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UNDERSTANDING CERTAIN LICENSING REQUIREMENTS OF THE DIVISION OF FINANCIAL INSTITUTIONS (“DFI”) FOR LENDERS THAT DO NOT TAKE DEPOSITS

DFI administers and interprets **Chapter 412, Hawaii Revised Statutes** (“HRS”), which is Hawaii’s Code of Financial Institutions (hereafter “**the Code**”).

IMPORTANT: You are advised to consult an attorney regarding other Hawaii laws that may apply to your particular situation, including corporation, taxation, and other licensing laws. DFI cannot advise you on the applicability or interpretation of such other laws.

Most inquiries received by DFI relate to licensing as a “**nondepository financial services loan company**”, commonly called a finance company. The licensing requirements for this type of financial institution are in **Article 9** of the Code. (Other financial institutions regulated under the Code include banks, savings banks, savings and loan associations, trust companies, depository financial services loan companies, and credit unions.)

To determine whether a lender’s activities in this State require an Article 9 license, you should become familiar with the law on Interest and Usury in **Chapter 478, HRS** (hereafter “**Chapter 478**”). Chapter 478 sets maximum allowable interest rates or finance charges for various types of transactions, and provides certain exemptions from those limitations. **IMPORTANT: DFI neither administers nor interprets Chapter 478, so you should consult an attorney if you need help understanding that law.**

I. Factors Affecting Need for Licensing as a Nondepository FSLC

An Article 9 license as a nondepository financial services loan company is required if **both** of the following apply:

- A. The lender has, or will have, a physical **or** legal presence in the State of Hawaii (e.g., *physical presence* is established if a lender opens an office or hires an employee in this State; *legal presence* is established if an out-of-state lender has obtained a certificate of authority to do business in this State); **and**
- B. The lender intends to charge, on a “consumer credit” transaction (other than credit card agreement) or a “home business loan” that is not otherwise exempt from the application of Chapter 478, a rate of interest or finance charge that exceeds what is

permitted by Chapter 478 for a lender not licensed or chartered under the Code. (The terms in quotation marks are defined in §478-1, HRS.)

To understand Paragraph B above, you should refer to §478-4, HRS - "Rates permissible by written contract" and §478-8, HRS - "Exemptions from usury". In general, **unless an exemption from usury applies**, licensing by DFI **may** be required if a lender with legal or physical presence in this State intends to make loans with rates in excess of 12% per year or 1% per month. However, there are many exemptions from usury for certain types of loans or transactions listed in §478-8, HRS, including first mortgage loans. Therefore, you should review Chapter 478 in detail and consult an attorney if you need assistance in applying the law to your business situation. As stated above, DFI does not administer Chapter 478 and cannot interpret that law for you.

Nondepository financial services loan companies licensed under Article 9 of the Code can exceed the Chapter 478 rate ceilings of 12% per year or 1% per month. Those companies are subject, instead, to the limitations in Article 9, which basically permit a maximum simple interest rate of 24% per year or higher-yielding precomputed interest rates, as described in §§412:9-301 and 412:9-302, HRS.

II. Licensing May Be Required To Make Even One Loan With Rate Exceeding Chapter 478 Limitations

Unless an exemption from usury applies, a lender with physical or legal presence in this State, who intends to make any loan, even just one, with interest rate or finance charge that exceeds what is permissible under Chapter 478 for unlicensed lenders, must be licensed by DFI. (See, §412:9-101, HRS.)

III. Licensing May Be Required for Purchaser or Assignee of Loans Made Under Article 9 of the Code

Any person (natural person, entity, or organization of any type) **with a legal or physical presence in this State**, who is a purchaser or assignee of loans made under Article 9 by a nondepository or depository financial services loan company, must be licensed or chartered by DFI, unless that person is otherwise authorized to charge or receive interest at the same rate and terms as provided for in the loans.

Notwithstanding the foregoing, a financial services loan company may assign the **right to collect** delinquent payments to one or more persons that are not financial institutions, who may enforce the terms of the loan to the same extent as the financial services loan company that originated the loan. (See, §412:9-309, HRS.) Persons collecting delinquent payments should determine whether they may be subject to registration as a collection agency pursuant to Chapter 443B, HRS. That law is administered by the Professional and Vocational Licensing Division, whose address and telephone number are listed below at Part IV.B of this fact sheet.

IV. Mortgage Lending in Hawaii

Until December 31, 2010:

Licensing by DFI is **not** required if a mortgage lender does not establish a physical or legal presence in Hawaii, **and** conducts all of its Hawaii lending from offices outside the State of Hawaii, doing business by mail or by telecommunications directly with borrowers, or by using licensed Hawaii mortgage brokers. This type of lender is not subject to any of the Code's provisions,

although it may still want to determine whether it is a “foreign lender” as defined in Chapter 207, HRS, in order to benefit from additional immunities and exemptions under Hawaii law as described in that chapter.

A. Out-Of-State Mortgage Lenders May Benefit As “Foreign Lenders” Under Part II, Chapter 207, HRS

An out-of-state mortgage lender engaging only in interstate commerce may want to determine whether it is a “foreign lender” as defined in §207-11 in Part II, Chapter 207, HRS, a Hawaii law relating to mortgage loans. Under that law, a foreign lender is entitled to benefit from certain exemptions and immunities. Foreign lenders need not register with any state agency to benefit from the exemptions and immunities.

IMPORTANT: A mortgage lender needing help with determining whether it is a “foreign lender” under Part II, Chapter 207, should consult an attorney, since DFI does not administer that law and cannot provide legal advice of this nature.

B. Mortgage Broker Licensing Is Not Required for “Foreign Lenders”

If a mortgage lender is a “foreign lender” as defined in §207-11, HRS, then the mortgage lender is exempt from mortgage broker licensing under the law on Mortgage Brokers and Solicitors, Chapter 454, HRS. That exemption, listed in §454-2, HRS, is self-executing. The **Professional and Vocational Licensing Division** of the Department of Commerce and Consumer Affairs administers Chapter 454, HRS, but does not register or confirm exemptions. **If you have additional questions on mortgage broker licensing, please contact:**

Licensing Branch
Professional and Vocational Licensing Division
Department of Commerce and Consumer Affairs
Post Office Box 3469
Honolulu, Hawaii 96801

Tel. (808) 586-3000

From January 1, 2011:

Effective January 1, 2011, the law on Mortgage Brokers and Solicitors, Chapter 454, HRS, is repealed pursuant to Act 84, 2010 Session Laws of Hawaii. From and after January 1, 2011, any person who is a mortgage loan originator or a mortgage loan originator company, as defined under Hawaii’s Secure and Fair Enforcement for Mortgage Licensing Act, Chapter 454F, HRS, and who is not otherwise exempted by that law, will be subject to licensing as a mortgage loan originator and/or a mortgage loan originator company, as applicable, in accordance with the requirements of Chapter 454F, HRS.

A licensed nondepository financial services loan company is not required to be licensed as a mortgage loan originator company, but must nevertheless register with the Nationwide Mortgage Licensing System if any of its employees act as a mortgage loan originator as defined in Chapter 454F, HRS, or if the nondepository financial services loan company uses the services of an exclusive independent contractor mortgage loan originator, or loan processor or underwriter, as defined in Chapter 454F, HRS.

The exemption from licensing as a mortgage loan originator company afforded to a licensed nondepository financial services loan company does not exempt an employee of a nondepository financial services loan company who originates mortgage loans, or an independent contractor providing mortgage loan originating, processing, or underwriting services to a nondepository financial services loan company, from licensure under Chapter 454F, HRS.

V. Minimum Requirements to Apply for Licensing as Nondepository FSLC

To be licensed as a nondepository financial service loan company, a company must meet certain requirements including having an office in this State, and minimum paid-in capital and surplus of \$500,000. (See, Part III, Article 3 of the Code.) A nondepository financial services loan company need not be incorporated in this State. (§412:9-101, HRS.)

Application requirements are set forth in §412:3-301, HRS. A non-refundable fee of \$10,000 must accompany the application.

VI. How to Get Access to Hawaii Revised Statutes (“HRS”)

- ✓ **For quick on-line access to *unofficial* HRS Chapters 412, 454F,** and most HRS chapters applicable to the Department of Commerce and Consumer Affairs (DCCA), go to: www.hawaii.gov/dcca/hrs

(The HRS text provided on this DCCA Web site is *unofficial* because only the bound volumes issued by the Revisor of Statutes contain the official Hawaii Revised Statutes.)

- ✓ **For all of the HRS on-line,** go to: www.capitol.hawaii.gov

Select the “Laws & Research” tab, then select “Hawaii Revised Statutes”.

- WARNING: On-line updates of the HRS that were amended or repealed in a recent legislative session may be delayed for many months. FOR HELP WITH LEGISLATIVE DOCUMENTS ON-LINE: Call the Public Access Room of the Legislative Reference Bureau at Tel. (808) 587-0478, or send e-mail to par@capitol.hawaii.gov.

FOR MORE INFORMATION, Go to DFI’s Web site: www.hawaii.gov/dcca/dfi