" means the Code of Federal Regulations, as amended.

"Certificate of interest or participation in any profit-sharing agreement" shall not include any interest in a general partnership or joint venture where the interest is not assignable without the consent of all the other members and where all the members participate directly in managing the partnership or joint venture.

"Code" means the Internal Revenue Code of 1986, as amended.

"Commissioner" means the state commissioner of securities.

"Compensation" as used in the definition of "investment adviser" in section 485-1(6), HRS, shall include, but not be limited to, a salary, flat fee, or any periodic retainer fee.

"Control" or "controlling person" means possession of the power, authority, or means to engage in the management or policymaking functions of a person, directly or indirectly, through ownership of securities, by contract or otherwise. A person owning at least twenty-five per cent of the outstanding voting securities of another shall be presumed to be a "controlling person." Any presumption may be rebutted by evidence but shall continue until a determination to the contrary has been made by the commissioner.

"CRD" means the Central Registration Depository of the NASD.

"IARD" means the Internet-based Investment Adviser Registration Depository operated by the NASD to receive and store filings and collect related fees from investment advisers and investment adviser representatives on behalf of the commissioner.

"Insider" means every controlling person of another, including every officer, director, partner or trustee, or individual occupying similar status or performing similar functions, and every promoter (if the organization took place within three years from date of application).

"Institutional buyer." For purposes of section 485-6(8), HRS, "institutional buyer" includes any organization within the scope of section 501(c)(3) of the Code.

"Isolated transaction" means an offer or sale of a security or securities, whether effected through a dealer or not, where the number of persons solicited in this State in any one twelve-month period on behalf of the seller with respect to the securities shall not exceed twenty-five.

"NASAA" means the North American Securities Administrators Association.

"NASD" means the National Association of Securities Dealers, Inc.

"Officer" means a president, vice president, secretary, treasurer, or any other person performing similar functions with respect to any organization, whether incorporated or unincorporated.

"Organization" means a corporation, partnership, trust, association, joint venture, syndicate, limited liability company, and any other form of business entity.

"Parent" means an affiliate controlling another person.

"Predecessor" means a person, a major portion of whose business, assets, or control has been acquired by another.

"Promoter" means a person who, acting alone or in conjunction with others, takes the initiative in founding, organizing, or incorporating the business or enterprise of an issuer.

"Prospectus" means a document meeting the applicable requirements of chapter 485, HRS.

"Public offering" means any security offered for sale to the general public:

- (1) If it is advertised for sale in any newspaper, magazine, periodical, or other publication, or by means of a prospectus, offering circular, pamphlet, brochure, dodger, or addressed or unaddressed written or printed communication intended for public distribution or information; or
- (2) Where solicitation is made by billboard, window display, or use of phonographic or other recording, radio, television, or any public demonstration or explanation by any similar device.

"Registrant" means an applicant whose registration of securities has become effective or whose registration has been approved under chapter 485, HRS.

"Registration statement" means the application to register securities with the commissioner.

"SCOR" means small company offering registration.

"SEC" means the U.S. Securities and Exchange Commission.

"Securities Act" means the Securities Act of 1933, as amended.

"Securities Exchange Act" means the Securities Exchange Act of 1934, as amended.

"Share" means a share of stock or unit of investment in a corporation, or a unit of interest in an unincorporated person.

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"State" means the State of Hawaii.

"Subsidiary" means an affiliate controlled by another person.

"Underwriter" means a dealer who participates in the distribution of a security, in connection with a public offering, either as a purchaser with a view to offer for resale, or one who undertakes to offer or sell, directly or indirectly, for an issuer. [Eff 6/4/70; am and ren §16-38-1, 7/30/81; am and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-1, 485-6)

§16-38-2 Filing. (a) A document is filed when it is received in the office of the commissioner.

(b) All communications shall be addressed to: Commissioner of Securities, Business Registration Division, Department of Commerce and Consumer Affairs, P.O. Box 40, Honolulu, Hawaii 96810; or delivered to: 1010 Richards Street, Honolulu, Hawaii.

(c) The office of the commissioner shall be open for the transaction of business between the hours of 7:45 a.m. and 4:30 p.m. on weekdays, excluding holidays.

(d) Only the original form or exhibit shall be required, unless otherwise authorized by the commissioner. [Eff 6/4/70; am and ren §16-38-2, 7/30/81; am and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§80-1, 485-2)

§16-38-3 Fees. The following fees shall be submitted with an initial or renewal application, or notice filing:

- (1) The fee for registration of securities by qualification shall be one-tenth of one per cent of the aggregate offering price of the securities to be offered in the State with a minimum fee of \$250, and a maximum fee of \$2,500. The annual fee to renew a registration by qualification shall be \$250;
- (2) The fee for registration of securities by notification shall be one-twentieth of one per cent of aggregate offering price of the securities to be offered in the State with a maximum fee of \$500;
- (3) The fee for an initial notice filing for investment company securities shall be \$200 per portfolio or series. The annual fee to renew such notice filing shall be \$50 per portfolio or series;

- (4) The application fee for registration of a dealer shall be \$100. The annual fee to renew a dealer's registration shall be \$200;
- (5) The application fee for registration of an investment adviser shall be \$100. The annual fee to renew an investment adviser's registration shall be \$100;
- (6) The notice filing fee for a federal covered adviser shall be \$100 per calendar year;
- (7) The application fee for registration of a securities salesperson shall be \$50. The annual fee to renew a salesperson's registration shall be \$50;
- (8) The application fee for registration of an investment adviser representative shall be \$50. The annual fee to renew an investment adviser representative's registration shall be \$50; and
- (9) The fee for copies of documents filed in the office of the commissioner shall be twenty-five cents per page. [Eff 6/4/70; am 5/27/80; am and ren §16-38-3, 7/30/81; am and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§92-24, 92-28, 485-9, 485-10, 485-14)

§16-38-4 Forms. (a) The following forms shall be used by persons submitting an application, notice filing, or renewal to the commissioner:

- Form ADV: shall be used by an investment adviser to request registration or to renew a registration, and by a federal covered adviser to submit a notice filing;
- Form ADV-W: shall be used by an investment adviser to terminate a registration, or by a federal covered adviser to terminate a notice filing;
- Form BD: shall be used by a dealer or issuer to request registration;
- Form BD-W: shall be used by a dealer or issuer to terminate a registration;
- Form U-1: shall be filed by an issuer seeking registration of its securities by qualification;
- Form U-2: shall be used to satisfy any requirement under chapter 485, HRS, that a consent to service of process be filed with the department. In lieu of filing a Form U-2, however, the department shall accept an originally executed Form ADV, Form BD, or Form U-4 that has been filed with the department or with the CRD;

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- Form U-2A: shall be used by any person required under chapter 485, HRS, to file a corporate resolution with the department;
- Form U-4: shall be used by a salesperson or investment adviser representative to request registration or to request a transfer of registration from one dealer, issuer, investment adviser, or federal covered investment adviser to another;
- Form U-5: shall be used to terminate the registration of a salesperson or investment adviser representative;
- Form NF: shall be used by an investment company to comply with the notice filing requirements under section 16-38-65;
- S-5: bond for dealer, issuer, or investment adviser;
- S-6: application for registration as a dealer in securities;
- S-12: application for exemption from the registration requirement of chapter 485, HRS, in order to offer or sell securities of a residential cooperative corporation;
- SCOR Form: shall be used by issuers seeking registration of a SCOR offering.

(b) Dealers that are registered under the Securities Exchange Act of 1934 may file Forms BD, BD-W, U-4, and U-5 with the commissioner through the CRD.

(c) Investment advisers and federal covered advisers may, to the extent permitted by the IARD, file Forms ADV, ADV-W, U-4, and U-5 with the commissioner through the CRD.

(d) Every applicant or registrant that has filed any of the forms listed in subsection (a) with the commissioner shall promptly file with the commissioner any and all amendments necessary to keep the information previously reported on such forms current and accurate. If the form being amended was filed with the commissioner through the CRD, any amendment to such form may also be filed through the CRD. [Eff 6/4/70; am and ren §16-38-4, 7/30/81; am and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §§91-2, 485-2) (Imp: HRS §§485-10, 485-14)

§16-38-4.5 Action on documents submitted to the commissioner; automatic approval; extension. (a) Unless otherwise provided by law, all documents submitted to the commissioner shall be approved or denied within sixty days after the submission of a complete application. A complete application shall consist of the appropriate form

described in section 16-38-4, together with any additional documents or information and fees required under this chapter or chapter 485, HRS.

(b) The commissioner shall notify an applicant within sixty days of an application being received if the application is not complete and shall provide the applicant a list of the documents, information, and fees that must be filed in order to have the application deemed complete. An applicant shall have an additional sixty days from the receipt of the commissioner's letter within which to complete the pending application. If the application has not been completed within this time, it may be denied by the commissioner pursuant to section 485-15(1), HRS. [Eff and comp 4/14/03] (Auth: HRS §§26-9, 91-13.5, 485-2) (Imp: HRS §91-13.5)

SUBCHAPTER 2

DEALERS

§16-38-5 Registration; generally. An applicant may be registered under chapter 485, HRS, if the commissioner finds that the applicant is qualified, has sufficient training and experience, is of good repute, and otherwise satisfies the requirements of chapter 485, HRS, and this chapter. [Eff 6/4/70; am and ren §16-38-5, 7/30/81; am and comp 10/12/85; comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-5.1 Registration; eligibility requirements. (a) An applicant, if a natural person, shall have attained the age of eighteen years.

(b) An applicant, except an applicant that is registered as a broker or dealer under the Securities Exchange Act, shall have a minimum capital as provided in section 16-38-5.3(b) of not less than \$5,000.

(c) A partner or an officer of a registered dealer or issuer may engage in the capacity of a salesperson only if that person has been duly registered as provided by section 485-14, HRS.

(d) A dealer that is a foreign corporation or a partnership that intends to establish a branch office in Hawaii shall, in addition to the requirements under this chapter and chapter 485, HRS, comply with the requirements of the Hawaii foreign corporation law (chapter 414, HRS) or the Hawaii partnership law (chapter 425, HRS), as applicable. [Eff 6/4/70; am 1/1/71; am and ren §16-38-5, 7/30/81; am, ren §16-38-5.1 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

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§16-38-5.2 Registration; application. (a) An application for registration of a dealer shall be filed on Form BD, which may be filed with the commissioner directly or through the CRD. If Form BD is filed with the commissioner directly, it shall be originally executed.

(b) The application shall be filed together with the filing fee of \$200. Unless the applicant is registered as a broker or dealer under the Securities Exchange Act, the application shall be accompanied by a \$5,000 bond, or cash or securities in lieu thereof, and either a verified balance sheet as of a date within thirty days of filing, or if the applicant has been engaged in business one year or more preceding, a balance sheet certified by an independent public accountant as of the last fiscal year, together with a balance sheet verified by the applicant as of a date within thirty days of filing. If the applicant is registered under the Securities Exchange Act, the applicant shall include with its application a copy of its most recent annual financial statement.

(c) Additional exhibits or information not specifically required by the application may be submitted by the applicant.

(d) The commissioner may require the applicant to file additional information if such information is necessary for the commissioner to determine whether to approve or deny the application. In accordance with the provisions of section 16-38-4.5, any such additional information requested by the commissioner shall be requested in writing within sixty days of the commissioner's receipt of the application. [Eff 6/4/70; am 1/1/71; am and ren §16-38-5, 7/30/81; am, ren §16-38-5.2 and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-5.3 Registration; financial requirements. (a) Every registered dealer shall file an annual report of condition within ninety days following the end of the calendar or fiscal year adopted as follows:

- (1) Dealers registered under the Securities Exchange Act shall file a copy of the annual financial report filed with the SEC; and
- (2) All other dealers shall file a balance sheet certified by an independent public accountant in conformance with generally accepted accounting principles and that evidences the dealer's compliance with the requirements of subsection (b).

(b) A dealer that is subject to subsection (a)(2) shall have at all times a minimum net capital of not less than \$5,000. As used in this section, "net capital" shall

mean net worth, or the difference between total assets and total liabilities or indebtedness, after adjustment to eliminate or revise assets of doubtful or uncertain value and to reflect true liabilities, in accordance with the following schedule:

- (1) Asset items not allowable:
 - (A) Furniture, fixtures, and equipment; and
 - (B) Intangible items, such as goodwill, prepaid preincorporation, or organizational expenses, etc.;
- (2) Asset items to be adjusted or substantiated:
 - (A) Securities owned shall be adjusted to market value;
 - (B) Value of real estate shall be attested to by qualified and disinterested persons;
 - (C) Property in joint ownership shall be limited to applicant's interest therein; and
 - (D) Value of unsecured notes, accounts receivable, or advanced commissions due from a salesperson, officer, director, partner, or affiliate may be required by the commissioner to be substantiated by an opinion of a bank, finance company, or other lending institution satisfactory to the commissioner. [Eff 6/4/70; am 1/1/71; am and ren §16-38-5, 7/30/81; am, ren §16-38-5.3 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-5.4 Books and records. (a) Every dealer, except a dealer that is registered under the Securities Exchange Act, shall make and keep the books and records listed in subsections (b) through (h). All dealers registered under the Securities Exchange Act shall keep and maintain books and records as required under the Securities Exchange Act. All records required to be kept by this section shall be maintained and preserved for a period of at least three years and made available for inspection by the commissioner upon reasonable notice.

(b) Blotters (or other records or books of original entry) containing an itemized daily record of:

- (1) Purchases and sales of securities;
- (2) Receipts and deliveries of securities;
- (3) Receipts and disbursements of cash;
- (4) All other debits and credits; and
- (5) Each transaction, reflecting:
 - (A) The account or name of the customer;

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- (B) Name and amount of securities;
 - (C) Certificate number, if any;
 - (D) Unit and aggregate purchase or sale price;
 - (E) Trade date; and
 - (F) Name or other designation of person from whom purchased or received, or to whom sold and delivered.
- (c) Ledgers, reflecting:
- (1) Assets and liabilities;
 - (2) Income and expenses;
 - (3) Capital accounts;
 - (4) Securities in transfer;
 - (5) Dividends and interest received;
 - (6) Securities borrowed and loaned;
 - (7) Monies borrowed and loaned, and collateral used or substituted therefor;
 - (8) Securities failed to receive and failed to deliver; and
 - (9) A record of all puts, calls, spreads and straddles and other options in which dealer has any direct or indirect interest, or which it has granted or guaranteed, containing at least:
 - (A) Identification of the security; and
 - (B) Number of units involved.
- (d) Ledger accounts, itemizing separately as to each cash or margin account of every customer and of the dealer, including employees and partners thereof:
- (1) Name and address of the beneficial owner of the account;
 - (2) In the case of a margin account, the signature of the owner, or person authorized to transact business for the account;
 - (3) Purchases and sales;
 - (4) Receipts and deliveries of securities; and
 - (5) All other debits and credits to the account.
- (e) Securities records, reflecting for each security (including securities in safekeeping) carried by the dealer for its account, or for the accounts of its customers, employees, or partners:
- (1) Clearance dates of all long and short positions;
 - (2) Location of all securities long and offsetting position to all securities short; and
 - (3) Name or designation of the account in which each position is carried.
- (f) Memorandum, of the following:
- (1) Each brokerage order for the purchase or sale of a security showing:

- (A) Any instruction given or received, whether executed or unexecuted;
 - (B) Terms and conditions or instructions, and any modification or cancellation thereof;
 - (C) Account for which entered;
 - (D) Date and time of entry, and time of execution or cancellation, to the extent feasible;
 - (E) Price at which executed; and
 - (F) Orders entered pursuant to the exercise of discretionary authority so designated;
- (2) Each purchase and sale for the account of the dealer, including employees and partners thereof, showing:
- (A) Name of purchaser or seller;
 - (B) Price; and
 - (C) Date and time of execution.
- (g) Confirmations of all purchases and sales of securities and notices of all other debits and credits for securities, cash, and other items for the account of customers, partners, and employees shall be given or sent to persons at or before completion of each transaction, copies to be retained by the dealer disclosing, at least:
- (1) The account for which the transaction is entered;
 - (2) Instructions, terms, and conditions, whether executed or unexecuted;
 - (3) Date of execution of transaction (the time of trade shall be furnished upon request.);
 - (4) Whether the dealer is acting as agent or as dealer for its own account; and
 - (5) If the dealer is acting as agent for the customer, the following information, or a statement that the same shall be furnished upon request:
 - (A) The name of the person from whom the security was purchased, or to whom it was sold, and date and time the transaction occurred; and
 - (B) The source and amount of commission or remuneration received or to be received in connection with the transaction.
- (h) Complaint forms, correspondence, memoranda, and any other document concerning complaints filed with the dealer; and any complaint forms, correspondence, memorandum, or other document that was filed by a client with any governmental entity or self-regulatory organization that was provided to the dealer by the governmental entity or self-regulatory organization. [Eff 6/4/70; am 1/1/71; am and ren

§16-38-5.4

§16-38-5, 7/30/81; am, ren §16-38-5.4 and comp 10/12/85; am and comp 4/14/03]
(Auth: HRS §485-2) (Imp: HRS §485-16)

§16-38-5.5 Registration; post-effective requirements. (a) Upon approval of the application by the commissioner, a certificate of registration shall be issued certifying that the dealer is authorized to engage in the securities business in this State.

(b) Every registrant shall immediately notify the commissioner of any material change in any information, exhibits, or schedules submitted, or circumstances disclosed in its last prior application, by filing a correcting amendment at the time of occurrence or discovery of the changes. Changes that shall be reported under this rule include, but are not limited to, the following:

- (1) Change in firm name, ownership, management, or control of a dealer;
- (2) A change in any of its partners, officers, or persons in similar positions;
- (3) Change in its business address, or the creation or termination of a branch office in Hawaii;
- (4) Change in type of entity, general plan, or character of dealer's business, method of operation or type of securities in which it is dealing or trading;
- (5) Material adverse change in financial condition, insolvency, dissolution or liquidation, or impairment of working capital, or noncompliance with the minimum capital or bond requirements provided in sections 16-38-5.2(b) and 16-38-5.3(b);
- (6) Termination of business or discontinuance of those activities as a dealer or salesperson; and
- (7) The commencement of any proceeding or action that must be disclosed pursuant to the disciplinary questions on Form BD, including but not limited to, filing of a criminal charge or civil action against a registrant or a partner or officer, in which a fraudulent, dishonest, or unethical act is alleged, or a violation of a securities law or any aspect of the securities business is involved, entry of a court or administrative order or proceeding against a registrant to deny, suspend, or revoke a registration, or threatening to do so, or to enjoin it from engaging in or continuing any conduct or practice in the securities business, or to impose a fine, suspension, or expulsion from the NASD.

(c) Registration of successor dealer. In the event that a new dealer becomes the successor and continues the business of a dealer registered pursuant to section 16-38-5.2, the registration of the predecessor dealer shall be deemed to remain

effective as the registration of the successor dealer only if the successor dealer, within thirty days after such succession, files an application for registration on Form BD, and the predecessor dealer files a notice of withdrawal from registration on Form BDW.

- (1) The registration of the predecessor dealer shall cease to be effective as the registration of the successor dealer forty-five days after the application for registration on Form BD is filed by the successor dealer; and
- (2) Notwithstanding any other provision of this section, if a new dealer becomes the successor and continues the business of a registered dealer, and the succession is based solely on a change in the predecessor dealer's date or state of incorporation, form of organization, or composition of a partnership, the successor dealer may, within thirty days after the succession, amend the registration of the predecessor dealer on Form BD to reflect these changes. This amendment shall be deemed an application for registration filed by the predecessor dealer and adopted by the successor dealer. [Eff 6/4/70; am 1/1/71; am and ren §16-38-5, 7/30/81; am, ren §16-38-5.5 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-5.6 Registration; expiration, renewal, termination. (a) All registrations shall automatically expire on December 31 of each year (unless sooner terminated) and shall be renewed as provided in this section. A dealer or issuer shall be responsible for renewing the registration of its salespersons at the time the dealer or issuer renews its registration. A member of the NASD shall renew its registration with the commissioner by filing the renewal documents and fees through the CRD. All other dealers and issuers shall renew their registration by annually filing, not earlier than November 1 or later than December 1 of the current registration year, an originally executed copy of page one of Form BD together with:

- (1) All amendments to Form BD that have previously been filed with the commissioner;
- (2) A list of all salespersons of the dealer that are renewing their registrations for the coming calendar year;
- (3) A copy of all amendments to Forms U-4 of all such salespersons if such amendments have not been previously filed with the commissioner;

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- (4) A Form U-5 on each registered salesperson of the dealer who is not renewing its salesperson registration; and
- (5) A renewal fee as set forth in section 16-38-3 for the dealer and for each salesperson renewing a registration.

Dealers who fail to file a complete renewal with the commissioner by December 1 shall be subject to a penalty of one hundred per cent of the renewal fee.

(b) Where registrations are permitted to expire on December 31 without the filing of a renewal therefor, a subsequent application shall be considered in all respects as an original application.

(c) Registration of a dealer may be terminated prior to the expiration date by filing a Form BD-W with the commissioner. Termination of the dealer's registration for any reason shall automatically terminate the registration of each registered salesperson of the dealer. [Eff 6/4/70; am 1/1/71; am and ren §16-38-5, 7/30/81; am, ren §16-38-5.6 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

SUBCHAPTER 3

SALESPERSONS

§16-38-6 Registration; generally. A person may be registered as a securities salesperson under chapter 485, HRS, if the commissioner finds that the applicant is of good repute and otherwise satisfies the requirements of chapter 485, HRS, and this chapter. [Eff 6/4/70; am 5/27/80; am and ren §16-38-6, 7/30/81; am 11/5/81; am and comp 10/12/85; comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-6.1 Registration; eligibility requirements; filing requirements. (a) An applicant, if a natural person, shall have attained the age of eighteen years.

(b) A dealer or issuer may apply for the registration of a salesperson by filing a complete Form U-4 with the commissioner together with the application fee set forth in section 16-38-3. If the dealer is registered through the CRD, the salesperson's Form U-4 and fees shall be submitted to the commissioner through the CRD. If the dealer is not registered through the CRD, an originally executed Form U-4 and fees shall be filed with the commissioner directly. If requested by the commissioner, the applicant shall provide the commissioner copies of documents relating to the applicant's disciplinary history as disclosed on Form U-4. Any request by the commissioner for

such disciplinary documents shall be provided in writing to the applicant or the dealer or issuer filing the application within sixty days of the application being received by the commissioner. [Eff 6/4/70; am 5/27/80; am and ren §16-38-6, 7/30/81; am 11/5/81; am, ren §16-38-6.1 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-6.2 Registration; application. (a) An application for registration of a salesperson shall be filed in accordance with the requirements of section 16-38-6.1.

(b) The commissioner shall notify the applicant in writing within sixty days of receipt of the application of any deficiencies that must be completed in order for the application to be deemed complete. Such deficiencies may include, but are not limited to, requiring copies of the documents relating to the applicant's disciplinary history.

(c) A salesperson's application that has been on file for a period of ninety days with no attempt by the applicant to pass the qualifying examination shall be automatically withdrawn sixty days after the applicant has received any deficiency notice from the commissioner pursuant to subsection (b) that the deficiency request has not been satisfied, shall be deemed automatically withdrawn. The commissioner shall notify in writing the applicant and the dealer or issuer with which the applicant is affiliated, of the automatic withdrawal and the reasons therefor. [Eff 6/4/70; am 5/27/80; am and ren §16-38-6, 7/30/81; am 11/5/81; am, ren §16-38-6.2 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-6.3 Registration; examination requirements. (a) Unless specifically exempt, every applicant for registration as a securities salesperson shall be required to pass a written examination that tests the applicant's knowledge of the securities business.

(b) The examination requirement of subsection (a) shall be deemed satisfied upon the provision of evidence to the commissioner that the applicant:

- (1) Has passed an examination administered by the NASD that is appropriate for the type of business that will be conducted by the salesperson; and
- (2) Has not had a lapse of more than two continuous years in its registration as a salesperson with the NASD or in any state since passing the examination; and

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- (3) Notwithstanding any other provision to the contrary, the commissioner, by order, may waive the examination requirement if the commissioner determines that the examination is not necessary or appropriate in the public interest or for the protection of investors. [Eff 6/4/70; am 5/27/80; am and ren §16-38-6, 7/30/81; am 11/5/81; am, ren §16-38-6.3 and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-6.4 Registration; post-effective requirements. (a) Every applicant and registrant shall promptly file with the commissioner any and all amendments necessary to keep the information previously reported on the applicant's or registrant's Form U-4 current and accurate. If the form being amended was filed with the commissioner through the CRD, any amendment to the form may also be filed through the CRD.

(b) Upon the receipt of an amendment, the commissioner may request additional information from the applicant or registrant to determine whether the applicant's application should be denied or the registrant's registration should be suspended or revoked. [Eff 6/4/70; am 5/27/80; am and ren §16-38-6, 7/30/81; am 11/5/81; am, ren §16-38-6.4 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-6.5 Registration; expiration, renewal, termination. (a) The registration of each salesperson of a dealer or issuer shall automatically expire on December 31 of each calendar year unless the registration has been renewed on or before December 31. A salesperson's registration shall be renewed by the dealer or issuer as provided in section 16-38-5.6.

(b) A salesperson's registration may be terminated prior to its expiration date by either the dealer or issuer employing the salesperson or by the salesperson filing a Form U-5 with the commissioner. Termination shall be effective when the notice of termination is received by the commissioner unless another date is indicated on the Form U-5. A salesperson who filed its Form U-4 with the commissioner through the CRD may also file its Form U-5 through the CRD.

(c) A salesperson whose registration with a dealer or issuer has been terminated may apply for registration as a salesperson for another issuer or dealer by filing an application for registration with the commissioner in accordance with the requirements of section 16-38-6.2.

(d) Termination of any dealer's or issuer's registration for any reason shall automatically terminate the registration of all salespersons employed by or affiliated with the dealer or issuer.

(e) When a salesperson ceases the activities of a salesperson, a Form U-5 to terminate the salesperson's registration shall be promptly filed by the issuer or dealer with whom the salesperson is registered. [Eff 6/4/70; am 5/27/80; am and ren §16-38-6, 7/30/81; am 11/5/81; am, ren §16-38-6.5 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

SUBCHAPTER 4

DENIAL OF APPLICATION, SUSPENSION, AND REVOCATION OF REGISTRATION OF DEALERS, SALESPERSONS, INVESTMENT ADVISERS, AND INVESTMENT ADVISER REPRESENTATIVES

§16-38-7 Denial, suspension, and revocation. (a) A proceeding to deny an application for registration, or to suspend or revoke the effectiveness of a registration may be instituted by the commissioner if the action is in the public interest, reasonable grounds exist that the applicant or registrant has violated or failed to comply with any provision of chapter 485, HRS, or this chapter, or the applicant or registrant has demonstrated its unworthiness to transact the business of a dealer, issuer, or salesperson.

(b) Without in any way limiting the generality thereof, for the purposes of section 485-15(11), HRS, any of the following shall demonstrate an applicant's or registrant's unworthiness to transact the business of a dealer, issuer, or salesperson:

- (1) Causing unreasonable delay or failure to execute orders, liquidate customers' accounts, or in making delivery of securities purchased or remittances (or credit) for securities sold;
- (2) Selling securities at unfair prices in relation to market value, or with unreasonable or excessive markups or commissions;
- (3) Effecting transactions in the account of a customer without the customer's knowledge or consent or maintaining discretionary accounts without written authorization;
- (4) Wilful switching, churning, overtrading, or reloading of securities in a customer's account for the ostensible purpose of accumulating or compounding commissions;

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- (5) Inducing a customer to invest beyond the customer's known immediate financial resources, or without regard to the nature and character of the account;
- (6) Engaging or aiding in "boiler room" operations or high-pressure tactics in connection with the promotion of speculative offerings or "hot-issues" by means of an intensive telephone campaign or unsolicited calls to persons not known by, nor having an account with the salesperson or dealer represented by the applicant, whereby the prospective purchaser is encouraged to make a hasty decision to buy, irrespective of the prospective purchaser's investment needs and objectives;
- (7) Participating in the solicitation or offer for sale of promotional securities without the use and dissemination of a prospectus (where required), or making oral or written statements contrary to or inconsistent with the disclosures contained therein;
- (8) Making false, misleading, deceptive, exaggerated, or flamboyant representations or predictions in the solicitation or sale of a security. Examples of this include without limitation misrepresenting:
 - (A) That the security shall be resold or repurchased;
 - (B) That the security shall be listed or traded on an exchange or established market;
 - (C) That the security shall result in an assured, immediate or extensive increase in value, future market price, or return on investment;
 - (D) With respect to the issuer's financial condition, anticipated earnings, potential growth, or success; or
 - (E) That there is a guarantee against risk or loss;
- (9) Failing to disclose a dual agency capacity or effecting transactions upon terms and conditions other than those stated per confirmations;
- (10) Failing to make a bona fide public offering pursuant to an underwriting agreement or entering into an arrangement which establishes unfair or unreasonable terms and conditions or compensation;
- (11) Establishing fictitious accounts in order to execute transactions which would otherwise be prohibited;
- (12) Entering into agreements for selling concessions, discounts, commissions, or allowances as consideration for services in connection with the distribution or sale of a security in Hawaii to any non-licensed dealer or salesperson, unless the person is not required to be registered in order to engage in the securities business in this State;

- (13) Operating a securities business while being unable to meet current liabilities, or violating any rule or order relating to minimum capital, bond, record-keeping and reporting requirements, or provision concerning use, commingling, or hypothecation of customers' funds or securities;
- (14) Failing or refusing to furnish a customer, upon reasonable request, information to which the customer is entitled, or to respond to a formal written demand or complaint;
- (15) Failing to comply with any rule of a national securities exchange or self-regulatory organization approved by the SEC; or
- (16) Failing to cooperate with, or providing false or incomplete information to, the commissioner in connection with any investigation under this chapter or chapter 485, HRS.

(c) Without in any way limiting the generality thereof, for the purposes of section 485-15(11), HRS, any of the following shall demonstrate an applicant's or registrant's unworthiness to transact the business of an investment adviser or investment adviser representative:

- (1) Causing unreasonable delay or failure to execute orders, liquidate customers' accounts, or in making delivery of securities purchased or remittances (or credit) for securities sold;
- (2) Effecting transactions in the account of a customer without the customer's knowledge or consent or maintaining discretionary accounts without written authorization;
- (3) Placing an order upon instruction from a third party without client authorization;
- (4) Wilfully switching, churning, overtrading, or reloading of securities in a customer's account for the ostensible purpose of accumulating or compounding commissions;
- (5) Inducing a customer to invest beyond the customer's known immediate financial resources, or without regard to the nature and character of the account or the client's investment objectives;
- (6) Borrowing or lending money or securities except when the investment adviser is a registered broker-dealer providing margin accounts;
- (7) Failing to provide a client or prospective client written disclosure statements in compliance with the requirements of section 16-38-38;
- (8) Placing an order through an unlicensed broker or agent which the investment adviser should have known was unlicensed;

- (9) Providing a report or recommendation to a client prepared by someone other than the investment adviser without disclosing that fact; provided this shall not apply to published research or statistical reports, or where an investment adviser orders reports in the normal course of business;
- (10) Participating in the solicitation or offer for sale of promotional securities without the use and dissemination of a prospectus (where required), or making oral or written statements contrary to or inconsistent with the disclosures contained therein;
- (11) Making false, misleading, deceptive, exaggerated, or flamboyant representations or predictions in connection with the rendering of investment advice. Examples of such representations or predictions include, but are not limited to:
 - (A) That the security shall result in an assured, immediate or extensive increase in value, future market price, or return on investment; or
 - (B) That there is a guarantee against risk or loss;
- (12) Violating any of the provisions of section 16-38-42 that prescribe limitations on advertisements;
- (13) Disclosing the identity, affairs, or investment of any client unless required to do so or unless consented to by the client;
- (14) Failing to properly supervise the activities of employees to ensure compliance with the law and rules; failing to properly investigate the character, business repute, experience, and qualifications of employees;
- (15) Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment adviser or any employee of the investment adviser, or misrepresenting the nature of the advisory services being offered or fees to be charged for such service, or failing to state a material fact necessary to make the statements made regarding qualifications, services, or fees, in light of the circumstances under which they are made, not misleading;
- (16) Charging a client an unreasonable advisory fee;
- (17) Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the adviser or any of its employees which could reasonably be expected to impair the rendering of unbiased and objective advice including, but not limited to:
 - (A) Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and

- (B) Charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the adviser or its employees;
- (18) Guaranteeing a client that a specific result will be achieved (gain or no loss) with advice which will be rendered;
- (19) Entering into, extending or renewing any investment advisory contract unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the adviser and that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract; or
- (20) Failing or refusing to furnish a client, upon reasonable request, information to which the client is entitled, or to respond to a formal written demand or complaint by the client. [Eff 6/4/70; am and ren §16-38-7, 7/30/81; am and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-15)

SUBCHAPTER 5

REGISTRATION OF SECURITIES, PROSPECTUS

§16-38-8 Registration of securities. (a) An application to register securities for distribution in the State of Hawaii shall be filed with the commissioner on Form U-1. The application shall include all exhibits applicable to the type of registration sought by the applicant, i.e., notification or qualification.

(b) An application filed with the SEC under the Securities Act of 1933, Regulation A, 17 CFR sections 230.251 to 230.262, as amended, may be filed with the commissioner either by notification or qualification. Notwithstanding the requirements of the SEC, however, the prospectus or offering circular used in connection with an offering of securities under Regulation A of the SEC shall contain the financial statements prescribed by section 485-9, HRS, (notification) or section 485-10, HRS, (qualification). [Eff 6/4/70; am and ren §16-38-8, 7/30/81; am and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-9, 485-10)

§16-38-9 Prospectus. (a) The prospectus of any securities that are subject to registration under chapter 485, HRS, or this chapter may be printed, mimeographed, lithographed, or typewritten, or prepared by any similar process in clearly legible copies.

(b) Every subscription agreement concerning a registration of securities by qualification shall contain a statement by the purchaser that the purchaser has received a copy of the prospectus covered by the registration.

(c) Interstate offerings shall contain the information required by the application form together with the following:

- (1) How the public offering price was established;
- (2) Whether there has been a public market for the securities;
- (3) Terms and conditions of the escrow agreement; and
- (4) Business history of the officers and directors.

(d) Intrastate offerings shall contain the same information as interstate offerings, plus the following:

- (1) That the offering is only to bona fide residents of the State of Hawaii;
- (2) That during the public offering no securities may be transferred to a non-resident of Hawaii;
- (3) That in case of a sale to a non-resident, the issuer may rescind the sale and refund the purchase price; and
- (4) In an offering of interest-bearing securities, what reserves or sinking fund shall be provided to pay for the securities as they become due, or whether no reserves shall be provided.

(e) The prospectus shall be prepared in substantially the following form and shall contain the information as hereinafter specified together with any additional data as the commissioner may prescribe. (The following specimen form has been prepared for use in connection with a speculative intrastate offering and may therefore be modified to the extent the provisions are inapplicable.)

- (1) Cover page:

PROSPECTUS

(Date)

(NAME OF ISSUER)

(Address)

Incorporated under the laws of the State of Hawaii (Date)
 Shares of Common Stock of the Par Value of \$ Per
 Share.

	Offering Price	Sales Commissions	Net Proceeds To Issuer*
Per Share	\$ <u> </u>	\$ <u> </u>	\$ <u> </u>
Aggregate	\$ <u> </u>	\$ <u> </u>	\$ <u> </u>

*Before deducting expenses estimated not to exceed \$ to be borne by the issuer.

THESE SECURITIES ARE OFFERED AS A SPECULATION.
 NEITHER THIS PROSPECTUS NOR THE SECURITIES DESCRIBED
 HEREIN HAVE BEEN APPROVED OR DISAPPROVED BY THE
 COMMISSIONER OF SECURITIES OF THE STATE OF HAWAII, NOR
 HAS THE COMMISSIONER PASSED UPON THE ACCURACY OR
 ADEQUACY OF THIS PROSPECTUS.
 THIS OFFERING IS ONLY TO BONA FIDE RESIDENTS OF THE
 STATE OF HAWAII.

To be sold by

- (2) Business.
 - (A) State the history, showing capitalization, mergers, change of names, etc., general character and location of issuer's business, properties, branch offices, stores, plants, outlets, etc., and similar information concerning its predecessors, affiliates, and subsidiaries. There should also be a statement as to the length of time the issuer has been in business;
 - (B) Describe the physical properties, equipment, claims, patents, or patent applications, etc., and nature of title or interest therein;

- (C) If the issuer leases its plant, office, or other physical properties, disclose briefly the terms of the lease and relationship of lessor to any officer, director, promoter, or stockholder of the issuer;
 - (D) State the nature of present or proposed products or services, the principal market therefor;
 - (E) Set forth the general competitive conditions in the industry or business in which the issuer is, or proposes to be, engaged, and any particular risks or hazards to which it might be subjected; and
 - (F) Describe the issuer's employee relations by setting forth the number of employees and whether any of them are covered by collective bargaining agreements and, if so, approximately how many are so covered, when agreements expire, and whether collective bargaining is on a company or industry wide basis. Also describe whether the issuer has experienced any work stoppages in recent years;
- (3) Use of proceeds. Outline the proposed plans, objectives, or programs of the issuer and make a reasonable itemized statement of the purposes for which the net proceeds to the issuer from the sale of securities are to be used and the amounts to be used for each purpose, indicating the order of priority;
- (4) Method of offering. If the securities are to be offered through a dealer, state the name and address of the dealer, with a statement of any material relationship between the issuer and the dealer. State whether the securities are to be offered for cash only or whether the securities may be paid for in installments and, if so, the terms and conditions. If a minimum purchase is required, it should also be disclosed. State briefly the commission to be paid to the dealer, including cash, securities, contracts, options, or any other consideration. If the securities are to be sold by the issuer, it should also be stated that the offering shall be done by securities salespersons duly registered with the commissioner of securities. If the proceeds of the offering are to be placed in escrow, state the terms and conditions of the escrow, and provide other terms prescribed by the commissioner for the certification by the escrow agent to the commissioner when the amount specified in the escrow agreement has been met in the specified time and the conditions whereby the funds shall be released to the subscribers by the escrow agent. State also that during the public offering, no securities may be

transferred to a non-resident and that in case of a sale to a non-resident, the issuer shall rescind the sale and refund the purchase price;

- (5) Speculative features of the offering. Explain generally the speculative features of the offering and any special conditions which may affect the success or failure of the enterprise or the investor's interest therein. State how the public offering price was established and whether there has been a public market for the shares. In a speculative offering, the front cover shall contain a clear and conspicuous statement that the securities are speculative. If the officers, directors, or promoters are receiving or have received salaries, fees, or other compensation from the issuer, indicate the amounts, how paid, and services rendered (see section 16-38-11.5);
- (6) Description of securities. Outline briefly as follows:
 - (A) In the case of shares, the par or stated value, if any; the rate of dividend, if fixed, whether cumulative or noncumulative and any restrictions on dividend payments; the preference, if any; and if convertible, the conversion rate; the restrictions, if any, on the transfer of the securities;
 - (B) In the case of debt securities, the rate of interest; the date of maturity or, if the issue matures serially, a brief indication of the serial maturities; if the issue is redeemable before maturity, a brief statement of the redemption date or dates and price or prices; if payment of principal or interest is contingent, an indication of the contingency; a brief indication of the priority of the issue; and if convertible, the conversion rate; and
 - (C) In the case of any other kind of security, appropriate information of a comparable character;
- (7) Management and control. List the names and residence addresses of all officers and directors of the issuer and of any person or persons controlling the issuer and, if the issuer was organized within the last three years, the names and addresses of all promoters of the issuer. For each person listed, show the business history;
- (8) Interests with management. Provide a description of all direct or indirect interests, by security holdings or otherwise, of each officer and director of the issuer and, if the issuer was organized within the last three years, of each promoter of the issuer:
 - (A) In the issuer or its affiliates; and

- (B) In any material transactions within the past two years or in any material proposed transactions to which the issuer or any of its predecessors or affiliates was or is to be a party, stating the cost to those persons of any property or services for which payment by or for the account of the issuer has been or is to be made;
- (9) Ownership. If the issuer was organized within the last three years, a statement of the percentage of outstanding securities of the issuer which shall be held by directors, officers, and promoters as a group, and the percentage thereof which shall be held by the public if all of the securities to be offered are sold, and the respective amounts of cash (including cash expended for property transferred to the issuer) paid therefor by the group and by the public;
- (10) Options and warrants. A brief description of all options or warrants presently outstanding or proposed to be granted to purchase securities of the issuer, including the names of the holders thereof, the cost thereof to the holders, the terms and conditions on which they may be exercised, and the price at which the securities may be acquired pursuant thereto;
- (11) Litigation. Briefly describe any material pending legal proceedings other than ordinary routine litigation incidental to the business to which the issuer or any of its subsidiaries is a party or of which any of their property is the subject;
- (12) Legal opinion. State the name and address of the attorney who has advised the issuer with respect to the legality and validity of the securities and their issuance;
- (13) Escrow provisions. If the officers, directors, promoters, or insiders have stock which is subject to escrow pursuant to section 485-18, HRS, or subject to escrow pursuant to any state or federal statute or regulation, make a complete disclosure of the number of shares escrowed, names of persons escrowing the stock, where escrowed, and the terms and conditions of the escrow; and
- (14) Financial statements. Provide a balance sheet of the issuer at the close of the issuer's last fiscal year preceding the date of filing of the prospectus, and a profit and loss statement and analysis of surplus for the fiscal year ended at the date of the balance sheet, all certified by an independent public accountant; together with a balance sheet of the issuer as of a date within ninety days prior to the date of

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filing of the prospectus and a statement of profit and loss for the period from the close of the last preceding fiscal year to the date of the balance sheet, both verified by a duly authorized officer of the issuer or, if the issuer has been in existence for less than one year, a balance sheet of the issuer as of a date within ninety days prior to the date of filing and a statement of profit and loss for the period from the date of the issuer's organization to the date of the balance sheet, both certified by an independent public accountant.

If consolidated financial statements are used, there should also be a financial statement of the issuer alone. If the issuer has not yet commenced business, there should be submitted in lieu of the statement of profit and loss a statement of receipts and disbursements certified to by an independent public accountant. [Eff 6/4/70; am and ren §16-38-9, 7/30/81; am and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-9, 485-10, 485-18)

§16-38-10 Residential cooperative corporations. The information required shall be as prescribed in the application form together with other information as the commissioner may prescribe. [Eff 6/4/70; am and ren §16-38-10, 7/30/81; am and comp 10/12/85; comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-7)

SUBCHAPTER 6

STATEMENTS OF POLICY RELATING TO REGISTRATION OF SECURITIES

§16-38-11 Registration of securities by qualification. The commissioner shall look with disfavor and reject any application for registration of securities as being fraudulent or working or tending to work a fraud upon the purchaser, or may find that the enterprise or business of the issuer is based on unsound business principles, unless the following requirements are met or good cause is shown for an exception. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am and comp 10/12/85; comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10)

§16-38-11.1 Financial reports. Financial statements as required hereunder shall be prepared, audited, and certified by independent certified public accountants or licensed independent public accountants in accordance with generally accepted accounting procedures and practices, applied on a consistent basis. If a report contains exceptions of a material nature, it shall not be considered to be certified. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am, ren §16-38-11.1 and comp 10/12/85; comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10)

§16-38-11.2 Maximum commissions and expenses. Compensation to dealers in connection with the sale and promotion of a public offering, including selling expenses and allowances or reimbursement for items as salaries, overrides, salesperson's commissions, clerical, administrative, printing, postage, advertising, and all other expenditures incurred, and anything of value accruing to the dealer directly or indirectly, shall not exceed fifteen per cent of the total amount of the offering. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am, ren §16-38-11.2 and comp 10/12/85; comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10)

§16-38-11.3 Promotional securities. (a) If an issuer:

- (1) Is in the promotional, exploratory, or development stage;
- (2) Has been organized within three years prior to the date of filing the application for registration of securities;
- (3) Has issued any equity securities of or substantially of the same class as those sought to be registered to promoters, officers, directors, or underwriters of the issuer within three years prior to the date of filing, or is or proposes to become committed to issue any equity securities of or substantially of the same class as those sought to be registered to any promoter, officer, director, or underwriter of the issuer, in any case at a price less than the public offering price of the securities sought to be registered; or
- (4) Has issued any equity securities of or substantially of the same class as those sought to be registered within three years prior to the date of filing for a consideration other than cash:

then conditions and restrictions in subsection (b) shall apply unless good cause shall be shown to the commissioner for the waiver of one or more or all of the conditions and restrictions.

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(b) The following restrictions shall apply to any issuer who is subject to subsection (a):

- (1) The purchase price paid or payable for any securities referred to in subsection (a)(3) or (4) shall be not less than twenty-five per cent of the public offering price of the securities to be registered;
- (2) Each promoter, officer, director, and underwriter who shall have acquired or to whom it is proposed to issue any security, or right or option to acquire a security, referred to in subsection (a)(3) or (4), shall file with the issuer and the commissioner a written representation that the security has been or upon the exercise of any right or option shall be acquired for investment and not for distribution, and that no security shall be transferred (other than by operation of law or by will or the laws of descent) for a period of one year after termination of the public distribution;
- (3) The book value (determined in accordance with generally accepted accounting principles disregarding any operating losses incurred after the date of filing of the application for registration) of the equity securities outstanding upon completion of the public offering (assuming all securities so offered to be sold) shall be not less than two-thirds of the public offering price; and
- (4) Shares issued for a consideration other than cash shall be required to be held in escrow pursuant to section 485-18, HRS, and a summary of the escrow provisions shall be required to be included in the prospectus. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am, ren §16-38-11.3 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10, 485-18)

§16-38-11.4 Options and warrants. Options and warrants and other acquisitions or conversion rights granted to or reserved for officers, directors, promoters, or insiders shall be fully justified, reasonable in number and method of exercise, and meet the following requirements:

- (1) A complete explanation for the basis and reason for the issuance shall be provided;
- (2) The total number of underlying shares subject to options does not exceed ten per cent of the shares to be outstanding if all shares being offered are sold;

- (3) The rights are not exercisable during the effectiveness of the public offering nor for a period of eleven months from date issued, and the exercise price thereafter of not less than the percentage amounts provided in the following schedule:

Period at which exercise privilege may take place	Per cent of public offering price at which rights may be exercised
After 1 year from issuance	107%
2 years from issuance	114%
3 years from issuance	121%
4 years from issuance	128%

- (4) The rights are not exercisable after the expiration of five years from the date of issue; and
- (5) Options or warrants to dealers or underwriters do not exceed the limitations imposed by section 16-38-11.2 relating to maximum commissions allowable as compensation in whole or in part for the sale of securities and shall be nontransferable. Options or warrants issued to all shareholders pro rata, or in connection with qualified stock options to employees which meet the requirements of the United States Internal Revenue Code, or other employees' options pursuant to a stock purchase or profit-sharing plan, shall not be subject to the restrictions provided in this section if they are justified and reasonable in number and method of exercise. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am, ren §16-38-11.4 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10)

§16-38-11.5 Impoundment of proceeds. (a) The commissioner shall ordinarily require, as a condition to registration of speculative and promotional securities, that all proceeds from the sale of securities less selling expenses be impounded in escrow until the time that a sufficient amount has been realized to accomplish the purposes of the offering. For purposes of this chapter, "speculative and

promotional securities" means securities issued by a company that is organized within three years of the filing, that has no earnings record, is in the development, exploratory or promotional stage, and is financing an initial or proposed enterprise, or is a company in poor financial condition intending to raise additional working capital to continue its operation. An executed copy of the escrow agreement shall be filed with the commissioner and shall contain the following information in addition to whatever other information the commissioner may require:

- (1) Funds required to be impounded shall be deposited in a separate trust account with a bank, a corporate trustee, or similar institution authorized to do business in this State, or other person acceptable to the commissioner;
- (2) Net proceeds shall be returned directly to the investors by the escrow holder and not through the intermediary of the issuer in the event that the minimum prescribed amount is not obtained within the specified period, in the event the depositor certifies to the commissioner that the terms and conditions of the escrow agreement have not been met and requests authorization to return the impounded funds to the purchasers. If the minimum prescribed amount is obtained within the specified period, the escrow depository shall so certify to the commissioner and request authorization to release the impounded funds to the issuer;
- (3) No certificates evidencing securities purchased (other than subscription agreements or receipts) shall be issued until after release of the funds from escrow;
- (4) In the event that checks, drafts, money orders or other remittances are not made payable to the escrow depository, all monies received from the sale of securities, after collection, and deduction for allowable selling commission and expenses, the issuer, or dealer, if any, shall promptly (and in no event later than ten days after receipt thereof) transmit to the escrow depository the net amount required to be impounded;
- (5) A commitment by the escrow depository to furnish to the commissioner or the commissioner's staff, upon request for information, data concerning the status of, or amounts on deposit in, the escrow account;
- (6) Ordinary and standard terms and conditions which are generally required by escrow agents in connection with the payment of fees, charges and expenses, liability, claims, litigation, notice and hold-harmless and indemnification clauses, etc.; and

- (7) That no funds are to be released from impoundment, and no changes effectuated in the agreement except by written consent and authorization of the commissioner.
- (b) A request for a modification of the escrow arrangements as accepted, or for partial release of the funds so impounded, shall be generally regarded with disfavor, and shall be granted only upon good cause shown, and by application containing the following information:
 - (1) A certified statement from the escrow depository setting forth the total amount of subscriptions and the character of each deposit; and
 - (2) A waiver and consent executed by each purchaser or subscriber whose funds are sought to be released, or, an acknowledgment by the purchaser or subscriber that an offer for return of investment has been made and rejected. The offer, or solicitation for waiver and consent shall recite:
 - (A) That the issuer has failed to meet the impoundment conditions required, if that is the case;
 - (B) The asserted reasons for requesting a partial release of funds or modification of the escrow arrangements; and
 - (C) A statement that the subscriber realizes that the subscriber is under no obligation to give consent and waiver, and that the consent and waiver is freely and voluntarily given. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am, ren §16-38-11.5 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10, 485-18)

§16-38-11.6 Limit of debt securities-interstate offerings. The total amount of unsecured interest-bearing securities, excluding investment certificates, that may be registered or may be outstanding at any time shall not exceed five times the net worth of the issuer; provided that, if the issuer maintains reserves to pay for securities as they become due, the reserves may be included in determining the ratio. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am, ren §16-38-11.6 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10)

§16-38-11.7 Real estate investment trusts. (a) Applications to register securities issued or issuable by a real estate investment trust shall substantially meet the requirements of this section.

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(b) For purposes of this section, a "real estate investment trust" or "trust" means an unincorporated trust or association which intends to comply with sections 856, 857, and 858 of the Code.

(c) The declaration of trust, or other instrument forming the trust, among other things, shall ordinarily contain provisions as set forth in subsections (d) to (l).

(d) A majority of the trustees shall not be affiliated with the adviser of the trust or any organization affiliated with the adviser of the trust. The trustees shall be elected by the shareholders of the trust annually.

(e) No trustee, officer, or adviser of a trust, or any person affiliated with any trustee, officer, or adviser of a trust, shall sell any property or assets to the trust or purchase any property or assets from the trust, directly or indirectly, nor shall any trustee, officer, or adviser of a trust receive any commission or other remuneration, directly or indirectly, in connection with the purchase or sale of trust assets, except pursuant to transactions that are fair and reasonable to the shareholders of the trust and that relate to:

- (1) The acquisition of property or assets at the formation of the trust or shortly thereafter that is fully disclosed in the prospectus;
- (2) The acquisition by the trust of federally insured or guaranteed mortgages at prices not exceeding the currently quoted prices at which the Federal National Mortgage Association is purchasing comparable mortgages;
- (3) The acquisition of other mortgages on terms not less favorable to the trust than similar transactions involving unaffiliated parties; or
- (4) The acquisition by the trust of other property at prices not exceeding the fair value thereof as determined by independent appraisal.

All transactions and all other transactions in which a person has any direct or indirect interest shall be approved by a majority of the trustees, including a majority of the independent trustees. All commissions or remuneration received by any trustee, officer, or adviser of a trust in connection with any transactions shall be deducted from the advisory fee.

(f) The aggregate annual expenses of every character paid or incurred by the trust, excluding interest, taxes, expenses in connection with the issuance of securities, shareholder relations, and acquisition, operation, maintenance, protection, and disposition of trust properties, but including advisory fees and mortgage servicing fees and all other expenses, shall not exceed the greater of:

- (1) One and one-half per cent of the average net assets of the trust. For purposes of the section, "net assets" means the total invested assets at cost before deducting depreciation reserves, less total liabilities, calculated at least quarterly on a basis consistently applied; or

- (2) Twenty-five per cent of the net income of the trust, excluding provision for depreciation and realized capital gains and losses and extraordinary items, and before deducting advisory and servicing fees and expenses, calculated at least quarterly on a basis consistently applied; but in no event shall aggregate annual expenses exceed one and one-half per cent of the total invested assets of the trust.

The adviser shall reimburse the trust at least annually for the amount by which aggregate annual expenses paid or incurred by the trust as defined herein exceed the amounts herein provided.

(g) The aggregate borrowings of the trust, secured and unsecured, shall not be unreasonable in relation to the net assets of the trust, as defined in subsection (f), and the maximum amount of borrowings in relation to the net assets shall be stated in the prospectus.

(h) A real estate investment trust shall ordinarily have a net capital of not less than \$100,000 represented by outstanding shares or certificates of beneficial interest.

- (i) A trust shall not:
 - (1) Engage in any material trading activities with respect to its properties;
 - (2) Issue redeemable equity securities or equity securities of more than one class;
 - (3) Issue debt securities to the public unless the historical cash flow of the trust or the substantiated future cash flow of the trust, excluding extraordinary items, is sufficient to cover the interest on the debt securities; or
 - (4) Issue options or warrants to purchase its securities to the adviser of the trust or any person affiliated with the adviser, or to any other persons at exercise prices less than the fair market value of the securities on the date of grant.

(j) Any advisory contract entered into by the trust prior to the initial public offering shall be for a period not longer than three years, and any contract entered into thereafter shall be for a period not longer than one year. Any advisory contract shall provide that it may be terminated at any time without penalty, by the trustees or a majority of the holders of outstanding shares of beneficial interest, upon not less than sixty days' written notice to the adviser.

(k) The trust shall prepare an annual report concerning its operations for each fiscal year ending after the public offering of its securities, including financial statements prepared in accordance with generally accepted accounting principles applied on a consistent basis and by independent certified public accountants. The

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annual report shall be delivered to each public shareholder and debenture holder within one hundred twenty days after the end of the fiscal year. There shall be an annual meeting of the holders of outstanding shares of beneficial interest of the trust, upon reasonable notice, following delivery of the annual report.

(l) The investment policies intended to be followed by the trustees shall be stated with reasonable particularity and shall contain express statements of policy with respect to unimproved real estate and junior mortgages, including the risks inherent with the policies. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am, ren §16-38-11.7 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10)

§16-38-11.8 Offering price. In the case of an issuer which has been actually engaged in business or operation, the amount for which a security is being offered to the public should bear some reasonable relationship to:

- (1) Market value, if any;
- (2) Price-earnings ratio, as reflected by its financial statements covering an average three-year preceding period, or the shorter duration of experience or operation as may be applied; or
- (3) In the absence of an established or determinable market value or price-earnings ratio, the book value of the issuer may be taken into consideration in justifying or substantiating the reasonableness of the offering price. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am, ren §16-38-11.8 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10)

§16-38-11.9 Compliance with Hawaii corporation law. No application of a Hawaii corporation for the registration of securities shall be accepted if the corporation is not current in filing its annual corporation exhibits as required by Hawaii corporation law, and complete records as prescribed by Hawaii corporation law shall at all times be maintained. [Eff 6/4/70; am 8/8/71; am and ren §16-38-11, 7/30/81; am, ren §16-38-11.9 and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-10)

§16-38-12 Repealed. [R 10/12/85]

SUBCHAPTER 7

EFFECTIVENESS AND
POST-EFFECTIVENESS REQUIREMENTS

§16-38-13 Effectiveness. When an application for the registration of securities has been declared effective by the commissioner, it shall be designated as a registration statement, and the offering may be commenced upon the issuance of a certificate of registration or notification of effectiveness. A registration statement that has become effective with the SEC under the Securities Act becomes effective in Hawaii automatically at the moment of effectiveness with the SEC if no stop order or notice of deficiency has been entered. The applicant shall promptly advise the commissioner by telephone, fax, or electronically of the date and time of the securities' federal effectiveness. [Eff 6/4/70; am and ren §16-38-13, 7/30/81; comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-8, 485-9, 485-10)

§16-38-14 Confirmations by issuer. Every issuer selling its own securities in an intrastate offering, at or before completion of a transaction, shall give or send to each customer written confirmation, retaining copies thereof, concerning all sales of securities, and disclosing the:

- (1) Date the transaction occurred;
- (2) Price and commission charged; and
- (3) Name of the salesperson handling the transaction. [Eff 6/4/70; am and ren §16-38-14, 7/30/81; am and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-2)

§16-38-15 Amendments. If prior to or during the period of effectiveness any statement, document, or information contained in the registration statement or prospectus becomes materially inaccurate, incorrect, or misleading, or in the light of changes in circumstances, addendums are made necessary in order to present a full disclosure of material facts affecting the issuer's business or the offering, or if the commissioner requests additional data, information, or verification thereof, the registrant shall promptly file, and in no event later than fifteen days following the event, occurrence, discovery, or notice thereof necessitating same, a correcting amendment. In the event an issuer amends its prospectus, the revised date together with the date of

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the prospectus shall be shown on the front cover, and the portion or portions of the prospectus being amended should also show the amended date. [Eff 6/4/70; am and ren §16-38-15, 7/30/81; am and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-10)

§16-38-16 Renewals. A registration statement may be renewed not less than fifteen days prior to the expiration date by filing a new prospectus containing information of a date not more than ninety days prior to the date of filing, together with the renewal fee of \$250. The front cover shall show the balance of the offering, the amount of the original registration, and the date the original registration became effective. [Eff 6/4/70; am and ren §16-38-16, 7/30/81; am and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-10)

§16-38-17 Withdrawal, termination, or completion. (a) A request for withdrawal of a registration statement may be made before or after its effectiveness by written notification; provided that no request shall be granted during the pending of a stop order proceeding under section 485-13, HRS, unless the commissioner finds that the stop order is not necessary in the public interest. Upon the granting of a request for withdrawal, no part of the registration fee shall be refunded.

(b) Notification of termination or completion of a registered offering shall be submitted to the commissioner within thirty days after the termination or completion, and shall include the results of the offering. [Eff 6/4/70; am and ren §16-38-17, 7/30/81; am and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-9, 485-10, 485-13)

SUBCHAPTER 8

ADVERTISING AND FINANCIAL REPORTS

§16-38-18 Advertising. (a) Except as otherwise provided in this section, any written advertising, recording, or radio or television announcements, broadcast or

commercial to be used in connection with the sale of securities in Hawaii shall be filed with the commissioner at least two days prior to its proposed use.

(b) The following materials are exempt from the filing requirements of this rule: all advertising material previously filed with and cleared by the SEC or NASD; all "tombstone" advertisements; and all advertisements relating to a federal covered security or to a security that is exempt from registration pursuant to section 485-4, HRS, (exempt securities) or section 485-6, HRS, (exempt transactions). [Eff 6/4/70; am 5/27/80; am and ren §16-38-18, 7/30/81; am and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-25)

§16-38-19 Reports. A copy of all financial reports sent or intended to be sent to security holders by an issuer of securities that is registered under chapter 485, HRS, shall be filed with the commissioner so long as the issuer's registration statement is in effect. [Eff 6/4/70; am and ren §16-38-19, 7/30/81; comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-16)

SUBCHAPTER 9

BOND

§16-38-20 Cancellation of bond. The surety of any bond issued under chapter 485, HRS, or this chapter may cancel the bond by giving sixty days' notice in writing to the commissioner, and shall thereafter be relieved of any liability for any breach of condition occurring after the effective date of cancellation. [Eff 5/27/80; am and ren §16-38-20, 7/30/81; am and comp 10/12/85; comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-2)

SUBCHAPTER 10

EXEMPT TRANSACTIONS

§16-38-21 Limitation on issuers and offerors. (a) Nothing in this subchapter shall relieve, or be construed as in any way relieving, issuers or persons acting on their

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behalf from providing disclosure to prospective investors adequate to satisfy the anti-fraud provisions of chapter 485, HRS.

(b) In view of the objective of this subchapter and the purpose and policies underlying chapter 485, HRS, these exemptions are not available to any issuer or persons acting on their behalf with respect to any transaction which, although in technical compliance with this subchapter, is part of a plan or scheme to evade registration or the conditions or limitations explicitly stated in this subchapter.

(c) Nothing in this subchapter is intended to exempt registered dealers, issuers, or agents from the due diligence standards otherwise applicable to registered persons.

(d) Nothing in this subchapter is intended to exempt any person from the dealer, issuer, or agent requirements of chapter 485, HRS. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-6)

§16-38-22 Exemptions. (a) For purposes of section 485-6(8), HRS, which provides an exemption for sales to the banks and institutions listed in that section, the term "institutional buyer" shall include any organization within the scope of section 501(c)(3) of the Code.

(b) Any offer or sale of securities offered or sold in compliance with the Securities Act, Regulation D, 17 CFR sections 230.501, 230.502, 230.503, 230.505, and 230.506 as made effective in Release No. 33-6389 and complies with the conditions and limitations of this subchapter, shall be exempted under section 485-6(19), HRS.

(c) This section shall not apply to any offer or sale of securities offered or sold in compliance with the Securities Act, Regulation D, 17 CFR section 230.504, made effective in Release No. 33-6389. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-6)

§16-38-23 Filing. (a) The issuer shall file with the commissioner a signed copy of Form D (17 CFR section 230.500), not later than fifteen days after the first sale is made in this State.

(b) An executed consent to service of process and corporate resolution, if the issuer is a corporation, shall be included unless a currently effective consent to service of process is on file with the commissioner.

(c) Upon written request of the commissioner, the issuer shall provide information furnished by the issuer to the offerees. [Eff and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-6)

§16-38-24 Disqualification. (a) Any person who is disqualified from using any provision of Regulation D, 17 CFR section 230, of the Securities Act by the SEC shall not qualify for any of the exemptions under this subchapter.

(b) No exemption under this subchapter shall be used if any person or parties of interest:

- (1) Has filed a registration statement which is the subject of a currently effective stop order entered by any state within five years prior to the commencement of the offering;
- (2) Has been convicted within five years prior to the commencement of the offering of any felony or misdemeanor in connection with an offer or sale of any security;
- (3) Has been convicted within five years prior to the commencement of the offering of any felony or misdemeanor involving fraud or deceit, including but not limited to forgery, embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud;
- (4) Is currently subject to any state's administrative order or judgment which prohibits the use of any exemption from registration in connection with the purchase or sale of securities;
- (5) Is currently subject to any state's administrative order or judgment entered by that state's security administrator or commissioner within five years prior to the commencement of the offering or is subject to any state's administrative order or judgment in which fraud or deceit, including but not limited to making untrue statements of material facts or omitting to state material facts, was found and the order or judgment was entered within five years prior to the commencement of the offering; or
- (6) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment, or decree of any court of competent jurisdiction, entered within five years prior to the commencement of the offering, permanently restraining or enjoining the person from engaging in or continuing any conduct or practice in

connection with the offer or sale of any security or involving the making of any false filing with any state.

Paragraphs (1), (2), (3), (5), and (6) shall not apply if the person or party subject to the disqualifying order, judgment, or decree is duly licensed or registered to conduct securities related business in the state in which the order, judgment, or decree was entered against the person or party.

(c) Any disqualification caused by this section shall be automatically waived if the federal or state agency which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that the exemptions be denied. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-6)

§16-38-25 Advertising. Neither the issuer nor any person or party acting on behalf of the issuer shall offer or sell the securities by any form of general solicitation or general advertising, directly or indirectly, including but not limited to the following:

- (1) Any advertisement, article, notice, or other communication published in any newspaper, magazine, or similar media or broadcast over radio, television, or cable television system; and
- (2) Any seminar or meeting whose attendees are invited by any general solicitation or general advertising. [Eff and comp 10/12/85; comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-6)

§16-38-26 Integration. A separate sale of securities within or without this State shall be included as part of the same offering if, after considering the following elements, the particular facts and circumstances indicate the sale to be part of the same offering. The elements to be considered are whether the:

- (1) Sales are part of a single plan of financing;
- (2) Sales involve the issuance of the same class of security;
- (3) Sales are made at or about the same time;
- (4) Same type of consideration is received; and
- (5) Sales are made for the same general purpose. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-6)

§16-38-27 Limitation on expenses. All expenses of the issues with regard to the securities registered under this subchapter, including but not limited to expenses relating to sales, management fees, acquisition of real or personal property, entertainment, commissions, salaries, and cost of preparation of the offer, shall be reasonable considering the proposed use of the funds raised, the amount to be raised, the type of security being issued, and the relative risk of the investment. [Eff and comp 10/12/85; comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-6)

§16-38-28 Escrow of funds raised. (a) An escrow shall be established where, because of the nature of the intended use of the funds or the nature of the project or business plan, a minimum amount of funds shall be raised in order that the project can get underway with a reasonable chance of success even if no further sales are made.

(b) The requirements for an escrow under this section are:

- (1) The escrow agent shall be a licensed escrow depository under chapter 449, HRS, or an excepted institution under section 449-3, HRS; and
- (2) The escrow terms shall include instructions that the funds placed into escrow shall be held in trust for the benefit of the investors and shall not be released to the issuer until the minimum amount of funds set forth in the registration have been raised.

(c) The requirements of this section may be waived by the commissioner upon a showing that the escrow is not necessary and that the investor is adequately protected. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-2, 485-6, 485-18)

§16-38-29 Fees. The filing fee for any exemption granted under this subchapter shall be \$200, all of which shall be deposited into the compliance resolution fund. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §§485-2, 26-9) (Imp: HRS §§485-2, 485-6)

SUBCHAPTER 11

INVESTMENT ADVISERS

§16-38-33 Registration; generally. (a) A person, corporation, partnership, or other unincorporated association may be registered as an investment adviser under

chapter 485, HRS, if the commissioner finds that the applicant is of good repute and otherwise satisfies the requirements of chapter 485, HRS, and this chapter.

(b) All services of an investment adviser shall be made pursuant to a written investment advisory contract and shall be subject to the disclosure requirements of section 16-38-38.

(c) Designation. The commissioner hereby designates the Internet-based IARD to receive and store filings, and collect related fees from investment advisers and investment adviser representatives on behalf of the commissioner.

(d) Use of the IARD. Except as otherwise provided below, all investment adviser and investment adviser representative applications, amendments, reports, notices, related filings and fees required to be filed with the commissioner pursuant to chapter 485, HRS, and this chapter, shall be filed electronically with and transmitted to the IARD. The following additional conditions relate to these electronic filings:

(1) Electronic signature. When a signature or signatures are required by the particular instructions of any filing to be made through the IARD, a duly authorized officer of the applicant or the applicant him or herself, as required, shall affix his or her electronic signature to the filing by typing his or her name in the appropriate fields and submitting the filing to the IARD. Submission of a filing in this manner shall constitute irrefutable evidence of legal signature by any individuals whose names are typed on the filing.

(2) When filed. Solely for purposes of a filing made through the IARD, a document is considered filed with the commissioner when all fees are received and the filing is accepted by the IARD on behalf of the State.

(e) Electronic filings. The electronic filing of any particular document and the collection of related processing fees shall not be required until the IARD provides for receipt of such filings and fees, and the commissioner provides at least thirty days notice that electronic filing is available. Any documents or fees required to be filed with the commissioner that are not permitted to be filed with or cannot be accepted by the IARD shall be filed directly with the commissioner.

(f) Hardship exemptions. Notwithstanding subsections (d) and (e), there shall be two "hardship exemptions" from the requirements to make electronic filings.

(1) Temporary hardship exemption.

(A) Investment advisers registered or required to be registered under the Investment Advisers Act of 1940 who experience unanticipated technical difficulties that prevent submission of an electronic filing to the IARD may request a temporary hardship exemption from the requirements to file electronically.

- (B) To request a temporary hardship exemption, the investment adviser shall:
 - (i) File Form ADV-H (17 CFR section 279.3) in paper format with the commissioner where the investment adviser's principal place of business is located, no later than one business day after the filing (that is the subject of the Form ADV-H) was due; and
 - (ii) Submit the filing that is the subject of the Form ADV-H in electronic format to the IARD no later than seven business days after the filing was due.
 - (C) Effective date – upon filing. The temporary hardship exemption shall be deemed effective upon receipt by the commissioner of the complete Form ADV-H. Multiple temporary hardship exemption requests within the same calendar year may be disallowed by the commissioner.
- (2) Continuing hardship exemption.
- (A) Criteria for exemption. A continuing hardship exemption may be granted only if the investment adviser is able to demonstrate that the electronic filing requirements of this rule are prohibitively burdensome.
 - (B) To apply for a continuing hardship exemption, the investment adviser shall:
 - (i) File Form ADV-H (17 CFR section 279.3) in paper format with the commissioner at least twenty business days before a filing is due; and
 - (ii) If a filing is due to more than one commissioner, the Form ADV-H shall be filed with the commissioner where the investment adviser's principal place of business is located.
 - (C) Effective date – upon approval. The continuing hardship exemption shall be deemed effective upon approval by the commissioner. The time period of the exemption shall not exceed one year after the date on which the Form ADV-H is filed. If the commissioner approves the application, the investment adviser shall, no later than five business days after the exemption approval date, submit filings to the IARD in paper format (along with the appropriate processing fees) for the period of time for which the exemption is granted.

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- (3) Recognition of exemption. The decision to grant or deny a request for a hardship exemption shall be made by the commissioner where the investment adviser's principal place of business is located. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-33.5 Federal covered advisers; notice filing. (a) A federal covered adviser may transact business in this State upon submitting to the commissioner a notice filing and notice filing fee as set forth in section 16-38-3. The notice filing and notice filing fee may be filed with the commissioner through the IARD.

(b) The notice filing shall consist of the federal covered adviser's current Form ADV on file with the SEC. The notice filing shall be effective upon receipt and shall expire December 31 of each year. A notice filing may be renewed prior to December 31 by either:

- (1) Filing with the commissioner:
 - (A) A copy of page one of the federal covered adviser's most recent Form ADV;
 - (B) A copy of Item 2 of Part 1A of the federal covered adviser's most recent Form ADV;
 - (C) Any amendments to Form ADV that have not been previously filed with the commissioner;
 - (D) A list containing the name and social security number or the IARD number of each investment adviser representative of the adviser who is renewing its registration for the coming notice filing period together with any amendments to the investment adviser representative's Form U-4 that have not been previously filed with the commissioner;
 - (E) A Form U-5 for each registered investment adviser representative who is not renewing its registration for the upcoming notice filing period; and
 - (F) A renewal fee as specified in section 16-38-3, to cover the renewal of the federal covered adviser's notice filing and the registration of each of its representatives who is renewing its registration; or
- (2) Filing a renewal and renewal fees through the IARD. Any adviser that elects to renew its notice filing through the IARD shall be required to file directly with the commissioner any information listed in subsections

(b)(1)(D) and (E) that have not been filed through the IARD together with any fees due under subsection (b)(1)(F) that have not been paid through the IARD. [Eff and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14.3)

§16-38-34 Registration; eligibility requirements. (a) An applicant, if a natural person, shall have attained the age of eighteen years.

(b) A partner, officer, representative, or employee of a registered investment adviser may render investment advisory services only if the person meets all the requirements of and has been duly registered as an investment adviser or investment adviser representative, as provided by section 485-14, HRS.

(c) A corporation, partnership, sole proprietorship, or other unincorporated association whose partners, officers, representatives, or employees render investment advisory services as defined in section 485-1(6), HRS, shall comply with registration procedures as provided by section 485-14, HRS, and this chapter, unless otherwise exempted.

(d) An applicant shall have a minimum net worth, as defined in section 16-38-36, of not less than \$5,000, if the applicant has custody or discretionary authority over client funds. An applicant that maintains its principal place of business in a state other than this State shall not be required to comply with the minimum net worth requirement of this section; provided that the out-of-state adviser is registered in the state where it maintains its principal place of business and is in compliance with that state's net capital or net worth requirements, if any.

(e) An applicant who retains custody or discretionary authority over client funds shall obtain insurance covering the adviser's business for errors and omissions for at least \$100,000 per occurrence, with a \$200,000 aggregate for advisers with less than two years' experience or coverage for \$100,000 per occurrence with a \$500,000 aggregate for advisers with two or more years of experience. An investment adviser who commences a second year of experience during the interim period between registration and renewal shall submit within thirty days after the commencement of the second year proof of the higher insurance coverage commensurate with the above mentioned amounts.

(f) A foreign corporation or a partnership intending to establish a branch office in this State shall comply with the requirements of the Hawaii foreign corporation law (chapter 414, HRS) or the Hawaii partnership law (chapter 425, HRS), as applicable. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-35 Registration; application. (a) An application for registration shall be filed on Form ADV, which shall be filed with the commissioner directly or through the IARD and shall contain the information requested therein concerning the applicant's identification, qualification, business association, history, experience, and financial condition.

- (b) The application shall be filed together with the following:
 - (1) An application fee of \$100 as provided in section 16-38-3;
 - (2) Evidence of compliance with all applicable requirements of subsections 16-38-34(d) to (g);
 - (3) Financial statements consisting of either:
 - (A) A balance sheet as of a date within thirty days of filing, or if the applicant has been engaged in business one year or more preceding, a balance sheet certified by an independent public accountant as of the last fiscal year, together with a balance sheet verified by the applicant as of a date within thirty days of filing. However, if the applicant does not have custody or discretionary authority over client funds, the adviser need only file financial statements verified by the adviser; or
 - (B) If the adviser maintains its principal place of business in a state other than this State, and if the adviser is registered in the other state and is in compliance with the other state's financial reporting requirements, if any, a copy of the adviser's most recent financial statement filed with the state where the adviser maintains its principal place of business; and
 - (4) Proof that the applicant has complied with the exam requirement provided in section 16-38-37, or otherwise qualifies for exemption from the exam as specified in section 16-38-37.
- (c) Additional exhibits or information not specifically required by the application may be submitted by the applicant.

(d) The commissioner may require the applicant to file additional information if such information is necessary for the commissioner to determine whether to approve or deny the application. In accordance with the provisions of section 16-38-4.5, any additional information requested by the commissioner shall be requested by the commissioner in writing within sixty days of receipt of the application.

(e) The application for annual renewal registration as an investment adviser shall be filed with the IARD together with the applicable fee set forth in section 16-38-3.

(f) An application for initial or renewal registration shall not be considered filed until the required fee and all required submissions have been received by the commissioner.

(g) Registrations of investment advisers, including renewals, on or after July 1, 2001 shall be filed through the IARD. [Eff and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-36 Registration; financial requirements. (a) Every registered investment adviser shall file an annual report within ninety days following the end of the investment adviser's fiscal year as follows:

(1) An adviser that maintains its principal place of business in this State shall file a balance sheet certified by an independent public accountant in conformance with generally accepted accounting principles; provided that if an adviser does not have custody or discretionary authority over client funds, the adviser shall file financial statements verified by the adviser. Any statement which does not adequately reflect the applicant's true financial picture shall not be accepted;

(2) An adviser that maintains its principal place of business in a state other than this State shall file with the commissioner a copy of the most recent financial report or statement, if any, that the adviser has filed with the securities commissioner in the state in which it maintains its principal place of business. An adviser that maintains its principal place of business in a state other than this State but that is not registered in the State in which it maintains its principal place of business or is not in compliance with that state's financial reporting requirements, if any, shall be required to file with the commissioner a balance sheet that complies with the requirements of paragraph (1).

(b) Except as otherwise provided in subsection (d), each registered investment adviser shall have at all times a minimum net worth of not less than \$5,000. As used in this section and section 485-14(q), HRS, "net worth" shall mean the difference between total assets and total liabilities or indebtedness, computed in accordance with the following:

(1) Securities owned shall be adjusted to market value;

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- (2) Value of real estate shall be attested to by qualified and disinterested persons; and
- (3) Property in joint ownership shall be limited to the applicant's interest therein.
- (c) To ensure the investment adviser's compliance with section 485-14(q), HRS, and this section, the commissioner may require the investment adviser to provide to the commissioner, upon request, that the value of unsecured notes, accounts receivable, or advanced commissions due from a salesperson, officer, director, partner, or affiliate be substantiated by an opinion of a bank, finance company, or other lending institution satisfactory to the commissioner.
- (d) The provisions of subsections (b) and (c) shall not apply to an investment adviser that maintains its principal place of business in a state other than this State provided that that investment adviser is registered in the state where it maintains its principal place of business and is in compliance with such state's net worth or net capital requirements, if any. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-37 Registration; examination requirements. (a) Examination requirements. Except as otherwise provided in this chapter, an individual applying to be registered as an investment adviser shall provide the commissioner with proof of obtaining a passing score on one of the following examinations:

- (1) The Uniform Investment Adviser Law Examination (Series 65 examination); or
- (2) The General Securities Representative Examination (Series 7 examination) and the Uniform Combined State Law Examination (Series 66 examination).
- (b) An individual who has not been registered in any jurisdiction for a period of two consecutive years immediately preceding the date of the application shall be required to comply with the examination requirements of this section.

(c) Any investment adviser who fails to renew his or her registration for two or more consecutive years, or who has not registered for two or more consecutive years since passing a qualifying examination approved by the commissioner, shall be required to apply as a new applicant and comply with the examination requirements of this section.

- (d) Exemptions.

- (1) Any individual who is registered as an investment adviser or investment adviser representative in any jurisdiction in the United States on the effective date of this section shall not be required to satisfy the examination requirements for continued registration; provided that the commissioner may require additional examinations for any individual found to have violated any state or federal securities law;
 - (2) Waivers. The examination requirement shall not apply to an individual who currently holds one of the following professional designations:
 - (A) Certified Financial Planner (CFP) awarded by the International Board of Standards and Practices for Certified Financial Planners, Inc.;
 - (B) Chartered Financial Consultant (ChFC) awarded by the American College, Bryn Mawr, Pennsylvania;
 - (C) Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants;
 - (D) Chartered Financial Analyst (CFA) awarded by the Institute of Chartered Financial Analysts;
 - (E) Chartered Investment Counselor (CIC) awarded by the Investment Counsel Association of America, Inc.; or
 - (F) Such other professional designation as the commissioner may by rule or order recognize.
- (e) Notwithstanding any other provision to the contrary, the commissioner, by order, may waive the examination requirement if the commissioner determines that the examination is not necessary or appropriate in the public interest or for the protection of investors. [Eff and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-38 Registration; disclosure statements. Unless waived by the commissioner, every investment adviser that is registered or required to be registered under chapter 485, HRS, shall, in accordance with the provisions of this section, furnish each advisory client and prospective advisory client with a written disclosure statement that is in compliance with the provisions of SEC rule 204-3 under the Investment Advisers Act of 1940 notwithstanding the fact that the investment adviser is not registered or required to be registered under the Investment Advisers Act of 1940. The delivery and updating of the disclosure statement required by this section shall be in accordance with the requirements of SEC rule 204-3. [Eff and comp

10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-14, 485-25)

§16-38-39 Registration; post-effective requirements. (a) Upon approval of the application by the commissioner, a certificate of registration shall be issued certifying that the investment adviser is authorized to engage in the investment advisory business in this State.

(b) Every registrant shall immediately notify the commissioner of any material change in any information, exhibits, or schedules submitted, or circumstances disclosed in its last prior Form ADV by filing a correcting amendment on Form ADV when required by Form ADV. Changes to be reported shall include, but are not limited to, the following:

- (1) Change in firm name, ownership, management, or control of an investment adviser;
- (2) A change in any of its partners, officers, or persons in similar positions;
- (3) Change in its business address, or the creation or termination of a branch office in Hawaii;
- (4) Change in type of entity, general plan, or character of the investment adviser's business, method of operation or type of securities in which it is dealing or trading;
- (5) Material adverse change in financial condition, insolvency, dissolution or liquidation, or impairment of working capital, or noncompliance with the minimum net worth or bond requirements hereinabove provided; and
- (6) The filing of any disciplinary proceeding that is required to be disclosed on Form ADV, including but not limited to, a criminal charge or civil action against a registrant or a partner, officer, or employee who acts as an investment adviser in which a fraudulent, dishonest, or unethical act is alleged, or a violation of a securities law or any aspect of the securities business is involved or entry of a court or administrative order or proceeding against a registrant to deny, suspend, or revoke a registration, or threatening to do so, or to enjoin it from engaging in or continuing any conduct or practice in the securities business, or to impose a fine, suspension, or expulsion from the NASD.

(c) Registration of successor to registered investment adviser. In the event that a new investment adviser becomes the successor and continues the business of an investment adviser registered pursuant to section 16-38-35, the registration of the

predecessor investment adviser shall be deemed to remain effective as the registration of the successor investment adviser if the successor investment adviser, within thirty days after such succession, files an application for registration on Form ADV, and the predecessor investment adviser files a notice of withdrawal from registration on Form ADV-W.

- (1) The registration of the predecessor investment adviser shall cease to be effective as the registration of the successor investment adviser forty-five days after the application for registration on Form ADV is filed by the successor investment adviser.
- (2) Notwithstanding any other provision of this section, if an investment adviser succeeds to and continues the business of a registered investment adviser, and the succession is based solely on a change in the predecessor investment adviser's date or state of incorporation, form of organization, or composition of a partnership, the successor investment adviser may, within thirty days after the succession, amend the registration of the predecessor investment adviser on Form ADV to reflect these changes. This amendment shall be deemed an application for registration filed by the predecessor investment adviser and adopted by the successor investment adviser. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-40 Registration; expiration, renewal, termination. (a) All registrations shall automatically expire on December 31 of each year (unless sooner terminated) and shall be renewed as provided in this section. An investment adviser shall be responsible for renewing the registration of its investment adviser representatives at the time the investment adviser renews its registration. An investment adviser that is registered through the IARD shall renew its registration with the commissioner through the IARD no later than December 31 of each year. All other investment advisers shall renew their registration by filing with the commissioner not earlier than November 1 or later than December 1 of the current registration year, an originally executed copy of page one of Form ADV, together with:

- (1) Any amendments to Form ADV that have not been previously filed with the commissioner;
- (2) A list of the names and either the IARD number or social security number of each of the investment adviser's investment adviser representatives who is renewing a registration;

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- (3) Any amendments to Form U-4 on any investment adviser representative listed pursuant to paragraph (2) if the amendments have not been previously filed with the commissioner;
- (4) A Form U-5 on any registered investment adviser representative of the investment adviser who is not renewing its registration; and
- (5) A renewal fee as set forth in section 16-38-3, HRS, in an amount that is sufficient to cover the renewal of the registration of the investment adviser and each investment adviser representative listed pursuant to paragraph (2).

(b) Renewals not received by December 1 shall be subject to a penalty of one hundred per cent of the renewal fee. The registration of an investment adviser and each of its registered representatives that have not been renewed by December 31 shall be considered terminated effective as of 12:01 a.m., December 31. Thereafter, to apply for registration, the investment adviser and its investment adviser representatives shall comply with the provisions of this subchapter and subchapter 5. A subsequent application shall be considered in all respects as an original application.

(c) Registration may be terminated prior to the expiration date by filing a Form ADV-W for the investment adviser and a Form U-5 for each of the investment adviser's investment adviser representatives with the IARD. In the event a Form ADV-W is filed without any Form U-5, the commissioner's acceptance of the Form ADV-W shall authorize the commissioner to terminate the registration of each registered investment adviser representative of the investment adviser. [Eff and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-41 Books and records. (a) Every investment adviser registered or required to be registered under chapter 485, HRS, and this chapter shall make and keep true, accurate, and current the following books, ledgers, and records:

- (1) A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger;
- (2) General and auxiliary ledgers (or other comparable records) reflecting assets, liabilities, reserves, capital, and income and expense accounts;
- (3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the

investment adviser from a client concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction. The memorandum shall show the terms and conditions of the order, instruction, modification, or cancellation; identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed the order; and show the account for which the order is entered, the date of entry, and the bank or dealer by or through whom the order is executed, where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated;

- (4) All checkbooks, bank statements, canceled checks, and cash reconciliations of the investment adviser;
- (5) All bills or statements (or copies of), paid or unpaid, relating to the investment adviser's business as an investment adviser;
- (6) All trial balances, financial statements, and internal audit working papers relating to the investment adviser's business as an investment adviser. For purposes of this section, "financial statements" means without limitation a balance sheet prepared in accordance with generally accepted accounting principles, an income statement, a cash flow statement, and a net worth computation, if applicable;
- (7) Originals of all written communications received, and copies of all written communications sent, by the investment adviser relating to:
 - (A) Any recommendation made or proposed to be made and any advice given or proposed to be given;
 - (B) Any receipt, disbursement, or delivery of funds or securities; or
 - (C) The placing or execution of any order to purchase or sell any security; provided that:
 - (i) The investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser; and
 - (ii) If the investment adviser sends any notice, circular, or other advertisement offering any report, analysis, publication, or other investment advisory service to more than ten persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; provided that if the notice, circular, or other advertisement is

distributed to persons named on any list, the investment adviser shall retain with the copy of the notice, circular, or advertisement a memorandum describing the list and its source;

- (8) A list or other record of all accounts which identifies the accounts in which the investment adviser is vested with any discretionary power with respect to the funds, securities, or transactions of any client;
- (9) A copy of all powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser;
- (10) A copy in writing of each agreement entered into by the investment adviser with any client, and all other written agreements otherwise relating to the investment adviser's business as an investment adviser;
- (11) A file containing a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser); and if the notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication (including by electronic media) recommends the purchase or sale of a specific security and does not state the reasons for the recommendation, a memorandum from the investment adviser indicating the reasons for the recommendation;
- (12) (A) A record of every transaction in a security in which the investment adviser or any investment adviser representative (as defined in subparagraph (B)) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, excluding:
 - (i) Transactions effected in any account over which neither the investment adviser nor any adviser representative of the investment adviser has any direct or indirect influence or control; and
 - (ii) Transactions in securities which are direct obligations of the United States. The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale, or other acquisition or disposition); the price at which it was effected; and the name of the dealer or bank with or through whom the transaction was effected. The record may also

contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that the investment adviser or adviser representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than ten days after the end of the calendar quarter in which the transaction was effected;

(B) For purposes of paragraph (12) the following definitions shall apply: "investment adviser representative" means any partner, officer, or director of the investment adviser; any employee who participates in any way in the determination of which recommendation shall be made, any employee who, in connection with the employee's duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations, and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations:

- (i) Any person in a control relationship to the investment adviser;
- (ii) Any affiliated person of such controlling person; and
- (iii) Any affiliated person of an affiliated person.

"Control" shall mean the power to exercise a controlling influence over the management or policies of a company, unless this power is solely the result of an official position with the company. Any person who owns beneficially, either directly or through one or more controlled companies, more than twenty-five per cent of the voting securities of a company shall be presumed to control the company;

(C) An investment adviser shall not be deemed to have violated the provisions of this paragraph because of the failure to record securities transactions of any investment adviser representative if the investment adviser establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded;

(13) (A) Notwithstanding the provisions of paragraph (12), where the investment adviser is primarily engaged in a business or businesses other than advising investment advisory clients, a

record shall be maintained of every transaction in a security in which the investment adviser or any adviser representative (as defined below) of the investment adviser has, or by reason of any transaction acquires, any direct or indirect beneficial ownership; excluding:

- (i) Transactions effected in any account over which neither the investment adviser nor any adviser representative of the investment adviser has any direct or indirect influence or control; and
 - (ii) Transactions in securities which are direct obligations of the United States. The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale, or other acquisition or disposition); the price at which it was effected; and the name of the dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any transaction shall not be construed as an admission that the investment adviser or advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than ten days after the end of the calendar quarter in which the transaction was effected.
- (B) An investment adviser is "primarily engaged in a business or businesses other than advising investment advisory clients" when, for each of its most recent three fiscal years or for the period of time since organization, whichever is lesser, the investment adviser derived, on an unconsolidated basis, more than fifty per cent of:
- (i) Its total sales and revenues; and
 - (ii) Its income (or loss) before income taxes and extraordinary items, from such other business or businesses.
- (C) For purposes of this paragraph the following definitions shall apply:
- (i) "Investment adviser representative", when used in connection with a company primarily engaged in a business or businesses other than advising investment

advisory clients, shall mean any partner, officer, director, or employee of the investment adviser who participates in any way in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by the investment adviser prior to the effective dissemination of the recommendations or of the information concerning the recommendations: any person in a control relationship to the investment adviser; any affiliated person of a controlling person; and any affiliated person of an affiliated person.

(ii) "Control" shall mean the power to exercise a controlling influence over the management or policies of a company, unless this power is solely the result of an official position with the company. Any person who owns beneficially, either directly or through one or more controlled companies, more than twenty-five percent of the voting securities of the voting securities of a company shall be presumed to control the company.

(D) An investment adviser shall not be deemed to have violated the provisions of this paragraph because of the failure to record securities transactions of any investment adviser representative if the investment adviser establishes that the investment adviser instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transaction required to be recorded.

(14) A copy of each written statement and each amendment or revision thereof, given or sent to any client or prospective client of the investment adviser and a record of the dates that each written statement, and each amendment or revision, was given, or offered to be given, to any client or prospective client who subsequently becomes a client;

- (15) For each client that was obtained by the investment adviser by means of a solicitor to whom a cash fee was paid by the investment adviser;
- (A) Evidence of a written agreement to which the investment adviser is a party related to the payment of the cash fee;
 - (B) A signed and dated acknowledgment of receipt from the client evidencing the client's receipt of the investment adviser's disclosure statement and a written disclosure statement of the solicitor; and
 - (C) A copy of the solicitor's written disclosure statement. The written agreement, acknowledgment, and solicitor's written disclosure statement will be considered to be in compliance if these documents are in compliance with rule 275.206(4)-3 under the Investment Advisers Act of 1940.

For purposes of this section, the term "solicitor" shall mean any person or entity who, for compensation, acts as an agent of an investment adviser in referring potential clients.

- (16) All accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including, but not limited to, electronic media that the investment adviser circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment adviser); provided that, with respect to the performance of managed accounts, the retention of all account statements (if they reflect all debits, credits, and other transactions in a client's account for the period of the statement) and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this paragraph;
- (17) A file containing a copy of all written communication received or sent regarding any litigation involving the investment adviser or any investment adviser representative or employee, and regarding any written customer or client complaint;
- (18) Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to such client;

- (19) Written procedures to supervise the activities of employees and investment adviser representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations;
- (20) A file containing a copy of each document (other than any notices of general dissemination) that was filed with or received from any state or federal agency or self regulatory organization and that pertains to the registrant or its investment adviser representatives as that term is defined in this section. This file shall contain, but not be limited to, all applications, amendments, renewal filings, and correspondence.
 - (b) If an investment adviser subject to subsection (a) has custody or possession of securities or funds of any client, the records required to be made and kept under subsection (a) shall also include:
 - (1) A journal or other record showing all purchases, sales, receipts, and deliveries of securities (including certificate numbers) for all accounts and all other debits and credits to the accounts;
 - (2) A separate ledger account for each client showing all purchases, sales, receipts, and deliveries of securities, the date and price of each purchase and sale, and all debits and credits;
 - (3) Copies of confirmations of all transactions effected by or for the account of any client; and
 - (4) A record for each security in which a client has a position that indicates the name of the client, the amount or interest of the client, and the location of each security.
 - (c) Every investment adviser subject to subsection (a) who renders any investment supervisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment adviser, make and keep true, accurate, and current:
 - (1) Records showing separately for each client the securities purchased and sold, and the date, amount, and price of each purchase and sale; and
 - (2) For each security in which any client has a current position, information from which the investment adviser can promptly furnish the name of each client, and the current amount or interest of the client.
 - (d) Any books or records required by this section may be maintained by the investment adviser in a manner that the identity of any client to whom such investment adviser renders investment advisory services is indicated by numerical or alphabetical code or some similar designation.

(e) Every investment adviser subject to subsection (a) shall preserve the following records in the manner prescribed:

- (1) All books and records required to be made under the provisions of subsections (a) to (c)(1) (except for books and records required to be made under the provisions of subsection (a)(11) and (a)(16)), shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in the principal office of the investment adviser;
- (2) Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser of any predecessor, shall be maintained in the principal office of the investment adviser and preserved until at least three years after termination of the enterprise;
- (3) Books and records required to be made under the provisions of subsection (a)(11) and (a)(16) shall be maintained and preserved in an easily accessible place for a period of not less than five years, the first two years in the principal office of the investment adviser, from the end of the fiscal year during which the investment adviser last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media;
- (4) Books and records required to be made under the provisions of subsection (a)(17) through (a)(20), inclusive, shall be maintained and preserved in an easily accessible place for a period of not less than five years from the end of the fiscal year during which that last entry was made on such record, the first two years in the principal office of the investment adviser, or for the time period during which the investment adviser was registered or required to be registered in this State, if less; and
- (5) Notwithstanding other record preservation requirements of this section, the following records or copies shall be required to be maintained at the business location of the investment adviser from which the customer or client is being provided or has been provided with investment advisory services:
 - (A) Records required to be preserved under subsection (a)(3), (a)(7) through (a)(10), (a)(14) through (a)(19), (b), and (c); and

(B) The records or copies required under the provisions of subsection (a)(11) and (a)(16) which records or related records identify the name of the investment adviser representative providing investment advice from that business location, or which identify the business locations' physical address, mailing address, electronic mailing address, or telephone number. The records shall be maintained for the period described in subsection (e).

(f) An investment adviser subject to subsection (a), before ceasing to conduct or discontinuing business as an investment adviser shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section, and shall notify the commissioner in writing of the exact address where the books and records will be maintained during the period.

(g) (1) The records required to be maintained and preserved pursuant to this section may be immediately produced or reproduced by photographic film or, as provided in paragraph (2), on magnetic disk, tape, or other computer storage medium, and be maintained and preserved for the required time in that form. If records are produced or reproduced by photographic film or computer storage medium, the investment adviser shall:

- (A) Arrange the records and index the films or computer storage medium so as to permit the immediate location of any particular record;
- (B) Be ready at all times to provide, and promptly provide, any facsimile enlargement of film or computer printout or copy of the computer storage medium which the commissioner by its examiners or other representatives may request;
- (C) Store separately from the original one other copy of the film or computer storage medium for the time required;
- (D) With respect to records stored on computer storage medium, maintain procedures for maintenance and preservation of, and access to, records so as to reasonably safeguard records from loss, alteration, or destruction; and
- (E) With respect to records stored on photographic film, at all times have available for the commissioner's examination of its records facilities for immediate, easily readable projection of the film and for producing easily readable facsimile enlargements.

(2) Pursuant to paragraph (1) an adviser may maintain and preserve on computer tape or disk or other computer storage medium records which, in the ordinary course of the adviser's business, are created by the adviser on electronic media or are received by the adviser solely on electronic media or by electronic data transmission.

(h) For purposes of this section:

(1) "Investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client; and

(2) "Discretionary power" shall not include discretion as to the price at which or the time when a transaction is or is to be effected, if, before the order is given by the investment adviser, the client has directed or approved the purchase or sale of a definite amount of the particular security.

(i) Any book or other record made, kept, maintained, and preserved in compliance with rules 17a-3 (17 CFR section 240.17a-3) and 17a-4 (17 CFR section 240.17a-4) under the Securities Exchange Act, which is substantially the same as the book or other record required to be made, kept, maintained, and preserved under this section, shall be deemed to be made, kept, maintained, and preserved in compliance with this section.

(j) Every investment adviser that has its principal place of business in a state other than this State shall be exempt from the requirements of this section; provided that the investment adviser is licensed in that other state and is in compliance with that state's recordkeeping requirements. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-16)

§16-38-42 Advertisements. (a) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 485-25, HRS, for any investment adviser, directly or indirectly, to publish, circulate, or distribute any advertisement:

(1) Which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report, or other service rendered by the investment adviser; or

(2) Which refers, directly or indirectly, to past specific recommendations of the investment adviser which were or would have been profitable to any person; provided that this shall not prohibit an advertisement which sets out or offers to furnish a list of all recommendations made by the investment adviser within the immediately preceding period of not less than one year if the advertisement, and list if it is furnished separately:

- (A) State the name of each security recommended, the date and nature of each recommendation (e.g., whether to buy, sell, or hold), the market price at that time, the price at which the recommendation was to be acted upon, and the market price of each security as of the most recent practicable date; and
 - (B) Contain the following cautionary legend on the first page thereof in print or type as large as the largest print or type used in the body or text thereof: "It should not be assumed that recommendations made in the future will be profitable or will equal the performance of the securities in this list"; or
- (3) Which represents, directly or indirectly, that any graph, chart, formula, or other device being offered can in and of itself be used to determine which securities to buy or sell, or when to buy or sell them; or which represents directly or indirectly, that any graph, chart, formula, or other device being offered shall assist any person in making a decision as to which securities to buy, sell, or when to buy or sell them, without prominently disclosing in the advertisement the limitations thereof and the difficulties with respect to its use;
- (4) Which contains any statement to the effect that any report, analysis, or other service shall be furnished free or without charge, unless the report, analysis, or other service actually is or shall be furnished entirely free and without any condition or obligation, directly or indirectly.
- (b) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 485-25, HRS, for any investment adviser or federal covered adviser, directly or indirectly, to publish circulate, or distribute any advertisement that contains any untrue statement of a material fact, or which is otherwise false or misleading.
- (c) For purposes of this section, the term "advertisement" shall include any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers:
- (1) Any analysis, report, or publication concerning securities, or which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell;
 - (2) Any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell; or

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- (3) Any other investment advisory service with regard to securities. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-25)

SUBCHAPTER 12

INVESTMENT ADVISER REPRESENTATIVES

§16-38-48 Registration; generally. A person may be registered as an investment adviser representative under chapter 485, HRS, if the commissioner finds that the applicant is of good repute and otherwise satisfies the requirements of chapter 485, HRS, and this chapter. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-49 Registration; eligibility requirements. (a) An applicant, if a natural person, shall have attained the age of eighteen years.

(b) An applicant shall be appointed by either a registered investment adviser who shall state that the registered investment adviser believes the information in the application is true and complete or by a federal covered adviser that has made a notice filing with the commissioner.

(c) An investment adviser representative may not be registered with more than one investment adviser or federal covered adviser at any time. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-50 Registration; application. (a) An application for registration of an investment adviser representative shall be filed on Form U-4, which shall be filed with the commissioner through the IARD.

(b) The application shall be filed together with the following:

(1) A filing fee of \$50; and

(2) Proof that the applicant has passed the exam requirement as provided by section 16-38-51, or otherwise qualifies for exemption from the exam as specified in section 16-38-51.

(c) Additional exhibits or information not specifically required by the application may be submitted by the applicant.

(d) The commissioner may require the applicant to file additional information if such information is necessary for the commissioner to determine whether to approve or deny the application. In accordance with the provisions of section 16-38-4.5, any such additional information requested by the commissioner shall be requested in writing within sixty days of the commissioner's receipt of the application.

(e) The commissioner shall, in accordance with section 16-38-4.5, notify the applicant in writing within sixty days of receipt of the application of any deficiencies that must be completed by the applicant in order for the application to be deemed complete. These deficiencies may include, but are not limited to, requiring copies of the documents relating to the applicant's disciplinary history.

(f) The application of an investment adviser representative that has been on file for a period of sixty days after the applicant has received any request for additional information or deficiency notice from the commissioner pursuant to subsection (c) or (d) without the commissioner receiving a complete response to such request or notice, may be denied by the commissioner pursuant to section 485-15, HRS. The commissioner shall notify in writing the applicant and the investment adviser or federal covered adviser with which the applicant is affiliated of the denial and the reasons therefor.

(g) Within sixty days of receipt of a complete application, the commissioner shall notify an applicant in writing whether the application has been approved or denied. If the application was filed through the CRD, the written notification may be provided to the applicant through the CRD. Any application that has not been denied by the commissioner within sixty days of it being completed shall be deemed effective on the sixty-first day after it was deemed complete.

(h) Registrations of investment adviser representatives, including renewals, on or after July 1, 2001 shall be filed through the IARD. [Eff and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-51 Registration; examination requirements. (a) Examination requirements. An individual applying to be registered as an investment adviser representative shall provide the commissioner with proof of obtaining a passing score on one of the following examinations:

- (1) The Uniform Investment Adviser Law Examination (Series 65 examination); or
- (2) The General Securities Representative Examination (Series 7 examination) and the Uniform Combined State Law Examination (Series 66 examination).

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(b) An individual who has not been registered in any jurisdiction for a period of two consecutive years immediately preceding the date of the application shall be required to comply with the examination requirements of this section.

(c) Any investment adviser representative who fails to renew his or her registration for two or more consecutive years, or who has not registered for two or more consecutive years since passing a qualifying examination as approved by the commissioner, shall be required to apply as a new applicant and comply with the examination requirements of this section.

(d) Exemptions.

(1) Any individual who is registered as an investment adviser or investment adviser representative in any jurisdiction in the United States on the effective date of this rule shall not be required to satisfy the examination requirements for continued registration; provided that the commissioner may require additional examinations for any individual found to have violated any state or federal securities law.

(2) Waivers. The examination requirement shall not apply to an individual who currently holds one of the following professional designations:

- (A) Certified Financial Planner (CFP) awarded by the International Board of Standards and Practices for Certified Financial Planners, Inc.;
- (B) Chartered Financial Consultant (ChFC) awarded by the American College, Bryn Mawr, Pennsylvania;
- (C) Personal Financial Specialist (PFS) awarded by the American Institute of Certified Public Accountants;
- (D) Chartered Financial Analyst (CFA) awarded by the Institute of Chartered Financial Analysts;
- (E) Chartered Investment Counselor (CIC) awarded by the Investment Counsel Association of America, Inc.; or
- (F) Such other professional designation as the commissioner may by rule or order recognize.

(e) Notwithstanding any other provision to the contrary, the commissioner, by order, may waive the examination requirement if the commissioner determines that the examination is not necessary or appropriate in the public interest or for the protection of investors. [Eff and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-52 Registration; disclosure statements. Unless waived by the commissioner, every investment adviser representative of an investment adviser that is registered or required to be registered under chapter 485, HRS, shall, in accordance with the provisions of this section, furnish each advisory client or prospective advisory client with a written disclosure statement that is in compliance with the provisions of SEC rule 204-3 under the Investment Advisers Act of 1940 notwithstanding the fact that the investment adviser with which the representative is registered is not registered or required to be registered under the Investment Advisers Act of 1940. The delivery and updating of the disclosure statement required by this section shall be in accordance with the requirements of SEC rule 204-3. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-25)

§16-38-53 Registration; post-effective requirements. Every applicant for registration as an investment adviser representative and every registered investment adviser representative shall promptly file with the commissioner any and all amendments necessary to keep the information previously reported on the applicant's or registrant's Form U-4 current and accurate. If the Form U-4 being amended was filed with the commissioner through the IARD, any amendment to the Form U-4 may also be filed through the IARD. Upon the receipt of the amendment, the commissioner may request additional information from the applicant or registrant if the information is necessary to determine whether the commissioner should take any action to deny the applicant's application, or suspend or revoke the registrant's registration. [Eff and comp 10/12/85; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

§16-38-54 Registration; expiration, renewal, termination. (a) All registrations shall automatically expire on December 31 of each year, unless sooner terminated, and shall be renewed by an investment adviser pursuant to section 16-38-40 or by a federal covered adviser pursuant to section 16-38-33.5. An application for initial or renewal registration shall not be considered filed until the required fee and all required submissions have been received by the commissioner. Any registration of an investment adviser representative that has not been renewed by December 31 shall be terminated by the commissioner effective at 12:00 a.m., on December 31. An investment adviser representative whose registration has been terminated based upon a failure to timely renew such registration may apply for registration in accordance with the provisions of this subchapter. The investment adviser representative is under a continuing obligation

to update information required by Form U-4 as changes occur. An investment adviser representative and the investment adviser shall file promptly with the IARD any amendments to the representative's Form U-4. An amendment shall be considered to be filed promptly if the amendment is filed within thirty days of the event that requires the filing of the amendment.

(c) An investment adviser representative's registration may be terminated at any time prior to its expiration date by the investment adviser or federal covered adviser employing the investment adviser representative by filing a Form U-5 with the commissioner directly or through the IARD.

(d) An investment adviser representative's registration shall not be transferred. When a representative terminates an affiliation with the investment adviser or federal covered adviser with whom the representative is registered, and wishes to be employed by another investment adviser or federal covered adviser, a notice of termination shall be filed with the commissioner. The representative may then reapply for registration with another investment adviser or federal covered adviser by complying with the requirements of this subchapter.

(e) Termination of any investment adviser's registration or any federal covered adviser's notice filing for any reason shall automatically constitute cancellation of all investment adviser representatives registered thereunder.

(f) When an investment adviser representative ceases those activities of a representative, or the representative otherwise becomes ineligible to be registered, notice shall be promptly filed with the commissioner on Form U-5 by either the investment adviser representative, or the investment adviser or federal covered adviser with whom the representative is registered. Unless another date is indicated on the Form U-5, the termination of registration shall be effective upon the commissioner's receipt of such form. In no event shall Form U-5 be filed with the commissioner later than thirty days following the event or occurrence. [Eff and comp 10/12/85; am 4/4/87; am and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-14)

SUBCHAPTER 13

FINES AND PENALTIES

§16-38-58 Fines and penalties. Any fines and penalties imposed under this chapter shall be deposited into the compliance resolution fund. [Eff and comp

10/12/85; comp 4/14/03] (Auth: HRS §§485-2, 26-9) (Imp: HRS §§485-15, 485-21)

SUBCHAPTER 14

SMALL COMPANY OFFERINGS REGISTRATION

§16-38-59 Purpose. The purpose of this subchapter is to encourage investment in small businesses, and provide a method of registration for small companies offering securities to the public. The commissioner recognizes that small issuers raising small amounts of money face special problems not faced by issuers raising larger amounts, and that standards appropriate to registrations of larger offerings may become unduly burdensome when applied to registrations of small offerings. The registration method offered by this subchapter is intended to reduce the costs and burdens of raising capital for small business and to maximize the amount of offering proceeds available to the issuer for investment in the business, without sacrificing investor protection. Issuers eligible for this method of registration shall use the SCOR registration form as the disclosure document for the offering. [Eff and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-10, 485-24.5)

§16-38-60 Application of this chapter to SCOR registrations. (a) The provisions of subchapters 6, 7, and 8 shall apply to registrations under this subchapter; provided that section 16-38-11.1 relating to financial reports, section 16-38-11.7 relating to real estate investment trusts, and section 16-38-13 relating to SEC effective dates shall not apply.

(b) The commissioner reserves the right to apply this chapter (or any provision therein) to offerings under this subchapter if the commissioner determines that such application, even in the small business offering context, is necessary for the protection of investors. [Eff and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-10, 485-24.5)

§16-38-61 Availability. (a) SCOR is intended to allow small companies to conduct limited offerings of securities. SCOR uses a simplified offering format designed to provide adequate disclosure to investors concerning the issuer, the securities offered,

and the offering itself. Certain issuers may not be able to make adequate disclosure using the SCOR format and will, therefore, be unable to utilize SCOR.

(b) The commissioner finds that SCOR is generally unsuitable for the following issuers and programs:

- (1) Holding companies, companies whose principal purpose is owning stock in, or supervising the management of, other companies;
- (2) Portfolio companies, including, but not limited to, real estate investment trusts (as defined in section 16-38-11.7);
- (3) Issuers with complex capital structures;
- (4) Commodity pools;
- (5) Equipment leasing programs;
- (6) A "blind pool" or other offering for which the specific business to be engaged in or property to be acquired by the issuer cannot be specified; and
- (7) Real estate programs.

(c) These rules are available only to the issuer of the securities and not to any affiliate of that issuer or to any other person for resale of the issuer's securities.

(d) In addition, each of the following requirements shall be met:

- (1) The issuer shall be a corporation or centrally managed limited liability company organized under the law of the United States or Canada, or any state, province, or territory or possession thereof, or the District of Columbia, and have its principal place of business in one of the foregoing;
- (2) The issuer shall be required to engage in a business other than petroleum exploration or production or mining or other extractive industries;
- (3) The issuer shall not be a development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in merger or acquisition with an unidentified company or companies or other entity or person;
- (4) The offering price for common stock (and the exercise price, if the securities offered are options, warrants, or rights for common stock, and the conversion price, if the securities are convertible into common stock) shall be equal to or greater than one dollar per share. The offering price for common ownership interests in a limited liability company (and the exercise price, if the securities are options, warrants, or rights for common ownership interests, and the conversion price, if

the securities are convertible into common ownership interests) shall be equal to or greater than one dollar per unit of interest;

- (5) The aggregate offering price of the securities offered (within or outside this State) shall not exceed \$1,000,000 less the aggregate offering price of all securities sold within the twelve months before the start of and during the offering of the securities under SEC rule 504 in reliance on any exemption under section 3(b) of the Securities Act, in reliance on the exemption under section 3(a)(11) of the Securities Act, or in violation of section 5(a) of the Securities Act;
- (6) Commissions, fees, or other remuneration for soliciting any prospective purchaser in connection with the offering in this State are only paid to persons who, if required to be registered or licensed, the issuer believes, and has reason to believe, are appropriately registered or licensed in this State;
- (7) Financial statements shall be prepared in accordance with either U.S. or Canadian generally accepted accounting principles. If appropriate, a reconciliation note should be provided. If the issuer has not conducted significant operations, statements of receipts and disbursements shall be included in lieu of statements of income. Interim financial statements may be unaudited. All other financial statements shall be audited by independent certified public accountants; provided that if each of the following four conditions are met, such financial statements in lieu of being audited may be reviewed by independent certified public accountants in accordance with the Accounting and Review Service Standards promulgated by the American Institute of Certified Public Accountants or the Canadian equivalent:
 - (A) The issuer shall not have previously sold securities through an offering involving the general solicitation of prospective investors by means of advertising, mass mailing, public meetings, "cold call" telephone solicitation, or any other method directed toward the public;
 - (B) The issuer has not been previously required under federal, state, provincial, or territorial securities laws to provide audited financial statements in connection with any sale of its securities;
 - (C) The aggregate amount of all previous sales of securities by the issuer (exclusive of debt financing with banks and similar commercial lenders) shall not exceed U.S. \$1,000,000; and

(D) The amount of the present offering does not exceed U.S. \$1,000,000.

(e) SCOR registration shall not be available to investment companies subject to the Investment Company Act of 1940, nor is it available to issuers subject to the reporting requirements of section 13 or section 15(d) of the Securities Exchange Act. [Eff and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-10, 485-24.5)

§16-38-62 Disqualification from use of SCOR registration. (a) SCOR registration shall not be available for securities of any issuer if that issuer or any of its officers, directors, ten per cent shareholders, promoters or any selling agents of the securities to be offered, or any officer, director, or partner of such selling agent:

- (1) Has filed an application for registration which is the subject of a currently effective registration stop order entered pursuant to any federal, state, or provincial securities law within five years prior to the filing of the SCOR registration application;
- (2) Has been convicted within five years prior to the filing of the SCOR registration application of any felony or misdemeanor in connection with the offer, purchase, or sale of any security or any felony involving fraud or deceit; including but not limited to forgery, embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud;
- (3) Is currently subject to any federal, state, or provincial administrative enforcement order or judgment entered by any state or provincial securities commissioner or the Securities and Exchange Commission within five years prior to the filing of the SCOR registration application;
- (4) Is subject to any federal, state, or provincial administrative enforcement order or judgment in which fraud or deceit, including but not limited to making untrue statements of material facts and omitting to state material facts, was found and the order or judgment was entered within five years prior to the filing of the SCOR registration application;
- (5) Is subject to any federal, state, or provincial administrative enforcement order or judgment which prohibits, denies, or revokes the use of any exemption from registration in connection with the offer, purchase, or sale of securities;
- (6) Is currently subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminarily, or permanently restrains or enjoins such party from engaging in or continuing any conduct or practice in connection with the purchase or sale of any

security, or involving the making of any false filing with any state or with the SEC, entered within five years prior to the filing of the SCOR registration application; or

- (7) Has violated the law of a foreign jurisdiction governing or regulating any aspect of the business of securities or banking or, within the past five years, has been the subject of an action of a securities regulator of a foreign jurisdiction denying, revoking, or suspending the right to engage in the business of securities as a dealer, agent, or investment adviser or is the subject of an action of any securities exchange or self-regulatory organization operating under the authority of the securities regulator of a foreign jurisdiction suspending or expelling such person from membership in the exchange or self-regulatory organization.

(b) The prohibitions of subsection (a)(1) through (3) and (a)(5) shall not apply if the person subject to the disqualification is duly licensed or registered to conduct securities related business in the state or province in which the administrative order or judgment was entered against the person, or if the dealer employing the person is licensed or registered in this State and the Form BD filed in this State discloses the order, conviction, judgment, or decree relating to the person.

(c) No person disqualified under this section may act in any capacity other than that for which the person is licensed or registered. Any disqualification caused by this section is automatically waived if the jurisdiction which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that registration be denied. [Eff and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-10, 485-24.5)

§16-38-63 Agreement by registrant on splits and dividends of stock or ownership interests. By filing for SCOR registration in this State, the registrant agrees that it shall not split its common stock or common ownership interests, or declare a stock or ownership interest dividend, for two years after the effectiveness of the registration. [Eff and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-10, 485-24.5)

§16-38-64 Documents to be filed with commissioner by SCOR registrant. In addition to filing a properly completed SCOR form and S-1, applicants for SCOR registration shall file the following exhibits with the commissioner:

- (1) Form of selling agency agreement;

- (2) The issuer's articles of incorporation, articles of organization, or other charter documents and all amendments thereto;
- (3) The issuer's bylaws or operating agreement, as amended to date;
- (4) Copies of any resolutions by directors setting forth terms and provisions of capital stock to be issued or by managers or managing members setting forth terms and provisions of capital ownership interest to be issued;
- (5) Any indenture, form of note, or other contractual provision containing terms of notes or other debt, or of options, warrants, or rights to be offered;
- (6) Specimen of security or ownership interest certificate to be offered (including any legend restricting resale);
- (7) Consent to service of process accompanied by appropriate corporate or company resolution;
- (8) Copy of all advertising or other materials directed to or to be furnished investors in the offering;
- (9) Form of escrow agreement for escrow of proceeds;
- (10) Consent to inclusion in disclosure document of accountant's report;
- (11) Consent to inclusion in disclosure document of any tax advisor's opinion or description of tax consequences;
- (12) Consent to inclusion in disclosure document of any evaluation of litigation or administrative action by counsel;
- (13) Form of any subscription agreement for the purchase of securities in this offering;
- (14) Opinion of an attorney licensed to practice in a state or territory of the United States that the securities to be sold in the offering have been duly authorized and when issued upon payment of the offering price will be legally and validly issued, fully paid, and nonassessable and binding on the issuer in accordance with their terms;
- (15) Schedule of residence street addresses of officers, directors, and principal stockholders or managers, managing members, and principal members; and
- (16) Agreement by the registrant that the registrant shall not split its common stock or common ownership interests, or declare a stock or ownership interest dividend, for two years after the effectiveness of the registration.
[Eff and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §§485-10, 485-24.5)

SUBCHAPTER 15

NOTICE FILING REQUIREMENTS FOR INVESTMENT
COMPANY SECURITIES

§16-38-65 Notice filing requirements for investment company securities.

(a) The notice filing requirements pursuant to section 485-4.5, HRS, for a federal covered security that is issued by an investment company registered under the Investment Company Act of 1940 shall consist of:

- (1) A form NF or a copy of the issuer's federal registration statement;
- (2) A consent to service of process, unless one has previously been filed with the commissioner; and
- (3) A fee of \$200 per portfolio or series.

(b) Except as otherwise provided herein, a notice filing shall be effective commencing upon the later of its receipt by the commissioner or the effectiveness of the offering with the SEC and continuing until two months after the issuer's fiscal year end. A notice filing may be renewed prior to its expiration by filing with the commissioner a current Form NF or a copy of the issuer's most recent federal registration statement together with a renewal fee of \$50 per portfolio or series. A renewed notice filing shall take effect upon the expiration of the previous notice filing. The initial notice filing by a unit investment trust shall be effective indefinitely.

(c) A notice filing need not be submitted for a federal covered security that is exempt from the filing requirements of section 485-4.5, HRS, pursuant to section 485-4 or 485-6, HRS. [Eff and comp 4/14/03] (Auth: HRS §485-2) (Imp: HRS §485-10)

Amendments to and compilation of Chapter 16-38, Hawaii Administrative Rules, on the Summary page dated January 22, 2003, were adopted on January 22, 2003, following a public hearing held on the same date, after public notices were given in the Honolulu Star Bulletin, The Hawaii Tribune-Herald, West Hawaii Today, Kauai Publishing Company and The Maui News on December 13, 2003.

These rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

/s/ Mark E. Recktenwald
MARK E. RECKTENWALD, Director
Commerce and Consumer Affairs

APPROVED AS TO FORM: Date 2/19/03

/s/ Rodney J. Tam
Deputy Attorney General

APPROVED: Date 4/2/03

/s/ Linda Lingle
LINDA LINGLE
Governor
State of Hawaii

April 3, 2003
Filed

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

Amendments to Chapter 16-38
Hawaii Administrative Rules

January 22, 2003

SUMMARY

1. §§16-38-1 through 16-38-4 are amended.
2. §16-38-4.5 is added.
3. §§16-38-5.1 through 16-38-5.6 are amended.

4. §§16-38-6.1 through 16-38-6.5 are amended.
5. §§16-38-7 through 16-38-9 are amended.
6. §§16-38-11.3 through 16-38-11.9 are amended.
7. §§16-38-15 through 16-38-17 are amended.
8. §§16-38-18 and 16-38-19 are amended.
9. §§16-38-21 through 16-38-24 are amended.
10. §16-38-26 is amended.
11. §§16-38-28 and 16-38-29 are amended.
12. §16-38-33 is amended.
13. §16-38-33.5 is added.
14. §§16-38-34 through 16-38-42 are amended.
15. §§16-38-48 through 16-38-54 are amended.
16. A new subchapter 14 (§§16-38-59 through 16-38-64) is added.
17. A new subchapter 15 (§16-38-65) is added.
18. Chapter 38 is compiled.

This material can be made available for individuals with special needs. Please call the Division Secretary, Business Registration Division, DCCA, at 586-2744, to submit your request.