

### USA, Hawaii

Prepared by Lex Mundi member firm,  
Case Lombardi & Pettit

This guide is part of the Lex Mundi Guides to Doing Business series which provides general information about legal and business infrastructures in jurisdictions around the world. View the complete series at: [www.lexmundi.com/GuidestoDoingBusiness](http://www.lexmundi.com/GuidestoDoingBusiness).

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries. Through close collaboration, our member firms are able to offer their clients preferred access to more than 21,000 lawyers worldwide – a global resource of unmatched breadth and depth.

**Lex Mundi – the law firms that know your markets.**

---

CASE LOMBARDI & PETTIT

A LAW CORPORATION  
HONOLULU, HAWAII



*Established 1888*

**GUIDE TO DOING BUSINESS  
IN HAWAII**

Member

**LexMundi**  
World Ready

©2014 Case Lombardi & Pettit  
Pacific Guardian Center 2600 Mauka Tower 737 Bishop Street Honolulu, Hawaii 96813  
Telephone (808) 547-5400 Fax (808) 523-1888 Email: [info@caselombardi.com](mailto:info@caselombardi.com)  
[www.caselombardi.com](http://www.caselombardi.com)



---

## ABOUT CASE LOMBARDI & PETTIT

Case Lombardi & Pettit, A Law Corporation, is one of Hawaii's oldest and most established law firms, tracing its roots back to 1888. Case Lombardi & Pettit is a commercial law firm providing real estate, business, employee benefits, bankruptcy, litigation, and dispute resolution services. The firm provides its attorneys and clients with international legal resources and expertise through its membership in Lex Mundi, the world's leading association of independent law firms with more than 160 member firms worldwide.

The firm is a member of the Hawaii Chamber of Commerce and the Honolulu Executives Association, a local network organization for key players in the business community.

Case Lombardi & Pettit is known locally and nationally as one of Hawaii's premier law firms. Clients commend the firm for its attentiveness, accessibility and superior legal work. Attorneys have consistently been recognized by Chambers & Partners, Best Lawyers In America, Martindale Hubbell and other prominent lawyer referral organizations.

To assure the highest quality of service to its clients, the firm's attorneys, legal assistants and support staff are organized into client service groups. The firm presently has three client service groups, which are: business, bankruptcy, estate planning, probate and taxation; litigation and dispute resolution; and real estate.

**Business, Bankruptcy, Estate Planning, Probate & Taxation:** Our business attorneys assist clients in the formation and operation of business entities; prepare profit-sharing, pension and other employee benefit plans; assist clients in addressing the opportunities and challenges faced by an ongoing business; and provide advice regarding transactions governed by the Uniform Commercial Code, mergers, acquisitions, dissolutions, asset purchases, stock transfers and financings. Our bankruptcy practice covers all aspects of creditor-debtor relationships ranging from foreclosure, receivership, collection and enforcement of judgments in state and federal court to reorganization and liquidation in bankruptcy court. The firm also represents secured creditors, unsecured creditor committees and landlords in all aspects of bankruptcy proceedings. The firm has a team of creditor counsel experienced in negotiating workouts and restructurings outside of bankruptcy court. Drawing upon our experience in the laws of income, gift, estate, partnerships, corporations, and other business entities, the goal of the estate planning, probate and taxation practice group is



to design and implement comprehensive business and estate plans and analyze and structure a variety of sophisticated transactions that are designed to fit the client's particular circumstances and concerns.

**Real Estate:** Our areas of expertise include the structuring of real estate acquisitions and sales; commercial financing, including complex construction and syndicated loans; loan restructuring; real estate sales and administration; office and retail leasing; condominium and resort development; community association formation and administration; residential financing; and land use, zoning and entitlement matters. We represent landowners, purchasers, investors and lenders in the acquisition, sale and financing of all types of real estate, including undeveloped land, hotels, shopping centers, office buildings and residential developments.

**Litigation & Dispute Resolution:** We represent clients in real estate, business, construction, tort, and commercial litigation matters. Our lawyers are committed to efficient dispute resolution through mediation, arbitration, negotiated settlement, and, if necessary, the use of adversary court proceedings.

The firm's clients include international, national and local corporations and businesses, financial institutions, trusts and non-profit organizations, real estate developers, sole proprietors and individuals.

For more information about Case Lombardi & Pettit, please visit us at: [www.caselombardi.com](http://www.caselombardi.com).

Or contact:

Nancy J. Youngren, Esq.  
Michael L. Lam, Esq.

737 Bishop Street  
Mauka Tower, Suite 2600  
Pacific Guardian Center  
Honolulu, Hawaii 96813  
Tel: (808) 547-5400  
Fax: (808) 523-1888  
Internet E-mail: [Info@caselombardi.com](mailto:Info@caselombardi.com)



---

## DISCLAIMER

---

**Please note:** The information contained in this publication is for informational purposes only and discusses certain laws\* application to doing business in Hawai'i. This publication is not intended to provide legal advice and does not create an attorney-client relationship. It should not be relied upon in any specific factual or legal situation as it does not cover all laws and regulations that may apply in all circumstances. You should seek independent professional advice from a lawyer authorized to practice in Hawai'i before proceeding to invest or conduct business in Hawai'i.

---

**CIRCULAR 230 DISCLOSURE:** Pursuant to Regulations Governing Practice Before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

---

\*References to the Hawaii Revised Statutes ("HRS") are current through the 2014 Hawai'i State Legislature

---

The Hawaiian language uses diacritical markings. One such marking is the 'okina which is a glottal stop. Although the State of Hawai'i encourages the use of Hawaiian diacritical markings, the use of the 'okina within this guide is limited.



---

---

## TABLE OF CONTENTS

I. GEOGRAPHY.....	1
A. Geography, Location and Climate .....	1
B. Cultural/Ethnic Background.....	1
C. Government.....	2
II. BUSINESS ENTITIES.....	2
A. Administrative Agency and Forms.....	2
B. Corporations.....	3
C. Partnerships .....	4
D. Sole Proprietorship.....	5
E. Limited Liability Company.....	5
F. Joint Venture .....	6
G. Nonprofit Corporations .....	6
H. Branch Office.....	6
I. Registered Agents.....	6
III. TRADE REGULATIONS .....	6
A. Federal Antitrust Law .....	6
B. Regulation of International Trade and Investment.....	7
C. State Considerations .....	12
IV. TAXATION.....	13
A. Federal Taxation .....	13
B. State Taxation .....	13
V. LABOR AND EMPLOYMENT .....	15
A. Federal Considerations .....	15
B. State Considerations .....	20
VI. ENVIRONMENTAL LAW .....	23
A. Federal Considerations .....	23
B. State Considerations .....	24
VII. INTELLECTUAL PROPERTY.....	33
A. Federal Law.....	33
B. State Considerations .....	40
VIII. DISPUTE RESOLUTION.....	41
A. Federal Court System .....	41
B. State Court System .....	42



---

IX. FINANCIAL AND SECURITIES MATTERS .....	44
A. Tax Exempt Financing.....	44
B. Commercial Banking .....	44
C. Securities.....	45
X. REAL ESTATE .....	46
A. Ownership .....	46
B. Concurrent Ownership.....	47
C. Spousal Rights .....	47
D. Purchase and Sale Transactions.....	48
E. Closing and Costs of Real Estate Transfer.....	48
F. Foreclosure .....	49
G. Land Contracts .....	49
H. Easements .....	50
I. Land Use and Zoning .....	50
J. Leases.....	51
XI. MISCELLANEOUS .....	51
A. Requirements for Qualification to Do Business .....	51
B. Licensing and Regulatory Requirements.....	52
C. Applicability of State Usury Laws .....	54
D. Notice of Business Activities.....	54
E. Business Name Registration Requirements .....	54



## I. GEOGRAPHY

### A. Geography, Location and Climate

Hawai'i is an archipelago comprised of islands, atolls, shoals and reefs stretching over 1,523 miles in the north central Pacific Ocean. Hawai'i is about 2,400 miles west-southwest of San Francisco, California. The majority of the state's land mass and population is found on seven of its eight main islands: O'ahu, Hawai'i, Maui, Moloka'i, Lana'i, Kaua'i and Ni'ihau. The eighth island, Kaho'olawe is uninhabited. Offshore of these main islands are the Northwestern Hawaiian Islands: Kure Atoll, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisianski, Pearl and Hermes, Midway and Niihoa. The State of Hawai'i maintains jurisdiction over all islands except Midway which is administered by the United States Navy.

Extinct, dormant and active volcanoes dominate our landscape as evidenced by our tallest mountains Mauna Kea and Mauna Loa on the Island of Hawai'i, world famous Diamond Head on the Island of O'ahu, and Haleakala on the Island of Maui. These volcanic mountains and ranges, influenced by the climate, sedimentation and erosion over millions of years, have resulted in our sweeping sea cliffs, waterfalls, plains, harbors, bays and beaches. The Island of Hawai'i is also home to one of the world's most active volcanoes, Kilauea.

Hawai'i's climate is very comfortable with an annual average temperature of 78 to 85 degrees Fahrenheit. Hawai'i has two seasons: "summer" (between May and October) and "winter" (between November and April). During the summer the sun is directly overhead. The weather is warmer and drier with prevailing northeast trade winds. In winter, the sun is to the south and the trade winds are interrupted by other winds bringing intervals of clouds and rain.

### B. Cultural/Ethnic Background

Hawai'i is the "melting pot of the Pacific" where our dynamic people have learned to live, work and play together in harmony. Hawai'i is diverse racially with no ethnic group in the majority. Caucasians, Asians, Pacific Islanders and Native Hawaiians are the largest categories followed by African Americans, American Indians, Alaska Natives and others. In the 2010 census, 24 percent of the state's population considered themselves as multi-racial.

Hawai'i's culture is as diverse as its people. Throughout the year, the various ethnic groups share and celebrate their unique heritage by staging festivals, parades and gatherings of food, song and dance. Other festivals feature the arts, films and language.



Hawai'i is the home of the Honolulu Youth Symphony, the Hawaii Opera Theater, other theatrical and literary guilds, hula halaus, ballet and dance groups. As Hawai'i is the cross roads of the Pacific, musicians, shows and performing artists often include Hawai'i in their Asia and Pacific tours. Local musicians are enjoyed by residents and visitors alike in our many clubs and venues.

Among the many attractions Hawai'i has to offer are the Hawaii State Art Museum, Bishop Museum, Honolulu Botanical Gardens, Lyon Arboretum, Mission Houses Museum, The Contemporary Museum, the Honolulu Academy of Arts, Hanuama Bay Nature Center, Haleakala National Park and Hawaii Volcanoes National Park, Pearl Harbor and the Arizona Memorial, The USS Missouri, Punchbowl National Cemetery of the Pacific, and Iolani Palace.

### C. Government

When doing business in the State of Hawai'i it is important to note that there are only two tiers of Hawaiian government--State and County. The State government is composed of the executive branch, the legislative and the judiciary. State government is unusually centralized with the Governor and agencies overseeing functions of government often allocated to municipalities in other states. (For a description of Hawai'i State departments and agencies visit: <http://www.ehawaii.gov>.) The state legislature, consisting of the House of Representatives and Senate, is in session each January through May. (See: <http://www.capitol.hawaii.gov/>) The state's judiciary (<http://www.courts.state.hi.us/>) is comprised of the district courts, circuit courts, land and tax appeals courts, intermediate court of appeals and a supreme court.

There are four counties: The City and County of Honolulu (Island of O'ahu and most of the Northwestern Hawaiian Islands), Maui County (Islands of Maui, Moloka'i, Lana'i and Kaho'olawe), Kaua'i County (Island of Kaua'i) and Hawai'i County (Island of Hawai'i). Each county is a separate entity with a mayor and county council. (See: <http://www.honolulu.gov>, <http://www.co.maui.gov>, <http://www.kauai.gov>, <http://co.hawaii.hi.us/>)

## II. BUSINESS ENTITIES

### A. Administrative Agency and Forms

1. Administrative Agency. Corporations, partnerships, limited liability companies, limited liability partnerships, limited partnerships and all other Hawai'i entities are required to register and file various reports with the Department of Commerce and Consumer Affairs (the "DCCA"), Business Registration Division ("BREG"), located in the King Kalakaua Building at 335 Merchant Street, Room 201, Honolulu, HI, 96813.



2. Forms. Forms for the creation of these business entities may be obtained from the DCCA's website at [www.businessregistrations.com](http://www.businessregistrations.com).

B. Corporations. The Hawaii Business Corporation Act (the "Act") controls the formation, operation, and dissolution of Hawai'i corporations. As a general rule, the Act follows the Model Business Corporation Act. The Act can be found at Chapter 414 Hawaii Revised Statutes ("HRS").

1. Application Process. A Hawai'i corporation is formed by filing Articles of Incorporation with the Director of the DCCA along with a \$50 filing fee. There is also an additional \$1.00 state archives fee.

2. Organizational Documents. The Articles of Incorporation must include: the corporate name; the number of shares the corporation is authorized to issue; the mailing and street addresses of the corporation's initial registered office; the name and address of its initial registered agent; and the name and address of each incorporator. The Articles of Incorporation may include any other information that is permissible under the Act. The initial board of directors of the corporation may be appointed in the Articles or elected later at an organizational meeting at the call of a majority of the incorporators. The organizational meeting may take place out of state, and a meeting is not required at all if the actions that would have been taken at a meeting are consented to in writing by the incorporators.

3. Bylaws. The Bylaws contain detailed provisions for governance of the corporation including, but not limited to, meetings of shareholders, meetings of directors, election and authority of officers, and indemnification of officers and directors. They may contain any provision for managing and regulating the corporation's business affairs so long as it is not inconsistent with the law or the Articles of Incorporation.

4. Share Capital. The board of directors may issue shares of stock for consideration consisting of tangible or intangible property of benefit to the corporation including cash, promissory notes, services performed, contracts for services to be performed and other securities of the corporation. Unless the Articles or Bylaws provide otherwise, a corporation may issue some or all of the shares of any or all classes or series without certificates.

5. Meetings of Shareholders. The Act provides for annual and special meetings of the shareholders. Shareholders may also act by unanimous written consent in lieu of a meeting. The corporation is required to give notice to the shareholders of the date, time and place of each annual and special shareholders' meeting no fewer than ten nor more than sixty days before the date of the meeting. Notice of a special meeting of the shareholders must include a description of the



purpose or purposes for which the meeting is called. A shareholder may waive the notice requirement either in writing or by participating at the meeting. A special meeting of the shareholders may be called by the board of directors or shareholders representing at least ten percent of all votes entitled to be cast on any issue proposed to be considered at the meeting.

6. Directors. The Act requires each corporation to maintain a board of directors, consisting of one or more individuals, unless there is a shareholder's agreement that eliminates the board of directors. Directors are elected to serve one year terms unless the corporation elects to utilize staggered terms. The directors may act by holding meetings or through unanimous written consent. Directors do not have to be notified of regular meetings. However, directors must be given at least two days' notice of special meetings unless otherwise provided in the Articles or the Bylaws.

7. Officers. A corporation has the officers designed in its Bylaws or by the board of directors. Officers must be natural persons.

8. Merger or Share Exchange. The Act provides for mergers and share exchanges which as a general rule must be recommended by the board of directors and approved by the shareholders. A shareholder is entitled to dissent from and obtain payment of the fair value of the shareholder's shares in the event of these corporate actions.

9. Annual Corporate Report. Hawai'i corporations must file a corporate report with the DCCA every year. These may be filed electronically through the website [www.ehawaii.gov/annuals](http://www.ehawaii.gov/annuals). Failure to file a corporate report will ultimately lead to administrative dissolution of the corporation. Such a dissolution will typically have adverse consequences under both state (loss of limited liability protection) and federal law (taxable liquidation).

### C. Partnerships

1. General Partnership. A Hawai'i partnership is governed by the Hawaii Partnership Act which can be found at Chapter 425 HRS. A partnership is defined as the association of two or more persons to carry on, as co-owners, a business for profit, whether or not the persons intend to form a partnership. A Registration Statement for a general partnership shall be filed with the Director of the DCCA within 30 days after the partnership is formed. All partners are jointly and severally liable for the debts and obligations of the partnership.

2. Limited Liability Partnership. Limited liability partnerships are governed by the Hawaii Partnership Act, Chapter 425 HRS. The partnership which is registered with the DCCA may become a limited liability partnership by filing a



Statement of Qualification with the Director of the DCCA. An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership, and the partners are not personally liable.

3. Limited Partnership. Limited partnerships are governed by the Uniform Limited Partnership Act which can be found at Chapter 425E HRS. A limited partnership is a partnership formed by two or more persons, having as members one or more general partners and one or more limited partners. Limited partners are passive investors who are not bound by the obligations of the partnership and who are prohibited from participating in the management of the partnership. A limited partnership is formed by filing a Certificate of Limited Partnership with the Director of the DCCA.

4. Limited Liability Limited Partnership. With the consent of each general partner, the Certificate of Limited Partnership may be amended to state that the limited partnership is a limited liability limited partnership. An obligation of a limited partnership incurred while the limited partnership is a limited liability limited partnership, whether arising in contract, tort or otherwise, is solely the obligation of the limited partnership and the general partners are not personally liable.

D. Sole Proprietorship

A sole proprietorship is a business owned and controlled by one person. A sole proprietorship may be formed without any expense or formality of organization. A sole proprietorship is not an entity distinct from the owner, but may be operated under a trade name. The owner is individually responsible for the obligations of the business.

E. Limited Liability Company

Limited liability companies (LLCs) are governed by the Hawaii Limited Liability Company Act which can be found at Chapter 428 HRS. An LLC combines the pass-through tax treatment of a partnership with the limited liability of a corporation. Organizing an LLC requires the filing of Articles of Organization with the DCCA. Owners of an LLC are referred to as members. Management of the LLC may be vested in either the members or in the managers. The rights and obligations of the members should be set forth in an operating agreement. As a general rule, an operating agreement should at least provide for the following: allocations of profit and loss; distributions; management; liquidation; and the members' ability to transfer their individual interests in the LLC.



#### F. Joint Venture

Joint ventures are not a statutory form of organization in Hawai'i. A joint venture, sometimes called a "Hui" in Hawai'i, is legally a partnership and must be registered as such.

#### G. Nonprofit Corporations

Nonprofit corporations are governed by the Hawaii Nonprofit Corporation Act which can be found at Chapter 414D HRS. Articles of Incorporation must be filed with the DCCA to create a nonprofit corporation. The Articles of Incorporation must set forth the name of the nonprofit corporation, the name and address of the initial registered agent, the nonprofit corporation's principal address, the name and address of the incorporator and whether or not the nonprofit corporation will have members.

#### H. Branch Office

A branch office is a location other than the principal business office where a business operates. As a general rule, any form of Hawai'i business entity can operate one or more branch offices.

#### I. Registered Agents

Business entities are required to have a registered agent in Hawai'i pursuant to Chapter 425R HRS, which adopted the Model Registered Agents Act. The registered agent is the person or office designated to receive official state correspondence and notice if the corporation is served with a lawsuit. The registered agent must be either (1) a resident individual whose business office is the same as the registered office or (2) a corporation with authority to transact business in Hawai'i, having a business office identical with the registered office.

### III. TRADE REGULATIONS

#### A. Federal Antitrust Law

The antitrust laws of the United States are primarily reflected in five federal statutes: the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Act.

1. The Sherman Antitrust Act of 1890. The Sherman Act is divided into two primary sections. Section 1 prohibits contracts, combinations, and conspiracies made in restraint of trade. Section 2 prohibits unilateral and combined conduct that monopolizes or attempts to monopolize trade. Under the Sherman Act, some restraints



are "per se" unreasonable (such as price-fixing agreements between competitors) and others are subject to analysis under a "rule of reason" (such as some restrictions placed on a distributor by a manufacturer). Restraints subject to the "per se" rule are never permitted, while those governed by the "rule of reason" test will be evaluated on a case-by-case basis.

2. The Clayton Act of 1914. The Clayton Act prohibits certain specific anticompetitive activities. For example, the Act prohibits some corporate mergers, exclusive dealing contracts, and agreements under which one product is sold subject to the requirement that the purchaser also buy another product from the seller (known as a "tying" arrangement).

3. The Robinson-Patman Act of 1936. The Robinson-Patman Act prohibits a seller from discriminating (or inducing others to discriminate) among competing purchasers in the price charged for commodities "of like grade and quality." While the Act focuses on price discrimination, it also addresses other concerns such as discriminatory advertising allowances.

4. The Federal Trade Commission Act. The FTC Act declares unlawful "unfair methods of competition" and "unfair or deceptive acts or practices."

5. The Hart-Scott-Rodino Antitrust Improvements Act of 1976. The Hart-Scott-Rodino Act requires that, under certain circumstances, a company proposing to merge with or acquire another company must give prior notice of the proposed acquisition to the Federal Trade Commission and the Justice Department. Failure to report may result in very substantial fines.

**Enforcement:** Private individuals and corporations may bring lawsuits under the Sherman Act, the Clayton Act and the Robinson-Patman Act. Remedies may include injunctive relief, treble damages and attorneys' fees. The government may enforce the Sherman Act through criminal prosecutions and civil suits. In addition, the government may enforce the Clayton Act and the Robinson-Patman Act through the FTC or the Justice Department. Only the government can enforce the Federal Trade Commission Act and the Hart-Scott-Rodino Act.

#### B. Regulation of International Trade and Investment.

Foreign investment in the U.S. and other international commercial activities involving U.S. entities are subject to a number of U.S. statutes and related regulations. The following discussion outlines some of the more important aspects of these laws which might be relevant to someone investing in or trading with entities located in the U.S.



1. Restrictions on Foreign Investment. Under a statutory provision commonly referred to as the Exon-Florio Amendment (Section 721 of Title VII of the Defense Production Act of 1950, as added by Section 5021 of the Omnibus Trade and Competitiveness Act of 1988), the President has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons which could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to the national security of the U.S. Congress has indicated that the term "national security" is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

The statute sets out a timetable for investigations of transactions which can take up to 90 days to complete. The President or his designee has 30 days from the date of receipt of written notification of a proposed (or completed) transaction to decide whether to undertake a full-scale investigation of the transaction. The President has delegated the authority to make investigations pursuant to the Exon-Florio Amendment to the Committee on Foreign Investment in the U.S. ("CFIUS"), an interagency committee made up of representatives of various executive branch agencies. Notifications of transactions are not mandatory and may be made by one or more parties to a transaction or by any CFIUS member agency.

If at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete an investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days in which to decide whether there is credible evidence that leads the President to believe that the foreign interest exercising control might take action to impair the national security. If the President makes such a determination, Exon-Florio empowers the President to take any action which the President deems appropriate to suspend or prohibit the transaction, including requiring divestment by the foreign entity if the transaction has already been consummated.

U.S. law also places certain restrictions on acquisitions of businesses which require a facility security clearance in order to perform contracts involving classified information. Under Department of Defense regulations, foreign ownership may cause the Department to revoke a security clearance unless certain steps are taken to reduce the risk that a foreign owner will obtain access to classified information (DOD5220.22-R). Assuming that a foreign owner will be in a position to "effectively control or have a dominant influence over the business management of the U.S. firm," the Department of Defense may require, as a condition to continuation of the security clearance, that the foreign owner establish a voting trust agreement, a proxy agreement or a "special security agreement" approved by the Department of Defense and designed



to preclude the disclosure of classified information to the foreign owner or other foreign interests.

2. Reporting Requirements for Foreign Direct Investment. All foreign investments in a U.S. business enterprise which result in a foreign person owning a 10% or more voting interest (or the equivalent) in that enterprise are required to be reported to the Bureau of Economic Analysis, a part of the U.S. Department of Commerce. Pursuant to the International Investment and Trade in Services Survey Act (22 U.S.C. §§ 3101-3108) and the regulations promulgated thereunder (15 C.F.R. § 806), such reports must be made within 45 days after the investment transaction. Depending on the site of the entity involved, quarterly, annual and quintennial reports may be required thereafter.

3. The International Investment and Trade in Services Survey Act. The International Investment and Trade in Services Act ("IISA" or the "Act"), passed in 1976, authorizes the President to collect information and conduct surveys concerning the nature and amount of international investment in the U.S. The IISA's primary function is to provide the federal government with the information necessary to formulate an informed national policy on foreign investments in the U.S. It is not intended to regulate or dissuade foreign investment but is merely a tool used to obtain the data necessary to analyze the impact of such investments on U.S. interests.

Under the IISA, international investments are divided into two classifications – direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated the power to collect data on direct investments to the Bureau of Economic Analysis ("BEA"), a part of the Department of Commerce, and on portfolio investments to the Department of the Treasury.

A "foreign person" is any person who resides outside of the U.S. or is subject to the jurisdiction of a country other than the U.S. A "direct investment" is defined as the ownership or control, directly or indirectly, by one person of 10% or more of the voting interests in any incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise. Because the IISA further defines "business enterprise" to include any ownership in real estate, any foreign investor's direct or indirect ownership of U.S. real estate constitutes a "direct investment" and falls within the requirement that reports be filed with the BEA.

Unless an exemption applies, a report on Form BE-605 must be filed with the BEA for the quarter in which the acquisition or establishment took place. Reports are due within thirty (30) days of the end of the quarter. The form collects certain financial and operating data about the investment, the identity of the acquiring entity and certain information about the ultimate beneficial owner.



4. The Agricultural Foreign Investment Disclosure Act of 1978. The Agricultural Foreign Investment Disclosure Act ("AFIDA" or the "Act") of 1978 requires all foreign individuals, corporations and other entities to report holdings, acquisitions and dispositions of U.S. agricultural land occurring on or after February 1, 1979. The Act contains no restrictions on foreign investment in U.S. agricultural land and is aimed only at gathering reliable data from reports filed with the Secretary of Agriculture to determine the nature and magnitude of this foreign investment. Unlike the reports filed under the International Investment Security Act of 1976, reports filed under AFIDA are not confidential but are available for public inspection.

For the purposes of the Act, a "foreign person" is (i) any individual who is not a citizen or national of the U.S. and who is not lawfully admitted to the U.S.; (ii) a corporation or other legal entity organized under the laws of a foreign country; and (iii) a corporation or other legal entity organized in the U.S. in which a foreign entity, either directly or indirectly, holds 5% or more of an interest. The definition of "agricultural land" is any land in the U.S. which is used for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form ASCS-153 to the Secretary of Agriculture any time he holds, acquires or transfers any interest, other than a security interest, in agricultural land. The report requires rather detailed information concerning such matters as the identity and country of organization of the owning entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. In addition, the Secretary of Agriculture may require the identification of each foreign person holding more than a 5% interest in the ownership entity.

5. Export Controls. In general, U.S. export controls are more stringent and restrict a wider array of items than the export controls of most other countries. (See the Export Administration Act of 1979, as amended, 50 U.S.C. App. §§ 2401-2420 and the regulations promulgated thereunder, 15 C.F.R. §§ 730-799.) Except for exports to U.S. territories and possessions, and in most cases, Canada, all exports from the U.S. are subject to an export "license." An export license is an authorization which allows the export of particular goods or technical information. Two basic types of licenses exist, general licenses and individual validated licenses.

There are many types of general licenses. These are authorizations that are generally available and for which it is not necessary to submit a formal application. They cover all exports that are not subject to a validated license requirement. Most exports can be made under one of these general classifications.

In contrast, individual validated licenses are required for those items for which the U.S. specifically controls the export for reasons of national security, foreign policy or short supply. If the export of a specific product to a specific destination is



subject to an individual validated license requirement, it is necessary to apply for and obtain such a license from the Office of Export Administration, an office within the U.S. Department of Commerce, prior to the export. Certain commodities cannot be exported to any country without an individual validated license, while certain other commodities may require a validated license only for shipment to specified countries.

For purposes of the U.S. export control regulations, an export of technical information occurs when the information is disclosed to a foreign national even if such disclosure occurs in the U.S. Thus, if disclosure of information is subject to a validated license requirement, the disclosure may not be made to a foreign national without first obtaining the necessary validated license, whether or not the disclosure is to occur outside the U.S.

6. Foreign Trade Zones. Foreign trade zones are areas in or adjacent to ports of entry which are treated as outside the customs territory of the U.S. In order to expedite and encourage trade, goods admitted into a foreign trade zone are generally not subject to the customs laws of the U.S. until the goods are ready to be imported into the U.S. or exported. These foreign trade zones are isolated, enclosed and policed areas which contain facilities for the handling, storing, manufacturing, exhibiting and reshipment of merchandise. Foreign trade zones are created pursuant to the Foreign Trade Zones Act (19 U.S.C. §§ 81a-u) and are operated as public utilities under the supervision of the Foreign Trade Zones Board. Under the Foreign Trade Zones Act, the Board is authorized to grant to public or private corporations the privilege of establishing a zone. Regulations covering the establishment and operation of foreign trade zones are issued by the Foreign Trade Zones Board, while U.S. Customs Service regulations cover the customs requirements applicable to the entry of goods into and the removal of goods from these zones.

7. Anti-dumping Law. The U.S. anti-dumping law (19 U.S.C. §§ 1671-1677) provides that if a foreign manufacturer sells goods in the U.S. at less than fair value and such sales cause or threaten material injury to a U.S. industry, or materially retard the establishment of a U.S. industry, an additional duty in an amount equal to the "dumping margin" is to be imposed upon the imports of that product from the foreign country where such goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price which is less than their "foreign market value" (which generally is equivalent to the amount charged for the goods in the home market). The dumping margin is equal to the amount by which the foreign market value exceeds the U.S. price.

The Secretary of Commerce is charged with determining whether merchandise is being sold at less than fair value in the U.S. The International Trade Commission makes the determination of whether such sales cause or threaten material injury to a U.S. industry.



### C. State Considerations

1. Antitrust Laws. The Antitrust Provisions of Chapter 480 HRS operate in Hawai'i like the Sherman and Clayton Acts and the Federal Trade Commission Act operate federally. It declares that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State, or in any section of the State to be illegal. Further, no person shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize any part of trade or commerce in any commodity in any section of the State. The Hawai'i antitrust law is construed in accordance with judicial interpretations of the similar federal antitrust statutes except that lawsuits by indirect purchasers are permitted. Only consumers or the State may bring actions for unfair or deceptive acts or practices. Any person may bring an action for unfair methods of competition.

2. Franchise Regulation. It is unlawful to offer or sell a franchise in Hawai'i unless an offering circular prepared in accordance with Chapter 482E HRS has been represented to the prospective franchisee and filed with the Director of the DCCA at least seven days prior to the sale. There are certain exceptions, such as the sale of a motor vehicle franchise, which is separately regulated.

3. Consumer Protection Laws. Chapter 487 HRS creates an Office of Consumer Protection within the DCCA to coordinate the consumer protection activities of State and county governments and to cooperate with federal agencies. It has investigatory and enforcement powers.

Among the specific statutes which provide protection and recourse for consumers are the Unfair and Deceptive Practices Act, Chapter 481B HRS, which covers unsolicited goods, offers of prizes in connection with the sale, lease or rental of consumer products, refunds and exchanges, credit repair organizations and cybersquatting. Other chapters regulate Door-to-Door Sales (Chapter 481C), Going Out of Business Sales (Chapter 481D), Art Prints (Chapter 481F), Used Motor Vehicle Sales and Warranties (Chapter 481J), Motor Vehicle Leases (Chapter 481L), Lease-Purchase Agreements for Personal Property (Chapter 481M), Service Contracts (Chapter 481X), and Gold and Silver Marks (Chapter 482D).

Additional consumer protection statutes include Credit Sales (Chapter 476), the Fair Credit Extension Act (Chapter 477E), Interest and Usury (Chapter 478), the Automobile Lemon Law (Chapter 481I), the Telemarketing Fraud Prevention Act (Chapter 481P), Measurement Standards (Chapter 486-52) and the Residential Landlord-Tenant Code (Chapter 521).



The regulation of the professions and vocations as described in Section XIB below is also an element of the consumer protection fabric in the State.

#### IV. TAXATION

##### A. Federal Taxation

1. Federal Income Taxation. Federal income taxes are not affected by where a business chooses to locate in the U.S. There are various methods of controlling the amount of the U.S. income tax-payable, and many of these apply to domestic corporations as well as foreign owned corporations or foreign individuals.

2. Personal Income Tax. Individuals are subject to U.S. income tax on their worldwide income if they are U.S. citizens or resident aliens. Resident alien status is determined under a set of complex rules. Any individual who is not a U.S. citizen, and who does not wish to be taxed as such, and who plans to spend a substantial amount of time in the U.S., should pay careful attention to these rules. Currently, the highest marginal U.S. individual income tax rate is 35% for ordinary income and 15% for long-term capital gains (assets held for more than one year), unless you are selling collectibles or have depreciation recapture on real estate, then the maximum rate is 28% and 25% respectively. A nonresident alien generally is subject to tax on dividends from U.S. corporations, as discussed below.

##### B. State Taxation

1. Personal Income Tax. The amount of tax is determined using state income tax tables. The tax rates for individuals as of 2014 range from 10% to a maximum of 39.6% depending upon filing status and taxable income. The allowable standard deduction amounts vary according to filing status. The standard deduction amount for married person filing a joint return or surviving spouse with dependent child is \$12,400; single or married filing separately is \$6,200; and head of household is \$9,100. Capital gains are taxed at a maximum 28 %.

2. Corporate Income Tax. The tax rates for corporations, real estate investment trusts, and regulated investment companies are 4.4% if taxable income is not over \$25,000, 5.4% if over \$25,000 but not over \$100,000, and 6.4% if over \$100,000 of taxable income. The tax rate is 4% on capital gains that are entitled to federal alternative tax treatment. Deductions, in general, conform to the Internal Revenue Code.

3. General Excise and Use Tax. Hawaii does not have a sales tax; instead, Hawaii has the general excise tax, which is assessed on all business activities measured by gross proceeds of sales or gross income. The tax rate is .15% for



Insurance Commission and .50% for wholesaling, manufacturing, producing, wholesale services, and use tax on imports for resale. All other activities (including retailing businesses, professional services, contracting, theatre, amusement, radio, interest, commissions, and rentals) are taxed at 4%. Businesses that are taxed at the 4% rate and that are conducting business on the Island of O'ahu are also subject to the .50% Oahu County Surcharge Tax. The licensing fee for general excise tax licenses and nonprofit organizations is a one-time fee of \$20.

Use tax is an excise tax levied on personal property that is imported or purchased from an unlicensed seller for use in the State. The tax is based upon the purchase price or value of the tangible personal property purchased or imported, whichever is applicable. The rates are .50% if for resale at retail and 4% if for use or consumption.

4. Estate and Transfer Tax. Hawaii's estate and transfer tax system is directly tied to federal rates and exclusions. Under Chapter 236D, HRS, the State of Hawaii is authorized to impose a state estate tax: in an amount equal to the federal credit on the transfer of the taxable estate of every resident; on the transfer of the taxable estate located in Hawaii of every nonresident; and, effective April 29, 2010 and applicable to property interests of persons who die after April 30, 2010, on the noncitizen transfer of a taxable estate located in Hawaii of every nonresident decedent who was not a citizen of the United States at the time of their death. Decedents dying on or after May 1, 2010 with a taxable estate of \$3,500,000 or less are not subject to the estate tax.

A tax is imposed on all generation-skipping transfers made after June 30, 1994 of property located in Hawaii or property from a resident trust. The tax is equal to the amount of the federal credit for state taxes allowed by IRC § 2604 as it existed as of December 31, 2000, subject to generation-skipping transfer includes all real and personal property subject to federal generation-skipping transfer tax. The law defines "generation-skipping transfer" and "resident trust." Such a tax does not apply to decedents dying, or taxable transfers occurring, after January 25, 2010.

Hawaii does not impose a gift tax.

5. Property Tax. The counties and not the State, administer property taxes in Hawaii. The different counties are: City and County of Honolulu, County of Hawaii, County of Maui, and the County of Kauai. Properties are assessed at 100% of the fair market value of the property as of the preceding tax year (as of October 1 of the preceding year in the City and County of Honolulu and the County of Maui; as of January 1 of the preceding tax year for the counties of Kauai and Hawaii). Real property taxes are calculated by multiplying assessed values less any exemptions by the appropriate tax rate. Once a year (December 15 in the City and County of Honolulu,



other counties vary), property owners receive an assessment notice. The notice lists the assessed value, exemptions, net taxable value and general land classification. The tax rate is different for each year, and varies for different classes of property and for land and buildings. Yearly tax rates are available on the county websites.

6. Conveyance Tax. A conveyance tax is imposed on all documents transferring ownership or interest in real property. The rate varies depending on the amount of actual and full consideration paid or to be paid on the property and whether the property being transferred is a condominium or eligible for a homeowner real property tax exemption. Certain conveyances are exempted as provided by HRS § 247-3.

7. Transient Accommodations Tax. For the period beginning July 1, 2010 – June 30, 2015, a tax at the rate of 9.25% is payable on the gross rental or gross rental proceeds derived from furnishing transient accommodations, which are premises customarily occupied for less than 180 consecutive days as provided by HRS 237D-2.

8. Other Taxes. Other taxes are levied against Public Service Companies, Public Utilities, Banks and Financial Institutions, Fuel, Liquor, Cigarettes and Tobacco, Vehicles and Motor Vehicle Rentals.

9. Hawaii Civil Unions. Effective January 1, 2012, Hawai'i law recognizes civil unions. Under Hawai'i state tax law, with respect to the administrative of taxes (HRS § 231), income taxes (HRS § 235), and estate and transfer taxes (HRS § 236D), all provisions that apply to a "husband and wife, spouses, or person in a legal marital relationship shall be deemed to apply . . . to partners in a civil union . . . ."

10. Hawaii Same Sex Marriage. Effective December 2, 2013, Hawai'i law recognizes same-sex marriage. Under the Hawai'i Marriage Equality Act, gender-specific terminology is interpreted to include spouses of both genders. Hawai'i's tax laws therefore apply in the same manner to married same-sex spouses and married opposite-sex spouses.

## V. LABOR AND EMPLOYMENT

### A. Federal Considerations

1. Immigration. With the globalization of world markets, employers located in the United States often seek to employ foreign personnel. A variety of permanent and temporary visas are available depending on various factors such as the job proposed for the alien, the alien's qualifications, and the relationship between the United States employer and the foreign employer. Permanent residents are authorized to work where and for whom they wish. Temporary visa holders have authorization to



remain in the United States for a temporary time and often the employment authorization is limited to specific employers, jobs, and even specific work sites.

a. Permanent Residency (the "green card"). Permanent residency is most commonly based on family relationships, such as marriage to a United States citizen, or offer of employment. Permanent residence gained through employment often involves a time-consuming process that can take several years to obtain. Therefore, employers considering the permanent residence avenue for an alien employee should ascertain the requirements for that immigration filing prior to bringing the employee to the United States.

b. Temporary Visas. The following are the most commonly used temporary visas:

i. E-1 Treaty Trader and E-2 Treaty Investor Visas: These are temporary visas for persons in managerial, executive or essential skills capacities who individually qualify for or are employed by companies that engage in substantial trade with or investment in the United States. E visas are commonly used to transfer managers, executives or technicians with specialized knowledge about the proprietary processes or practices of a foreign company to assist the company at its United States location. Generally, E visa holders receive a five-year visa stamp but only one-year entries at any time.

ii. H-1A and H-1B Specialty Occupation Visas: H-1B visas are for persons in specialty occupations that require at least a bachelor's degree. Examples of such professionals are engineers, architects, accountants, and, on occasion, business persons. Initially, H-1B temporary workers are given three-year temporary stays with possible extensions of up to an aggregate of six years. H-1B visas are employer-and job-specific. H-1A visas are for registered nurses only.

iii. L-1 Intracompany Transferee Visas: Most often utilized in the transfer of executives, managers or persons with specialized knowledge from international companies to United States-related companies, L-1 visas provide employer-specific work authorization for an initial three-year period with possible extensions of up to seven years in certain categories. As in the case of certain E visa capacities, some L managers or executives may qualify for a shortcut in any permanent residence filings.

iv. B-1 Business Visitors and B-2 Visitors for Pleasure: These visas are commonly utilized for brief visits to the United States of six months or less. Neither visa authorizes employment in the United States. B-1 business visitors are often sent by their overseas employers to negotiate contracts, to attend business conferences or board meetings, or to fill contractual obligations such as repairing



equipment for brief periods in the United States. B-1 or B-2 visitors cannot be on the United States payroll or receive United States-source remuneration.

v. TN Professionals: Under the North American Free Trade Agreement, certain Canadians and Mexicans who qualify and fill specific defined professional positions can qualify for TN status. Such professions include some medical/allied health professionals, engineers, computer systems analysts, and management consultants. TN holders are granted one-year stays for specific employers and other employment is not allowed without prior INS approval. Particularly with regard to Canadians, paperwork required for filing these requests is minimal.

vi. F-1 Academic Student Visas Including Practical Training: Often foreign students come to the United States in F-1 status for academic training or M-1 status for vocational training. Students in F-1 status can often engage, within certain constraints, in on-campus employment and/or off-campus curricular or optional practical training for limited periods of time. Vocational students cannot obtain curricular work authorization but may receive some post-completion practical training in limited instances.

vii. J Exchange Visitor Visas: These visas are for academic students, scholars, researchers, and teachers traveling to the United States to participate in an approved exchange program. Training, not employment, is authorized. Potential employers should note that some J exchange visitors and their dependents are subject to a two-year foreign residence requirement abroad before being allowed to change status and remain or return to the United States.

viii. O-1 and O-2 Visas for Extraordinary Ability Persons: O-1 and O-2 visas are for persons who have extraordinary abilities in the sciences, arts, education, business or athletics and sustained national or international acclaim. Also included in this category are those persons who assist in such O-1 artistic or athletic performances.

ix. P-1 Athletes/Group Entertainers and P-2 Reciprocal Exchange Visitor Visas: These temporary visas allow certain athletes who compete at internationally recognized levels or entertainment groups who have been internationally recognized as outstanding for a substantial period of time, to come to the United States and work. Essential support personnel can also be included in this category.

x. There are a number of other non-immigrant visas categories that may apply to specific desired entries.

When planning to bring foreign personnel to the United States, United States employers should allow several months for processing by the Immigration and



Naturalization Service, as well as the Department of State and Department of Labor. Furthermore, employers should be aware that certain corporate changes, including stock or asset sales, job position restructuring, and changes in job duties, may dramatically affect (if not invalidate) the employment authorization of foreign employees.

## 2. Labor and Employment Statutes.

a. Age Discrimination in Employment Act ("ADEA"). The ADEA forbids discrimination based on age in employment decisions. The ADEA applies to employers engaged in interstate commerce who have twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

b. Americans with Disabilities Act ("ADA"). The ADA proscribes discrimination in employment based on the existence of a disability. Furthermore, the Act requires that employers take reasonable steps to accommodate disabled individuals in the workplace. This Act applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

c. Employee Polygraph Protection Act ("EPPA"). The EPPA greatly restricts polygraph testing of employees. The Act applies to all employers engaged in interstate commerce. Exempted are employers whose primary business purpose is running a security service or manufacturing, distributing or dispensing a controlled substance.

d. Fair Labor Standards Act ("FLSA"). The FLSA establishes the minimum wage, overtime and child labor laws for employers engaged in industries affecting interstate commerce, regardless of the number of employees.

e. Equal Pay Act ("EPA"). The EPA was an amendment to the Fair Labor Standards Act and is designed to promote equal pay for men and women who do the same jobs. Therefore, if the minimum wage provision of the FLSA is applicable to one's business, then the EPA is applicable as well.

f. Family and Medical Leave Act ("FMLA"). The FMLA requires that eligible employees be allowed to take up to twelve weeks of unpaid leave per year for the birth or adoption of a child or the serious health condition of the employee or the spouse, parent or child of the employee. This Act applies to all employers engaged in commerce where the employer employs fifty or more employees for each working day during each of twenty or more calendar weeks in the current or preceding calendar year.



g. Federal Contractors. Employers that are federal contractors or subcontractors, depending on the type and size of their contracts, may have affirmative action obligations under Executive Order 11246 and the Vocational Rehabilitation Act. Certain federal contractors are also covered by the Drug-Free Workplace Act.

h. Other Federal Regulations. Many employers operate in industries that are regulated by federal agencies. For example, the Department of Transportation requires employers to drug test employees who drive motor vehicles of over 26,000 pounds. Employers in regulated industries must be aware of any requirements imposed by federal or state regulations.

i. National Labor Relations Act and Labor Management Reporting and Disclosure Act. These statutes set forth the guidelines governing labor-management relations. They apply to all employers who are engaged in any industry in or affecting interstate commerce, regardless of the number of employees. Employers who operate under the Railway Labor Act are not subject to these Acts.

j. Occupational Safety and Health Act ("OSHA"). OSHA is the act that established the mechanism for establishing and enforcing safety regulations in the workplace. It applies to all employers who are engaged in an industry affecting commerce, regardless of the number of employees.

k. Title VII. Title VII is the broad civil rights statute that forbids discrimination in hiring based on race, religion, gender and national origin. It applies to employers engaged in interstate commerce who have fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

l. Worker Adjustment Retraining and Notification Act ("WARN"). WARN requires employers to give sixty days notice to their employees of plant closings or mass layoffs. This Act applies to all businesses that employ 100 or more employees, excluding part-time employees, and to businesses that employ 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).

m. Immigration Reform and Control Act ("IRCA"). IRCA requires that employers verify employment authorization for all employees hired on or after November 6, 1991. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under IRCA, as well as for hiring unauthorized workers or discriminating against persons who appear or sound foreign.



### 3. Employee Benefits.

a. Employee Retirement Income Security Act of 1974 ("ERISA"). ERISA governs implementation and maintenance of most types of employee benefit plans, including most retirement programs, life and disability insurance programs, medical reimbursement plans, health care plans, and severance policies. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting and funding requirements. ERISA generally preempts state laws governing employee plans and arrangements.

b. Consolidated Omnibus Budget Reconciliation Act ("COBRA"). COBRA requires employers to make continuing coverage under medical reimbursement and health care plans available to certain terminated employees, at the cost of the employees. The usual period for which this coverage must be continued is eighteen months. COBRA contains very specific procedures for notifying terminated employees of their COBRA rights.

### B. State Considerations

1. Employment-At-Will. Hawaii is an employment-at-will state. Therefore, unless an employee is employed under a fixed term contract or an agreement that provides that termination shall only be for cause, employment may be terminated by either the employer or the employee for any reason or no reason at all. The at-will rule does not apply if the termination violates a federal or state statute or local ordinance. In addition, the at-will rule will not apply if the termination violates a judicially created exception to such rule such as where the termination violates public policy or where there are implied contracts created by employee manuals or other documents or by verbal assurances and promises in the employee's employment.

2. Employment Statutes. The Hawaii Legislature has enacted the following statutes which govern labor and employment in the State of Hawaii.

a. Discriminatory Practices. This statute prohibits employment discrimination on the basis of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record. The state discrimination statute is enforced by the Hawaii Civil Rights Commission. A charge of alleged discrimination under this statute must be filed with the HCRC within 180 days after the date of the alleged unlawful discriminatory practice or last occurrence in a pattern of ongoing discriminatory practices occurred.

b. Whistleblower Protection Act. This law provides protection for an employee who 1) reports or is about to report to a public body a violation or a



suspected violation of a federal or state law or rule; or 2) who is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body or a court action. An aggrieved employee may obtain injunctive relief and/or actual damages for a violation of this law. The statute of limitations for such an action is two years after the occurrence of the alleged violation of this law.

c. Employment Relations Act. This law provides the right to employees of self-organization and right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. The law governs labor disputes and is administered by the Hawaii Labor Relations Board.

d. Wage and Hour Law. The Hawaii Wage and Hour Law is the state counterpart of the federal Fair Labor Standards Act ("FSLA") which establish minimum wages and overtime standards. Most employers are covered under the FSLA, which requires employers to pay the more beneficial wage or overtime requirements between state and federal law. Presently, the state minimum wage is higher than the federal minimum wage. Like the FSLA, the state law requires payment of overtime at one-and-one half times the employee's basic rate for all non-exempt employees.

e. Payment of Wages and Other Compensation. This statute provides for the timely payment of wages and other compensation to employees. The statute provides for civil remedies and penalties for the failure of an employee to provide timely payment of wages. It also provides for payment of an aggrieved employee's attorneys' fees and costs incurred in collecting unpaid wages.

f. Child Labor Law. This statute regulates the employment of children under eighteen years of age. No minor under the age of fourteen is permitted to work except in specified circumstances. Minors between the age of fourteen and sixteen may not work more than six consecutive days nor more than forty hours in any one week with certain exceptions. Minors between the age of sixteen and eighteen may be employed during periods when the minor is not legally required to be in school unless excused by school authorities. All employers employing minors must obtain certificates of employment and age from the director of labor and industrial relations.

g. Workers' Compensation Law. The Hawai'i workers' compensation law provides compensation and medical care to employees who suffer an injury or disease "arising out of and in the course of employment". Unless rebutted by substantial contrary evidence, it is presumed that 1) the employee's claim is for a covered work injury; 2) sufficient notice of the injury was given to the employer; 3) the injury was not caused by the intoxication of the injured employee; and 4) the injury was not caused by the willful intention of the injured employee to injure her or himself.



Recovery under Hawaii's workers' compensation law is an employee's exclusive remedy for work-related injuries or diseases.

h. Hawaii Employment Security Law. Hawaii's unemployment insurance law is broadly written and liberally interpreted to provide temporary income protection for individuals who lose their jobs through no fault of their own. The law is administered by the Unemployment Insurance Division of the Hawaii Department of Labor and Industrial Relations. The law is designed to provide benefits for a limited time while unemployed individuals seek work.

i. Prepaid Health Care Act and Affordable Care Act. The Hawaii Prepaid Health Care Act requires private sector employers to provide minimum prepaid health care coverage to eligible employees. Employees are eligible for coverage if they work for an employer twenty (20) or more hours per week for four (4) consecutive weeks and earn a monthly wage of at least 86.67 times Hawaii's minimum hourly wages. Employees must be covered at the earliest possible time permitted by the health care contractor after meeting eligibility requirements. The employer must notify eligible employees of their rights under the Act, provide advance notice of any changes and provide the employer's health care contractor's name, plan number, group number, effective date of coverage, and employee's cost share for funding health insurance premiums.

The Patient Protection and Affordable Care Act (ACA) was signed into law on March 23, 2010. However, the Hawaii Prepaid Health Care Act still applies. Private sector employers are still required to offer the prevalent plan to employees working twenty (20) or more hours per week for four (4) consecutive weeks. Employers are responsible for 98.5% of employee-only premiums. Under the ACA, large employers will be forced to make a choice: to either "play" by offering affordable health coverage that provides minimum value or "pay" by potentially owing a penalty to the Internal Revenue Service if they fail to offer such coverage. Although the Employer Mandate generally took effect on January 1, 2014, the effective date is deferred for employers with fiscal year plans that meet certain requirements. These "pay" or "play" aspects of the ACA do not generally apply to employers in Hawaii because of the Prepaid Health Care Act. However, these aspects do apply to employers that are exempt from Hawaii's Prepaid Health Care Act.

j. Temporary Disability Insurance. Hawaii's Temporary Disability Insurance Law ("TDI") requires employers to provide temporary disability insurance coverage for their employees. TDI insures employees against total wage loss in the event of disability due to a non-occupational sickness or accident. The purpose of the law is to establish a statutory sick leave program or "safety net." TDI lessens the economic consequences of an employee's inability to work due to a non-occupational disability.



## VI. ENVIRONMENTAL LAW

### A. Federal Considerations

1. Resource Conservation and Recovery Act ("RCRA"): 42 U.S.C. § 6901, et seq. RCRA's primary goal is to control the generation, transportation, storage, treatment and disposal of hazardous waste. The administration of RCRA has been delegated to a number of states by statute and, therefore, the states regulate most aspects of hazardous waste management within their borders.

By statute, a permit is required for the disposal of hazardous waste. A permit for a treatment, storage, or disposal facility must detail required corrective action for any release of hazardous waste from any solid waste management unit, regardless of when the waste was placed on the site. The RCRA authorizes the Federal Environmental Protection Agency (the "EPA") to bring suit against any person or entity contributing to the handling, storage, treatment or disposal of a hazardous waste in a manner presenting an imminent and substantial endangerment to health or the environment. §§ 6928, 6973, 7003.

2. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"): 42 U.S.C. § 9601, et seq. CERCLA, or "Superfund" as it is commonly called, was enacted in 1980 to provide for the clean-up of abandoned disposal sites. It also provides a vehicle for the EPA to recover for damage or to prevent threatened damage to natural resources caused by the release of hazardous substances.

CERCLA allows the government and private parties to sue potentially responsible parties ("PRPs") for reimbursement of clean-up costs caused by releases, actual or threatened, of hazardous substances. Liability is strict, joint and several, with little or no regard for causation. By statute, there are four categories of persons liable for clean-up costs:

1. Current owners or operators of the contaminated facility. A "facility" is virtually any place in which a hazardous substance is found. The current owner or operator is liable, regardless of when the hazardous substance was disposed of at the facility and whether the present owner or operator did anything to contribute to the release.
2. Prior owners or operators of the facility at the time of release of the hazardous substances. Any person who contracted or arranged to have hazardous substances taken to, disposed of, or treated at a facility. This category generally applies to generators and manufacturers.



3. Person who arranged for the disposal of hazardous substances.
4. Transporters of hazardous substances.

There are limited defenses under Superfund that are narrowly construed. A PRP can escape liability if it can establish that the hazardous substance release was caused solely by an act of war, an act of God, or an act of unrelated third parties. This latter "third party" defense does not apply if the damage from hazardous substances was caused by an employee or agent of the PRP, or a third party acting in connection with a contract with the PRP.

CERCLA was amended through enactment of Public law 107-118, titled the Small Business Relief and Brownfield Revitalization Act (the "Brownfields Amendments"). A Brownfields site is property where expansion, redevelopment or reuse is complicated by the fact that there is a presence or potential presence of hazardous materials. Government funds are available to investigate, clean up and encourage private purchase. Among other things, the Brownfields amendments provide a limitation on liability for persons who qualify as bona fide prospective purchasers.

3. The Clean Air Act ("CAA"): 42 U.S.C. § 7401, et seq. The CAA regulates air pollutants under federal standards implemented and enforced by the states. Under the Act, air emissions are regulated through various controls. The CAA authorizes the EPA to establish national ambient air quality standards ("NAAQS") and emission standards for hazardous air pollutants. The CAA requires an operating permit for all "major" air sources, with state administration and enforcement, subject to federal oversight.

4. The Clean Water Act ("CWA"): 33 U.S.C. § 1251, et seq. The CWA regulates the discharge of pollutants into all navigable waters. The CWA prohibits the discharge of any pollutant into the water of the U.S. unless a permit has been issued. § 1311. Permits are issued by either the state under an approved state program or by the EPA if the state program has not been approved. The permit limits are based upon EPA's effluent limitation regulations and are incorporated into a National Pollutant Discharge Elimination System ("NPDES") permit. The EPA delegates most of its permitting and enforcement responsibilities to the states, subject to its oversight. § 1251. The CWA also allows private citizens or groups to bring lawsuits against entities for violations of certain CWA provisions. § 1365.

## B. State Considerations

The State Department of Health ("DOH") is the primary environmental regulatory agency in the state. Within the DOH are various programs (branches, offices, and sections) dedicated to specific environmental issues. The DOH also promulgates the



Hawaii Administrative Rules ("HAR") to implement, administer and enforce applicable statutes. DOH rules are found in Title 11 of the HAR and are described in more detail in Section 2 below. The administrative rules may be found on the web at: <http://www.state.hi.us/doh/rules>.

1. Organization of Hawai'i's Regulatory and Enforcement Agencies.

The Environmental Health Administration of the DOH oversees the following divisions and offices: Hazard Evaluation and Emergency Response Office, Environmental Planning Office, Environmental Management Division, Environmental Health Service Division and Environmental Resources Office.

a. The Hazard Evaluation and Emergency Response Office ("HEER") provides risk assessments, responds to the release of hazardous substances and oversees the cleanup of contaminated sites. Office activities include evaluating health effects of air and water pollutants when no standards exist.

b. The Environmental Planning Office develops strategic plans, supports land use reviews, helps to get new programs underway such as the polluted runoff control program, and is involved in coordinating watershed management projects.

c. The Environmental Management Division ("EMD") is responsible for implementing and maintaining statewide programs for controlling air and water pollution, for assuring safe drinking water, and for the proper management of solid and hazardous waste. The division also regulates the state's wastewater.

i. The Clean Air Branch is responsible for the implementation of a statewide air pollution control program through services which include engineering analysis and permitting, monitoring and investigations, and enforcement of the federal and state air pollution control laws and regulations. The Clean Air Branch also monitors and conducts inspections of schools for compliance with the Asbestos Hazard Emergency Response Act (AHERA).

ii. Clean Water Branch. The Clean Water Branch administers and enforces statewide water pollution laws and rules through permitting of point sources, compliance monitoring, inspections, investigations of complaints, and ambient water quality monitoring.

iii. Safe Drinking Water Branch. The Safe Drinking Water Branch administers federal and state safe drinking water regulations to the approximately 155 public water systems in the State of Hawai'i to assure that the water served by these systems meets state and federal standards. Any system which services 25 or more people a minimum of 60 days per year or has at least 15 service connections is subject to these standards and regulations.



iv. Solid and Hazardous Waste Branch

(a) The Solid Waste Management Program. The Office of Solid Waste Management has program responsibilities which cover three major areas: Municipal Solid Waste Management Facility Permitting and Enforcement; Special Waste Management; and Alternative Waste Management.

(b) The Hazardous Waste Management Program conducts routine inspections of local facilities that generate, store, transport, and treat hazardous wastes. Initiation of formal enforcement action against noncompliant facilities is also a charge of the Hawai'i program.

(c) The Underground Storage Tank Management (UST) Program implements the federal UST regulations in Hawai'i while the State's capabilities in this subject area are being established. The federal UST regulations require specific technical design and operational standards for USTs, financial assurance, and corrective actions in response to tank releases.

(d) The Wastewater Branch implements the construction of county wastewater facilities with federal and state financing by low interest loans from the State Revolving Fund.

(e) Statewide Wastewater Operator Training Center.

d. The Environmental Health Service Division is responsible for controlling noise and radiation, and improving indoor air quality. The division is also responsible for lead abatement, sanitation, and vector control (rats, mosquitoes, and other public health threats).

i. The Food and Drug Branch ensures that food, drugs, cosmetics, medical devices and related consumer products are safe, effective (in the case of drugs and medical devices), and properly labeled; and that poisonous household substances are packaged in child resistant containers when required by rule. The branch also provides education and consultation for food handlers.

ii. The Noise, Radiation and Indoor Air Quality Branch is responsible for statewide programs of community noise and radiation control through the provision of services which include inspectional, educational, consultative and enforcement activities. The Branch also works to ensure that air conditioning and ventilation rules are enforced and that the public is protected from exposure to lead and asbestos.



iii. The Sanitation Branch is responsible for the implementation and enforcement of the statutes, rules, and policies relating to environmental sanitation. The branch regulates food and service establishments, public swimming pools, housing, milk, recreational trailer camps, tattoo artists, licensing for sanitarians, mortuaries, cemeteries and embalmers.

iv. The Vector Control Branch prevents or suppresses outbreaks of vector-borne diseases and vector nuisance by maintaining vector populations below disease-transmitting or nuisance-causing levels.

e. The Environmental Resources Office handles many of the grants and administrative responsibilities of the Environmental Health Administration, primarily seeing to it that the administration's reorganization is fully implemented, that new positions are described and established and maximum funding is obtained for programs from the EPA.

In addition, the four counties, by their respective Departments of Public Works, are responsible for recycling and solid waste disposal. Wastewater matters are governed by the Department of Public Works in the counties of Maui, Kaua'i and Hawai'i, and by the Department of Wastewater Management in the City and County of Honolulu.

## 2. Hawai'i's Environmental Statutes and Rules

a. Hawaii Environmental Response Law. Chapter 128D HRS. Chapter 128D is patterned after CERCLA and its long term goals are the same. There are, however, several significant differences. Notably, Hawai'i's law includes oil and trichloropropane in the definition of "hazardous substances." Other areas where Chapter 128D mirrors or diverges from federal law include the following:

Hawai'i law mirrors CERCLA in terms of liability and contribution. There is a state revolving fund, similar to the Superfund, to be used for response actions. The Director of the DOH is authorized to act, consistent with the state contingency plan (described below), to remove or arrange for the removal of, and provide for remedial action relating to a hazardous substance, pollutant, or contaminant at any time, or take any other response measure consistent with the state contingency plan which the Director deems necessary. Costs payable from the fund may be recovered by the attorney general from the liable person or persons. Liability mirrors federal liability under CERCLA § 9607(a).

There is no provision for a private cause of action under Chapter 128D that is the equivalent of CERCLA private recovery of costs under § 9607(a). There is, however, a provision for citizen's suits (128D-21) that is similar to that provided



in RCRA § 6972. Any person may commence a civil action against any person, including the state or any other governmental agency who is alleged to be in violation of any rule, regulation or requirement under this chapter. The plaintiff must give 60 days notice to the Director, DOH, and the alleged violator, prior to filing suit. The State, if not a party, may intervene as a matter of right.

Like CERCLA, at § 9603, there is a duty to report obligation, at § 128D-3. A person in charge of a facility shall immediately notify the DOH as soon as that person has any knowledge of any release of hazardous substances in a quantity exceeding the standards in CERCLA § 9603.

There is an innocent landowner exception under § 128D-6(d). § 128D-6(g) provides that no indemnification or other agreement is effective to transfer liability; however, nothing in the statute bars the parties from negotiating indemnification agreements as between themselves. Pursuant to § 128D-18, liability is joint and several, although as between liable parties, there is the right of apportionment and contribution

Like the federal Brownfields legislation, Hawai'i has made it a goal to encourage prospective developers, lenders and purchasers to voluntarily clean up contaminated property through a Voluntary Response Program. Under § 128D-31 – 41, in order to qualify for an exemption from liability, a prospective purchaser may enter into a voluntary response agreement with the DOH prior to becoming an owner. Requesting parties conduct investigation and response activities with oversight from the DOH and HEER. When the work is completed to the DOH's satisfaction, the requesting party will receive a "letter of completion" which will carry with it an exemption from liability as provided in Chapter 128D.

b. State Contingency Plan: Hawaii Administrative Rules ("HAR") 11-451. HAR 11-451 establishes the state contingency plan ("Plan") to implement, administer and enforce Chapter 128D HRS. The Plan identifies the hazardous substances, pollutant or contaminants which are subject to the Plan's requirements and procedures, designates reportable quantities, establishes notification requirements, describes the process the DOH may follow to solicit the cooperation of potentially responsible parties, establishes the methods for collecting data, describes the criteria for listing and prioritizing sites for response actions, describes factors which may be considered by the DOH in determining the type of response action to be taken, and describes those response actions which the DOH may implement or require.

c. Hawaii Pesticides Law: HRS 149A and HAR 4-66. The statute and administrative rules provide for the licensing, labeling and permit requirements to distribute, sell or transport pesticides in the state. The law is administered by the State Department of Agriculture.



d. State Water Code: HRS 174C and HAR 13-167 through 171. The State Water Code is administered by the Commission on Water Resource Management, under the State Department of Land and Natural Resources. The Commission plans and coordinates programs for development, conservation, protection, control and regulation of water resources. Its administrative rules establish well construction, pump installation and in-stream flow standards, and designate and regulate water management areas. A Hawaii Water Plan is formulated to serve as a long range guide for water resource management. Water quality issues are administered by the DOH.

e. Coastal Zone Management : HRS 205A. Among the land use objectives of this chapter are to protect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems; reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence, and pollution; promote the protection, use, and development of marine and coastal resources to assure their sustainability; adopt water quality standards; and regulate point and non-point sources of pollution to protect, and where feasible, restore, the recreational value of coastal waters. This chapter mandates that the various county planning commissions make findings that proposed development projects are consistent with the policies and objectives of protecting and preserving historic and pre-historic resources before a special management area use permit can be issued.

f. Environmental Response Tax: HRS 243-3.5. There is imposed, pursuant to the environmental response revolving fund procedures set forth in § 128D-2, a state environmental response tax of \$1.05 on each barrel or fractional part of a barrel of petroleum product sold by a distributor to any retail dealer or end user, other than a refiner, of petroleum product. The tax imposed by this subsection is paid by the distributor of the petroleum product.

g. Solid Waste: HRS 340A. County agencies are primarily responsible for the collection and disposal of solid waste. The state, under this chapter may grant permits for disposal activities, including landfills. See HRS 342G, H, and J.

h. Safe Drinking Water: HRS 340E and HAR 11-19 through 21, 23, and 25. The safe drinking water statute and administrative rules establish primary drinking water regulations, set maximum contaminant levels, test water catchment systems, inspect water supply facilities, and plan for the provision of drinking water under emergency conditions. They also establish a state underground injection control (UIC) program in order to protect the quality of the state's underground sources of drinking water from pollution by subsurface disposal of fluids. Conditions are specified to govern the location, construction and operation of injection wells so that injected fluids do not migrate and pollute underground sources of drinking water. The statute



and rules establish minimum standards and counties are not precluded from establishing more stringent standards.

i. Environmental Quality Control: HRS 341 and HAR 11-201. This statute creates an office of environmental quality control headed by a director of environmental quality control, placed within the DOH for administrative purposes. The office performs its duties under Chapter 343 (Environmental Impact Statements, see below) and serves the governor in an advisory capacity on all matters relating to environmental quality control. The statute also creates an advisory environmental council and, within the University of Hawai'i, an ecology or environmental center.

j. Air Pollution Control: HRS 342B and HAR 11-59 and 60.1. "Air pollutant" has the same meaning as in the Federal Clean Air Act. The DOH, by statute and administrative rules, establishes ambient air quality standards and permit programs, and controls open burning, fugitive dust and visible emissions, including motor vehicle emissions. Covered source permit applications are subject to EPA oversight and the permits are federally enforceable. Chapter 342B provides for civil and criminal penalties for violations. The Greenhouse Gas Emissions Reduction Task Force, a division of Hawai'i's Department of Business, Economic Development and Tourism, establishes state policy, which aims to reduce greenhouse gas emission levels in Hawai'i.

k. Ozone Layer Protection: HRS 342C. This statute regulates the sale and use of chlorofluorocarbon and halon.

l. Water Pollution: HRS 342D and HAR 11-54 and 55. The statute and administrative rules are intended to prevent, control and abate water pollution. Chapter 342D also provides that the Director of the DOH may control all management practices for domestic sewage, sewage sludge and recycled water. HAR 11-54 establishes water quality standards. HAR 11-55 contains the regulations for NPDES permits.

m. Nonpoint Source Pollution Management and Control; HRS 342E. This statute establishes a program to administer, enforce and carry out all laws, rules and programs relating to nonpoint source pollution in the state, in coordination with the Clean Water Branch of the DOH. Nonpoint source pollution is pollution that does not originate from a point source, which is pollution from a discernable, confined and discrete conveyance.

n. Noise Pollution: HRS 342F and HAR 11-46. Permits are required to construct, modify, and/or operate an excessive noise source. The statute and administrative rules establish permit criteria and fees and establish the maximum permissible sound levels for various zoning districts.



o. Integrated Solid Waste Management: HRS 342G and HAR 11-58.1. Each of the four counties must submit to the DOH a solid waste management plan adopted by the county, for review and approval by the DOH. Hawai'i's Beverage Container Deposit Program (the "Bottle Bill") establishes a refundable five cent deposit requirement on certain beverages sold in Hawai'i. The Bottle Bill is administered by the Hawai'i State Department of Health and covers soft drinks, beer, water, mixed spirits and wine, coffee and teas among other beverages in metal and glass containers. A nonrefundable fee of one cent is also charged to cover the cost of the redemption centers.

p. Solid Waste Pollution: HRS 342H and HAR 11-58.1. Among other things, the statute and administrative rules establish standards for siting, operation and closure of landfills. Permits are required to transport petroleum contaminated soil, for solid waste management systems, and to operate, construct, modify, expand, or close a municipal solid waste landfill unit. HAR 11-58.1 establishes permit requirements for facilities disposing, recycling, reclaiming and/or transferring waste. The design criteria for landfills set forth in HAR 11-58.1 are based on 40 CFR 258, Subtitle D.

q. Special Wastes Recycling: HRS 342I. This statute describes the permitted procedures for recycling lead acid batteries and used motor vehicle tires.

r. Hazardous Waste: HRS 342J and HAR 11-260 through 266, 268, 270, 271, 279 and 280. The state promotes hazardous waste minimization, reduction and recycling, exchange and treatment as the preferred means of managing hazardous waste, with disposal to be used only as a last resort. The statute and rules establish standards for generators, transporters, treatment, storage or disposal facilities, and persons who deal with hazardous waste fuel. Whenever the Director of the DOH determines there has been a release of hazardous waste into the environment, the Director may require the facility to take corrective action or may commence a civil action for appropriate relief, including injunctive relief. Permits are required for any persons who deal with used oil or used oil fuel, regardless of whether it is a hazardous waste. There exist extensive rules governing the identification and listing of hazardous waste, the permit program, and land disposal restrictions.

s. Underground Storage Tanks (USTs): HRS 342L, and HAR 11-281. Permits for USTs are issued by the Director of the DOH for a period of 5 years. Violations of the rules or permit conditions are grounds for administrative penalties of not more than \$25,000 for each tank for each day of violation, and a civil action for injunctive relief. Evidence of financial responsibility is required, which may be established by insurance, guaranty, surety bond, letter of credit, qualification as self-insurer or other method satisfactory to the DOH. The administrative rules establish the standards applicable to USTs and tank systems, and the procedures for investigating a suspected release. An owner or operator is liable to the DOH for any



costs incurred by the DOH in undertaking a response or enforcement action with respect to a release, to the same standard of liability as under section 311 of the Federal Water Pollution Control Act. No indemnification, hold harmless or similar agreement is effective to transfer liability from the owner or operator of a UST to any other person.

t. Asbestos and Lead: HRS 342P and HAR 11-501 through 504. This statute governs asbestos emission and lead hazard control, and provides for inspection of any building or place to investigate an actual or suspected source, use or presence of asbestos or lead to ascertain compliance with this chapter. Violators are subject to civil, administrative and criminal penalties.

u. Environmental Impact Statements ("EIS"): HRS Chapter 343 and HAR 11-200. Hawaii's EIS law is patterned after the National Environmental Policy Act (NEPA) requirements. The law requires the preparation of environmental assessments (EA) and environmental impact statements (EIS) for many development projects. If one or more of eight specific triggers is present, then an EA or an EIS must be prepared and circulated to the public for review. These circulations must address the impacts the projects will have on "cultural beliefs, practices, and resources of native Hawaiians as well as other ethnic groups." Even though certain minor or routine activities can trigger the review law, qualifying activities can be declared exempt from environmental review by the state or county agency that has oversight.

In 2000, the state legislature amended § 343-2 to require disclosure of the effects, including significant adverse effects, on the cultural practices of the community and state. EISs will have to address the impacts their projects will have on "cultural beliefs, practices, and resources of native Hawaiians as well as other ethnic groups."

The Office of Environmental Quality Control (OEQC) implements Chapter 343. Twice a month the OEQC publishes The Environmental Notice which informs the public of all the projects being proposed in the state that are subject to public review and comment.

v. State Environmental Policy: HRS 344. It is the policy of the state to conserve natural resources and enhance the quality of life. Various guidelines in support of that policy are identified.



## VII. INTELLECTUAL PROPERTY

### A. Federal Law

1. Copyright Law. This area is governed exclusively by federal law. Title 17, U.S.C.

a. In General. Copyright law provides the author of a copyrightable work (or such person's employer in the case of a "work made for hire") with certain specific exclusive rights to use, distribute, modify and display the work. Generally, works are entitled to copyright protection for the life of the author plus 50 years. However, as to "works made for hire," copyright protection is for the shorter of 75 years after publication or 100 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright and may be liable for actual or statutory damages and may be subject to injunctive relief.

b. Copyrightable Works. Works of authorship that qualify for copyright protection include literary works, musical works (including lyrics), dramatic works, choreographic works, audiovisual works, pictorial, graphic and sculptural works, sound recordings and architectural works. The Computer Software Copyright Act of 1980 expressly made computer software eligible for copyright protection, a point previously in doubt. The precise scope of copyright protection for computer software has not yet been fully defined. Constantly developing technology is likely to present many new issues, presently unforeseen. All works eligible for copyright protection must meet two specific requirements. First, the work must be fixed in some tangible form; there must be a physical embodiment of the work so that the work can be reproduced or otherwise communicated. Second, the work must be the result of original and independent authorship. The concept of originality does not require that the work entail novelty or ingenuity, concepts of importance to patentability.

c. Advantages of Copyright Registration. Copyright protection automatically attaches to a work the moment that the work is created. However, "registration" of the work with the U.S. Copyright Office provides advantages. A certificate of registration is prima facie evidence of the validity of the copyright, provided registration occurs not later than five years after first publication. With respect to works whose country of origin is the U.S., registration is a prerequisite to an action for infringement. With respect to all works, regardless of the country of origin, certain damages and attorneys' fees relating to the period prior to registration cannot be recovered in an infringement action. Registration also is a useful means of providing actual notice of copyright to those who search the copyright records.



d. Copyright Registration Application Process. In order to obtain registration of copyright, an application for registration must be filed with the U.S. Copyright Office. The application must be made on the specific form prescribed by the Register of Copyrights and must include the name and address of the copyright claimant, the name and nationality of the author, the title of the work, the year in which creation of the work was completed, and the date and location of the first publication. In the case of a work made for hire, a statement to that effect must be included. If the copyright claimant is not the author, a brief statement regarding how the claimant obtained ownership of the copyright must be included. An application must be accompanied by the requisite fee, and a copy of the work must be submitted.

e. Copyright Notice. Until 1989, all publicly distributed copies of works protected by copyright and published by the authority of the copyright owner were required to bear a notice of copyright. A copyright notice is no longer mandatory, but a copyright notice is still advantageous. For example, the defense of "innocent infringement" is generally unavailable to an alleged infringer if a copyright notice is used.

If a copyright notice is used, the notice should be located in such a manner and location to sufficiently demonstrate the copyright claim. The notice should consist of three elements. First should be the symbol of an encircled "C," or the word "copyright," or the abbreviation "copr." Second should be the year of first publication. Third should be the name of the copyright owner.

f. Works Made for Hire. In a "work made for hire" the employer is presumed to be the author. Authorship is significant because a copyright initially vests in the author. The parties can rebut the presumption of employer authorship by an express written agreement to the contrary. The term "work made for hire" applies to any work created by an employee in the course and scope of employment. On occasion there is dispute as to whether a work created by an employee arose from the employment. Employers often require execution of a formal employment agreement under which the employee expressly agrees that all copyright rights will belong to the employer. A similar agreement is also advisable in connection with the engagement of an independent contractor to perform copyrightable services for a business, but the employer should be aware that only certain types of works may be considered a "work made for hire" when created by an independent contractor. If the particular matter cannot be a "work made for hire", the employer should negotiate an agreement for the assignment of the copyright by the independent contractor.

g. Copyright Protection for Foreign Authors. Copyright protection is available under U.S. law for foreign authors until the copyrightable work is published. If the work has been published, the availability of continued U.S. copyright protection is dependent upon the location of the publication and the nationality or



domicile of the author. Copyright protection continues in the U.S. subsequent to publication if publication by the foreign author occurs in the U.S., or occurs in a country that is a party to the Universal Copyright Convention or to the Berne Convention, or occurs in a country named in a Presidential copyright proclamation. If the work is first published by a foreign author outside the U.S., continued copyright protection in the U.S. is only available if the foreign author is either a domiciliary of the U.S. or a national or domiciliary of a country that is party to a copyright treaty to which the U.S. is also a party. A person is generally a domiciliary of the country in which the person resides with the intention to remain permanently.

2. Patents. This area is governed exclusively by federal law. Title 35, U.S.C.

a. In General. One who invents or discovers a new machine or device or a new manufacturing process may be able to obtain a U.S. patent. A U.S. patent provides the inventor with the exclusive right for a specified time to make, use, import, offer to sell, or sell in the U.S. the patented invention. A patent provides the holder with a limited monopoly on the use of the patented invention. A valid patent forecloses use of the patented invention by any other party, even if another party independently conceives the identical invention.

A utility patent, which generally governs the functional aspects of a machine, manufacturing process, or composition of matter is enforceable beginning at the grant of the patent and ending 20 years (plus up to 5 more years for certain delays) after the filing date of the regular patent application. A design patent, which covers the design or appearance of an article of manufacture, is enforceable for 14 years from the granting date of the patent. A provisional patent, which is filed before a regular patent application, establishes a priority filing date and provides up to 12 months to further develop the invention without filing a regular patent application. Anyone without authority from the patent holder who makes, uses, imports, or sells in the U.S. the patented invention during the life of the patent is considered to "infringe" the patent and may be liable for damages.

b. Effect of Foreign Patents. A foreign patent is generally not enforceable in the U.S. Furthermore, an invention that is the subject of a foreign patent cannot be the subject of a U.S. patent, unless an application for a U.S. patent is filed within one year following issuance of the foreign patent. Accordingly, an inventor who holds a foreign patent and who fails to apply for a U.S. patent within one year from the date of issuance of a foreign patent will usually have no recourse against others who use the invention in the U.S.

c. Patentability Under Federal Patent Statutes. To be eligible for a federal utility patent, an invention must fall into one of the classes of patentable



subject matter set forth in the United States patent statutes. These classes are machines (e.g., a mechanism with moving parts), articles of manufacture (e.g., a hand tool), compositions of matter (e.g., a plastic), and processes (e.g., a method of refining). An improvement falling within any of these classes may also be patentable. Discoveries falling outside these categories are not patentable, unless some other statutory provision applies.

In addition to being within one of the four classes and being fully disclosed, a utility invention must also be:

- (a) "novel," in that it was not previously known to or used by others in the United States or printed or described in a printed publication anywhere;
- (b) "non-obvious" to a person having ordinary skill in the relevant art; and
- (c) "useful," in that it has utility, actually works, and is not frivolous or immoral.

A design patent may be obtained for the ornamental design of an article of manufacture. A design patent offers less protection than a utility patent, because the patent protects only the appearance of an article, and not its construction or function.

A plant patent may be obtained by anyone developing a new variety of asexually reproduced plant, such as a tree or flower. Some plants may also be protectable with a utility patent or under the Plant Variety Protection Act, administered by the United States Department of Agriculture.

In order to determine novelty and, hence, patentability of an invention, it is often useful to search the records of the U.S. Patent and Trademark Office. There one may examine all U.S. patents, many foreign patents, and a large number of technical publications. A patent search is customarily performed by a patent attorney or by an individual with similar technical training, sometimes referred to as a patent agent. A patent attorney or patent agent may be asked to render an opinion regarding the patentability of a particular invention. An inventor can then make an informed decision as to whether to proceed with the cost of an actual patent application.

d. Patent Application Process. A U.S. patent application must be filed with the U.S. Patent and Trademark Office. A complete patent application includes four elements. First, the application must include the "specification." The specification is a description of what the invention is and what it does. The specification



can be filed in a foreign language, provided that an English translation, verified by a certified translator, is filed within a prescribed period. Second, the application must include an oath or declaration. The oath or declaration certifies that the inventor believes himself or herself to be the first and original inventor. If the inventor does not understand English, the oath or declaration must be in a language that the inventor understands. Third, the application must include drawings, if essential to an understanding of the invention. Fourth, the appropriate fee must be included.

After a proper application is filed, the application is assigned to an examiner with knowledge of the particular subject matter. The examiner makes a thorough review of the application and the status of existing concepts in the relevant area to determine whether the invention meets the requirements of patentability. The patent review process takes from 18 months to three years.

Rejection of a patent application by the examiner may be appealed to the Board of Patent Appeals. Decisions of the Board of Patent Appeals may be appealed to the federal courts. Provisional patent application requirements are less stringent than a regular patent application. The oath or declaration of the inventor and claims are not required and the application is held for the 12-month period without examination.

e. Markings. After a patent application has been filed, the product made in accordance with the invention may be marked with the legend "patent pending" or "patent applied for." After a patent is issued, products may be marked "patented" or "pat.," together with the U.S. patent number. Marking is not required, but it may be necessary to prove marking in order to recover damages in an infringement action.

f. Rights to Patented Inventions. Disputes sometimes arise between employers and employees over the rights to inventions made by employees during the course of employment. Because of this, employers often require employees to execute formal agreements under which each signing employee agrees that all rights to any invention made by the employee during the term of employment will belong to the employer.

3. Trademarks. This area is governed by both state and federal law.

a. In General. A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination. A trademark should not be confused with a trade name. Although the same designation may function as both a trademark and a trade name, a trade name refers to a business title or the name of a business; a trademark is used to identify the



goods manufactured by the business. A business that sells services rather than goods may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.

b. Selection of Trademark. A manufacturer should carefully consider the trademark selected for its merchandise. The level of protection against infringement of a trademark varies with the "strength" or "uniqueness" of the trademark. "Descriptive" marks are the weakest and least defensible. A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A "fanciful" mark, the strongest type of mark, is a coined name that has no dictionary definition.

Evaluation should also include consideration of the likelihood of success in obtaining federal and state registrations of the trademark. For example, a trademark that is "merely descriptive" cannot be registered.

Selection of a trademark should be accompanied by a trademark search to determine whether another manufacturer has already adopted or used a mark that is the same or similar to the one desired. Publications provide lists of existing trademarks, registered and unregistered, and there are businesses that specialize in trademark searches. Actual and potential trademark conflicts should be avoided, lest the manufacturer become involved in an expensive infringement lawsuit. Of even greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising merchandise bearing the mark.

c. Advantages of Trademark Registration. Under the trademark laws of the United States, the principal method of establishing rights in a trademark is actual use of the trademark. "Registration" of a trademark is not legally required but can provide certain advantages.

Federal registration of a trademark is presumptive evidence of the ownership of the trademark and of the registrant's exclusive right to use of the mark in interstate commerce, strengthening the registrant's ability to prevail in any infringement action. Federal registration is also a prerequisite for bringing a lawsuit under the federal trademark laws.

After five years of continued use of the mark following federal registration the registrant's exclusive right to use of the trademark becomes virtually conclusive. Federal registration may assist in preventing the importation into the U.S. of foreign goods that bear an infringing trademark. There are also other less tangible advantages of registration, such as the goodwill arising out of the implication of government approval of the trademark.



State registration provides some advantages, not as extensive as federal registration. State registration is usually advisable, particularly in situations in which a manufacturer's sales will occur only in Hawai'i.

d. Federal Registration Application Process. 15 U.S.C. § 1051, et seq. Federal trademark registration requires that a trademark application be filed with the U.S. Patent and Trademark Office. The application must identify the mark and the goods with which the mark is used or is proposed to be used, the date of first use, and the manner in which it is used. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and three specimens of the mark as it is actually used. After the application is filed, it is reviewed by an examiner who evaluates, among other matters, the substantive ability of the mark to serve as a valid mark and the possibility of confusion with existing marks. If the examiner rejects the application, the examiner's decision can be appealed to the Trademark Trial and Appeals Board. An adverse decision by that body can be appealed to federal court.

If the application is approved, the mark is published in an official publication of the Patent and Trademark Office. Opponents of the registration have thirty days after publication, or such additional time as may be granted, to challenge the registration. If no opposition is raised, or if the opponent's claims are rejected, an applicant whose mark is already in use receives a "certificate of registration."

An applicant whose trademark is proposed for registration before actual use receives, upon approval of the application, a "notice of allowance." An application who receives a notice of allowance must within six months of the receipt of the notice furnish evidence of the actual use of the trademark. The applicant then is entitled to a certificate of registration. Failure to furnish evidence of the actual use of the mark within the time allowed results in rejection of the application.

e. Post-Certificate Federal Procedures. A certificate of trademark registration issued by the Patent and Trademark Office remains in effect for ten years. However, registration expires at the end of six years, unless the registrant furnishes evidence of continued use of the trademark. The initial ten-year term of a certificate of registration can be renewed within the term's last six months for an additional ten-year term by furnishing evidence of continued use of the mark and paying a fee.

After at least five years of continuous use of a trademark following the receipt of a certificate of registration, a registrant can seek to have the status of the trademark elevated from "presumptive" evidence of the registrant's exclusive right to use of the trademark to virtually conclusive evidence of an exclusive right. To do so, the registrant must furnish the Patent and Trademark Office with evidence of continuous use of the trademark for at least five years. Additionally, there must not be any outstanding lawsuit or claim that challenges the registrant's rights to use the mark.



## B. State Considerations.

1. Trademarks, Service Marks, and Trade Names. Hawai'i protects trademarks, service marks and trade names both under common law and under the state's registration statute, Chapter 482 HRS. In general, the common law confers exclusive rights to use a trademark, service mark or trade name on the person who is first to adopt it in connection with goods and/or services. If the trademark is descriptive or otherwise inherently non-distinctive, it is protected only if it has acquired "secondary meaning."

A trademark, service mark or trade name may be registered in Hawai'i by filing an application for registration with the Director of the DCCA. The application must disclose the goods or services in which the trademark or service mark is used or the nature of the business for which the trade name is being used, and the manner in which the trademark or service mark is used in connection with the goods or services, the class in which the goods or services falls, and the date of first use of the trademark or service mark anywhere in the State of Hawai'i. Applicants must state that they are the originator or assignee of the trademark service mark or trade name. If the trademark or service mark consists of words with stylized lettering or a design, a specimen must be provided with the application. The application forms may be obtained from the DCCA's website at [www.hawaii.gov/dcca](http://www.hawaii.gov/dcca).

A certificate of registration will generally be issued if the trademark, service mark, or trade name set forth in the application is not substantially identical to a trademark, service mark, trade name, corporate name or the name of any other type of entity already registered with the DCCA subject to the following limitation.

A trademark or service mark shall be denied registration if it (1) comprises immoral, deceptive or scandalous matter; (2) comprises matter which may disparage or falsely suggest a connection with persons, institutions, beliefs, or national symbols, or bring them into contempt or disrepute; (3) comprises the flag, coat of arms or other insignia of the United States, any state or municipality, or any foreign nation; (4) comprises the names, signature or portrait of a living individual, except with his written consent; (5) consists of a mark which (a) when used on or in connection with the goods and services is merely descriptive or deceptively misdescriptive (b) when used on or in connection with the goods or services is primarily geographically descriptive or deceptively misdescriptive; or (6) is primarily a surname.

Registration of a trademark, service mark or trade name is effective for five years from the date of registration. A registration may be renewed for successive five year periods by filing a renewal application within six months prior to the expiration of the current term. Registration of a trade name is effective for one year from the date



of registration and may be renewed for successive ten year periods by filing a renewal application prior to the expiration of a term.

It is a deceptive trade practice under Chapter 481A-3 HRS to pass off goods or services as those of another or to cause likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services.

Trademark counterfeiting is a class C felony under Section 708-875 HRS.

2. Trade Secrets Law. Hawai'i has adopted the Uniform Trade Secrets Act, Chapter 482B HRS. The Act provides for injunctive relief to restrain actual or threatened misappropriation of trade secrets. The Act also provides for awards of compensatory damages in most cases of misappropriation. Compensatory damages may include both the actual loss caused by misappropriation and any unjust enrichment caused by misappropriation that is not taken into account in computing actual loss, or a combination thereof. If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not to exceed twice the compensatory damages. An action for misappropriation must be brought within three years after the misappropriation is discovered or should have been discovered by the exercise of reasonable diligence.

The Act defines "trade secret" as information, including a formula, pattern, compilation, program device, method, technique or process that: (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

## VIII. DISPUTE RESOLUTION

### A. Federal Court System

The trial courts of the federal court system are the U.S. District Courts. Each district has four federal district court judges who are appointed by the President for life terms upon approval by the United States Senate. In Hawai'i, appeals are to the Ninth Circuit Court of Appeals.

The federal district courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both the U.S. Constitution and federal statute. They have exclusive jurisdiction over bankruptcy, patent and copyright, antitrust, postal matters, internal revenue, admiralty, and federal crimes, federal torts, and customs. All other jurisdiction is concurrent with that of the state courts. There are generally two



ways to gain access to the federal district courts when there is such concurrent jurisdiction. First is diversity jurisdiction, which involves disputes between citizens of different states with an amount in controversy exceeding \$50,000. To be brought in federal court, there must be complete diversity, i.e., none of the plaintiffs may be a citizen of the same state as any of the defendants. The second primary basis involves a federal question, i.e., presenting an issue arising under the Constitution, statutes, or treaties of the United States. If a party's case does not fit within one of the statutorily mandated jurisdictions, there is no recourse to the federal courts.

The workings of the federal district courts are governed by the Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court and approved by the U.S. Congress. These are a uniform body of procedural rules applicable to every federal district court in the U.S. Each federal district court also establishes its own rules applicable only to the procedure in that district court.

These rules often set forth very specific guidelines for the handling of an action, and close attention must be paid to them. Thus, one participating in a suit in federal district court must be aware of that court's local rules as well as the Federal Rules of Civil Procedure.

## B. State Court System

### 1. Lower Courts

a. District Courts. District Courts are courts of limited jurisdiction, having exclusive jurisdiction over traffic infractions, summary possession, ejectment proceedings (landlord-tenant) without regard to the amount of the claim, and small claims cases where the amount in controversy is under \$5,000. The District Courts also have jurisdiction over: 1) civil cases where the debt, amount, damages, or value of the property claimed does not exceed \$40,000, 2) civil cases where the remedy sought is specific performance valued under \$20,000, 3) criminal offenses where punishment is by fine or by imprisonment not exceeding one year, 4) cases arising from violations of a state law or county ordinance, and 5) petitions where restraining orders for relief from and for injunctions against harassment are involved.

b. Circuit Courts. Circuit Courts are courts of general jurisdiction, having jurisdiction to hold jury trials in civil and criminal cases. The Circuit Courts also have exclusive jurisdiction in probate, guardianship, and criminal felony cases, as well as civil cases where the contested amount exceeds \$25,000. Circuit Courts share concurrent jurisdiction with District Courts in civil non-jury cases in which the amounts in controversy are between \$10,000 and \$25,000. The Circuit Courts also hear cases regarding mechanic's and materialman's liens and misdemeanor violations transferred from the District Courts for jury trial. There are four judicial circuits in the



State of Hawai'i. The Island of O'ahu and other islands not in any other circuit constitute the First Judicial Circuit, the Islands of Maui, Moloka'i, Lana'i, Kaho'olawe, and Molokini constitute the Second Judicial Circuit, the Island of Hawai'i constitutes the Third Judicial Circuit, and the Islands of Kaua'i and Ni'ihau constitute the Fifth Judicial Circuit. The Fourth Judicial Circuit was done away with when it merged into the Third Judicial Circuit. Circuit Court judges are appointed to 10-year terms by the Governor from a list provided by the Judicial Selection Commission, subject to approval by the state Senate.

c. Family Courts. The Family Courts endeavor to resolve matters involving families and children in a fair, speedy, economical, and accessible forum. Family Courts hear cases involving 1) children, 2) domestic relations, 3) domestic violence, and 4) other family law related cases. Cases involving children include delinquency, status offenses, abuse and neglect, termination of parental rights, adoption, guardianships, and detention. Domestic relations cases include divorce, child support, paternity, uniform child custody jurisdiction cases, and miscellaneous custody matters. Domestic violence cases include requests for civil restraining orders involving family members, persons charged with the offense of abuse of family and household members, and felony charges limited to offenses against household members. The other kinds of cases the Family Court hears include civil commitments, guardianships of adults, and adult abuse cases.

2. State Land & Tax Appeal Courts. As a practical matter, one judge is responsible for both Land and Tax Appeal Court matters. The Administrative Judge of the Circuit Court of the First Circuit, subject to the direction of the Chief Justice, assigns all Land and Tax Appeal Court cases to this judge in the Circuit Court of the First Circuit.

a. Land Court. The Land Court has exclusive original jurisdiction over all applications under the Torrens Act for the registration of title to land, easements or rights in land held and possessed in fee simple within the State, with power to hear and determine all questions arising upon the applications. It also has jurisdiction over other questions brought under the Land Court Registration law (Hawaii Revised Statutes Chapter 501). The Land Court does not have jurisdiction over lands which are not registered under the Torrens Act which are called regular system properties. The Land Court Registrar retains custody and control of all papers and documents filed under the Land Court Registration law.

b. Tax Appeal Court. The Tax Appeal Court hears appeals regarding real property taxation directly from assessments or from the Boards of Review. It is a court of record and decides all questions of fact and law including constitutional questions involving real property taxation without a jury.



### 3. Appellate Courts

a. Intermediate Court of Appeals. The Intermediate Court of Appeals is the second highest court in the state. It has concurrent jurisdiction with the Supreme Court and hears matters assigned to it by the Chief Justice of the Hawai'i Supreme Court or the Chief Justice's designee. The Intermediate Court of Appeals has the authority to reverse, remand, modify, or affirm decisions from all trial courts. Its decisions are reviewable by the Supreme Court. One chief judge and three associate judges comprise the Intermediate Court of Appeals. The judges rule on cases in panels of three. The Governor appoints members of the Intermediate Court of Appeals to an initial 10-year term from a list submitted by the Judicial Selection Commission, subject to confirmation by the state Senate.

b. Supreme Court. The Supreme Court of Hawai'i is the highest court in the state. Its decisions are binding on all other Hawai'i courts. The Supreme Court primarily reviews decisions of the trial courts in which appeals have been taken. The cases that are reviewed by appeal have been initiated in either a trial court or an agency. Appeals are generally decided on the basis of the written record, but in some cases, the court may hear oral arguments as well. The Court takes no evidence, except in original proceedings. The Supreme Court has original jurisdiction to 1) answer questions of law reserved to it by the trial courts or certified to it by a federal court, 2) entertain civil cases submitted on agreed statements of facts, and 3) decide questions arising in proceedings for extraordinary relief in the nature of writs of mandamus, prohibition, and habeas corpus. There are five Supreme Court Justices. Members of the Supreme Court are appointed to an initial 10-year term by the Governor from a list submitted by the Judicial Selection Commission, subject to confirmation by the state Senate. Each Justice may thereafter be retained by the Judicial Selection Commission. All five Justices participate in the discussion of each case. The Supreme Court is also responsible for the formulation of court rules, licensing and discipline of attorneys, and determining judicial fitness.

## IX. FINANCIAL AND SECURITIES MATTERS

A. Tax Exempt Financing. The Director of Finance of the State of Hawai'i is empowered to issue special purpose revenue bonds which are exempt from state taxation for particular purposes, including gas and electric public utilities, nonprofit healthcare facilities, and industrial, manufacturing and processing enterprises. Other governmental agencies which can issue tax exempt bonds include the High Technology Development Corporation and the Aloha Tower Development Corporation. The counties and their boards of water supply may also issue tax exempt bonds.

B. Commercial Banking. Hawai'i has state-chartered financial institutions that provide business with a full range of commercial banking opportunities. A large



percentage of the commercial banking business is held by locally based banks. Bank of the Orient and HomeStreet Bank (formerly known as Continental Savings Bank) are the only two national out-of-state financial institutions that have been authorized to maintain interstate branches in Hawai'i. There are currently no foreign banks with offices in Hawai'i, although several of the largest commercial banks offer international banking services.

Under HRS Chapter 412, the Division of Financial Institutions within the DCCA is the primary regulator of Hawai'i financial institutions. The Division is headed by the Commissioner of Financial Institutions, an appointed position.

### C. Securities

1. General. The Uniform Securities Act (Modified) regulates the offer and sale of securities in Hawai'i. The Act also regulates and requires the registration of dealers, investment advisors, salespersons and investment adviser representatives.

2. Registration. Securities offered for sale or sold within Hawai'i must either be registered with the Hawai'i Commissioner of Securities (the "Commissioner") or exempt from such registration. Securities for which a registration statement has been filed with the Securities and Exchange Commission under the Securities Act of 2006 in connection with the offering of securities are exempt from registration pursuant to Section 485A-201. Issuers of securities which are federal covered securities under Section 18(b) of the Securities Act of 1933 are generally required to file a notice and consent to service of process and pay a filing fee pursuant to HRS Section 485A-201 and the rules adopted by the Commissioner.

Securities may be registered by qualification by filing an application for registration with the Commissioner pursuant to HRS Section 485A-303. The application for registration must contain the information specified in the statute and rules. The specified information is similar to the information required in a federal registration statement. The application must be accompanied by consent to service of process and filing fee.

3. Registration Exemptions. HRS Section 485A-201 describes those securities exempt from the requirements of sections 485A-301 to 485A-305 and 485A-504. HRS Section 485A-202 exempts several types of transactions from the registration requirements.

4. Broker-Dealer and Investment Adviser Registration. To transact business in Hawai'i as a broker-dealer, investment adviser, salesperson or investment adviser representative, a person (other than federally covered advisers) must be



registered with the Commissioner. Federally covered advisers are subject to certain notice filing requirements. All persons, individuals, sole proprietorships, partnerships, corporations, limited liability companies, limited liability partnerships, or other associations of individuals, however organized, wishing to conduct *residential* mortgage loan origination activities in Hawai'i are required to obtain a license as a mortgage loan originator ("MLO") or mortgage loan originator company ("MLOC"), unless otherwise exempt under HRS Chapter 454F. Hawai'i participates in the Central Registration Depository system.

5. Anti-Fraud Provisions. The anti-fraud provision of the Securities Act, HRS Section 485A-501, makes it unlawful for any person to (i) employ any device, scheme, or artifice to defraud; (ii) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, (iii) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon another person; (iv) to issue, circulate, or publish any prospectus, circular, advertisement, printed matter, document, pamphlet, leaflet, or other literature (in this chapter collectively referred to as "advertising matter"), which contains an untrue statement of a material fact or fails to state a material fact necessary to make the statements therein made, in light of the circumstances under which they are made, not misleading; (5) to issue, circulate, or publish any advertising matter or make any written representation, unless the name of the person issuing, circulating, publishing, or making the same and the fact that the person is issuing, circulating, or making the same shall be clearly indicated thereon; (6) to make any statement or representation or issue, circulate, or publish any advertising matter containing any statement, to the effect that the security has been in any way approved or endorsed by the commissioner; or (7) to issue, circulate, or publish any advertising matter unless a copy thereof has been previously filed with the office of the commissioner, or unless the commissioner has by rule adopted or order issued under this chapter exempted the filing of any advertising material.

## X. REAL ESTATE

A. Ownership. As a general rule, all recognized legal entities such as natural persons, corporations, trusts, limited liability companies, and partnerships can hold title.

1. Individuals. Any individual may own real estate in Hawai'i, including aliens.

2. Corporations. Foreign or domestic corporations may hold title to real estate.



3. Partnerships. Foreign or domestic partnerships may own real estate. Limited partnerships, limited liability partnerships and limited liability limited partnerships also may own real estate.

4. Limited Liability Companies. Foreign or domestic limited liability companies may own real estate.

5. Trusts. Trusts may own real estate in the names of the Trustees.

#### B. Concurrent Ownership

1. Tenancy in Common. Tenants in common do not enjoy the right of survivorship. Instead, the interest of deceased tenants in common passes to their heirs. Tenancy in common agreements may be used in Hawai'i to set out the rights and liabilities of the co-tenants.

Conveyances of any interest in land made to two or more persons are construed as being to tenants in common in equal shares (unless otherwise stated), not in joint tenancy or as tenants by the entirety, unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy or by the entirety. HRS Section 509-1.

2. Joint Tenancy. An express declaration of joint tenancy is required in order to be enforceable. Typically, a joint tenancy is created by a conveyance to two or more persons with the words "as joint tenants." Persons who hold property in joint tenancy enjoy rights of survivorship. This means that if one of the joint tenants dies, remaining joint tenants automatically become owners of the decedent's share in equal proportions.

3. Tenancy by the Entireties. Tenancy by the entireties is recognized in Hawai'i and an express declaration of tenancy by the entirety is required in order to be enforceable. This method of holding title applies only to spouses or to reciprocal beneficiaries. Tenants by the entirety have the right of survivorship and the property cannot be reached by the creditors of only one of the parties.

#### C. Spousal Rights

Hawai'i is not a community property state, although it was from 1945 to 1949. Community property established during that period is governed by HRS Chapter 510 to the extent it has not been divested.

1. Rights Upon Death. Dower and curtesy rights in real property have been extinguished.



Hawai'i will apply the Uniform Probate Code, HRS Chapter 560 to determine the share of a spouse or reciprocal beneficiary if a property owner dies without a will. Regardless of the provision of a will, a spouse or a reciprocal beneficiary has a right of election to take an elective share of the estate which is a percentage determined by the length of the marriage or relationship which ranges from 3% for a length of one year to 50% for a length of 15 or more years.

2. Death of a Partner. The death of a general partner will cause the dissolution and liquidation of a partnership unless the partnership provides otherwise. The death of a limited partner does not cause the dissolution and liquidation of a limited partnership unless the limited partnership agreement provides otherwise.

D. Purchase and Sale Transactions.

Hawai'i law requires that contracts for the sale or transfer of an interest in land must be in writing and signed by the party to be charged therewith to be enforceable. HRS Section 656-1.

1. Purchase Agreements. Many real estate brokers prepare and furnish Hawaii Association of Realtors pre-printed or computer generated standard forms for use in residential transactions. Purchasers should review these agreements with counsel prior to execution. A purchase agreement should include all of the terms of the transaction including without limitation the price, payment terms, closing date, contingencies, description of the property, obligations to be assumed, if any, personal property to be included and excluded, warranties to be given at closing, proration and escrow arrangements.

2. Conveyance Tax. A conveyance tax is levied under HRS Chapter 247 on all transfers or conveyances of realty or any interest therein by way of deeds, leases or subleases (for more than five years), assignments of lease, contracts for sale or any other document, subject to a narrow list of exceptions. The rate varies depending on the actual and full consideration paid or to be paid on the property.

3. Proration of Real Property Taxes. At closing, the real property taxes will be prorated between the buyer and seller taking into account any arrearages or advance payments. The real property tax year runs from July 1<sup>st</sup> to June 30<sup>th</sup> and payments are due in two installments on August 20<sup>th</sup> and February 20<sup>th</sup>.

E. Closing and Costs of Real Estate Transfer. Closing of the transaction will generally be governed by the purchase agreement.



1. Documents. While there is no statutory form of deed, lease or mortgage in Hawai'i, there are specific requirements for recordable documents in HRS Chapters 501 and 502. In order to be recorded, a document must be acknowledged, must contain the address of the grantee, and leave the top three and one-half inches of space on the first page blank for the recording information.

2. Effect of Failure to Record. If a deed, or a lease for a term of more than one year, or a mortgage is not recorded, it is void as against any subsequent purchaser, lessee or mortgagee, in good faith and for a valuable consideration, not having actual notice of the conveyance of the real estate, or interest granted therein, whose document is first duly recorded.

3. Escrow Agreement. Escrow agreements are not required for real estate transfers in Hawai'i, although most transactions are closed through licensed escrow companies.

4. Conveyance Tax Certificate. Any instrument of conveyance presented for recordation is required to be accompanied by a Conveyance Tax Certificate, together with the conveyance tax due, or by a form for Exemption From Conveyance Tax.

F. Foreclosure. A mortgage can be foreclosed in Hawai'i either by judicial foreclosure or non-judicial foreclosure.

Judicial foreclosure is an equitable claim brought in circuit court and is heard by a judge and not by a jury. All prior and subsequent mortgage creditors must be joined in the action. Mortgage creditors are entitled to payment according to the priority of their liens. The mortgagor, or any subsequent mortgagee, may defend the action for foreclosure and may show any matter in legal or equitable avoidance of the mortgage.

A mortgagee may conduct a non-judicial foreclosure if the mortgage contains a "power of sale" provision authorizing the same. The non-judicial foreclosure process is governed by Part II of Chapter 667 HRS. Specific forms of written notices to the borrower, mortgagor and any guarantor and the public are required. The property is sold by auction in a public sale. After the sale, the foreclosing mortgagee signs and records an affidavit detailing all the particulars of the foreclosure process.

G. Land Contracts. Real property may be purchased in Hawai'i under a land contract, called an Agreement of Sale. The use of an Agreement of Sale is usually the result of the unavailability of financing other than seller financing. Title is not transferred under an Agreement of Sale and a separate conveyance document is delivered once the payment obligations are satisfied. The conveyance document is sometimes held in



escrow to facilitate the closing of the conveyance portion of the transaction. Interest received under an Agreement of Sale is subject to the Hawai'i general excise tax.

H. Easements. A purchaser of real estate is said to have notice of an easement if the easement appears in the record chain of title, or, with respect to an easement appurtenant, if it would be noticed by inspection of the premises.

The property benefited by the easement is called the "dominant estate," while the property burdened is called the "servient estate." Under Hawai'i law, the owner of the dominant estate is entitled to any use of the easement that is reasonably necessary for full enjoyment of the dominant estate.

Owners of an easement are allowed to make repairs so that the easement is reasonably usable. They are not allowed to make material alterations in the easement's character that place a greater burden on the servient estate. The owner of the easement is required to keep it in repair and may enter onto the servient estate as necessary to do so.

Absent an agreement to the contrary, the owner of the servient estate may use the burdened property for any purpose that does not unreasonably interfere with or obstruct the use of the easement by the owner of the dominant estate. An easement cannot be lost by mere non-use, but can be lost by abandonment.

I. Land Use and Zoning. The State Land Use Commission, a nine-member appointed body, oversees the classification of lands into urban, rural, agricultural and conservation districts. Various uses of the lands are permitted and/or prohibited within each land use district. Amendments to district boundaries involving land areas greater than fifty acres are processed by the Land Use Commission. Amendments to district boundaries involving areas of fifteen acres or fewer (other than with respect to conservation districts) are processed by county land use authorities.

County Zoning Ordinances further define the uses which are permitted or prohibited within the land use districts other than conservation districts, which are governed by the State. Hawai'i adopted the 2006 International Building Code as its state building code, effective April 2010. Each county also has its own set of local rules that amend the state code.

Department of Land and Natural Resources. Certain areas are designated as Special Design Districts with additional regulations.



## J. Leases.

1. Residential. Leases on dwelling units are governed by the Residential Landlord-Tenant Code, HRS Chapter 521. It places certain limitations on rental agreements and practices, specifies certain duties of the landlord and obligations of the tenant, requires certain disclosures, regulates security deposits, and specifies the remedies of the parties.

Much of the residential property in Hawai'i has been held by a limited number of large landlords who issued ground leases for residential development. In 1967 a statute was adopted to force the involuntary sale of residential leaseholds, which after review by the U.S. Supreme Court, has led to the conversion of much of the residential ground leasehold property to fee simple ownership.

Discrimination in real property transactions is prohibited.

2. Commercial. Commercial leases are far less regulated than residential leases although there are some restrictions on certain covenants and methods of rental renegotiation.

## XI. MISCELLANEOUS

A. Requirements for Qualification to Do Business. There are various ways to organize a business in Hawai'i. They include sole proprietorships, general or limited partnerships, limited liability partnerships, corporations and limited liability companies. Except for sole proprietorships, these entities whether created in Hawai'i or elsewhere are required to register with the DCCA. Forms for the creation of or registration of these business entities may be obtained from the DCCA's website at [www.businessregistrations.com](http://www.businessregistrations.com). Many professions and occupations are also required to be licensed by the DCCA, whether conducted by a sole proprietor or by another form of business entity.

Pursuant to HRS 414D-271, the following activities do not constitute transacting business in Hawai'i.

- (1) Maintaining, defending, or settling any proceeding;
- (2) Holding meetings of the board of directors, shareholders, members, managers or partners or carrying on other activities concerning internal affairs;
- (3) Maintaining bank accounts;



- (4) Maintaining offices or agencies for the transfer, exchange, and registration of the entity's own securities or maintaining trustees or depositories with respect to those securities;
- (5) Selling through independent contractors;
- (6) Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;
- (7) Creating or acquiring indebtedness, mortgages, and security interests in real or personal property;
- (8) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
- (9) Owning of real or personal property that does not produce income;
- (10) Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature; and
- (11) Transacting business in interstate commerce.

A person or entity wanting to do business in Hawai'i is also required to register with the Department of Taxation if it is responsible for reporting general excise or use tax or withholding for Hawai'i employees.

B. Licensing and Regulatory Requirements. Licenses are required for a large number of occupations including the following:

- Acupuncture Practitioners
- Alarm Businesses
- Athlete Agents
- Motor Vehicle Industry
- Motor Vehicle Repairs
- Motor Vehicle Rental Industry
- Barbering, Beauty Culture
- Boxing Contests
- No Rules Combat or Similar Contests
- Cable Television Systems
- Cemetery and Funeral Trusts
- Chiropractic
- Collection Agencies



---

Contractors  
Debt Adjusting  
Unaccredited Degree Granting Institutions  
Dental Hygienists  
Dentistry  
Dietitians  
Dental Service Organizations  
Electricians and Plumbers  
Electrologists  
Elevator Mechanics  
Escrow Depositories  
Hearing Aid Dealers and Fitters  
Health Care Professionals  
Marriage and Family Therapists  
Massage  
Medicine and Surgery  
Mortgage Brokers and Solicitors  
Naturopathy  
Notaries Public  
Nurses  
Nurse Aides  
Nursing Home Administrators  
Occupational Therapy Practice  
Opticians, Dispensing  
Optometry  
Osteopathy  
Pest Control Operators  
Pharmacists and Pharmacy  
Physical Therapy Practice  
Pilotage  
Private Investigators and Guards  
Podiatrists  
Professional Engineers, Architects,  
Surveyors and Landscape Architects  
Psychologists  
Public Accountancy  
Radiologic Technology  
Real Estate Appraisers  
Real Estate Brokers and Salespersons  
Solicitation of Funds from the Public  
Social Workers  
Speech Pathologists and Audiologists  
Travel Agencies



Activity Providers and Activity Desks  
Undertakers, Embalmers, Funeral Directors  
Veterinary Medicine

The main licensing agency for the State is the DCCA.

The Hawai'i Supreme Court governs the practice of law by its rules.

The counties may license certain other activities, including for example, auctions, outdoor advertising, pawnbrokers, hotels and bonding houses, peddlers, second hand dealers and scrap dealers.

Various industries are also regulated by state agencies including financial institutions, public utilities, time sharing and insurance.

C. Applicability of State Usury Laws. With respect to any transaction other than (1) a consumer credit transaction, (2) a home business loan or (3) a credit card agreement, it is lawful to stipulate by written contract for any rate of interest not otherwise prohibited by law. A consumer credit transaction or a home business loan is limited to 12% per year except for loans from regulated financial institutions, who can charge 24% per year. A credit card agreement is limited to 18% per year. If a greater rate of interest than permitted is contracted for with respect to a consumer credit transaction, a home business loan or a credit card agreement, the contract is not void but only the principal can be recovered and the debtor can recover costs. The receipt of interest at a greater rate than is permitted by law is subject to a fine of not more than \$250 or imprisonment for not more than one year or both.

D. Notice of Business Activities. Aside from the registration of various entities noted in Section XI. A. above and the obtaining of licenses for various professions, occupations and industries noted in Section XI. B. above, there is no notice requirement for business activities in Hawai'i.

E. Business Name Registration Requirements. A trade name or the name of a corporation, partnership or limited liability company that is not substantially identical to any prior registered trade name or business entity name may be registered or reserved by application to the Director of the DCCA. A trade name registration is effective for five years and can be renewed for additional periods of five years by filing a renewal application within six months prior to the expiration of the current term. The name of a proposed business entity that is reserved is protected for a period of 120 days.

---

**ASIA TO THE LEFT.  
NORTH AMERICA TO THE RIGHT.**

**(WELCOME TO THE CENTER OF THE PACIFIC RIM)**

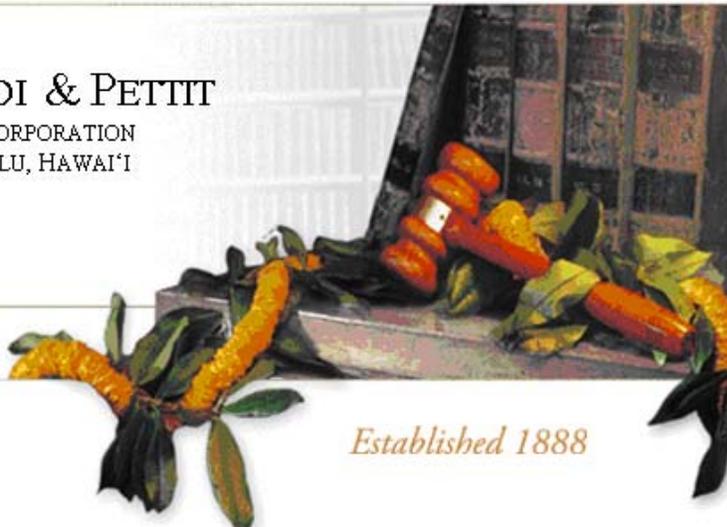
---

**Practicing law in the middle of the Pacific has its advantages. With an office in Honolulu, Case Lombardi & Pettit is within reach of the economic dynamism of East Asia and the resources of the United States. Our days begin talking to New York and end speaking with Tokyo, Hong Kong and Beijing. For well over a century, we have been providing international clients with the legal resources and expertise to succeed when doing business in Hawai'i.**

---

**CASE LOMBARDI & PETTIT**

A LAW CORPORATION  
HONOLULU, HAWAI'I



To learn more about our firm, visit [www.caselombardi.com](http://www.caselombardi.com)

Member

**LexMundi**  
World Ready

**Esther H. Roberts, Esq. Managing Director**  
Pacific Guardian Center 2600 Mauka Tower 737 Bishop Street Honolulu, Hawaii 96813  
Telephone (808) 547-5400 Fax (808) 523-1888 Email: [info@caselombardi.com](mailto:info@caselombardi.com)