

STATE SMALL BUSINESS CREDIT INITIATIVE
HI-CAP COLLATERAL SUPPORT PROGRAM
PARTICIPATING LENDER AGREEMENT

This Participating Lender Agreement (this "AGREEMENT") is dated as of _____, but is effective as of _____ (the "EFFECTIVE DATE"), between **HAWAII GREEN INFRASTRUCTURE AUTHORITY**, an instrumentality of the State of Hawaii ("ADMINISTRATOR"), and _____, a _____ ("LENDER") (hereinafter, collectively, the "PARTIES").

RECITALS

WHEREAS, the American Rescue Plan Act of 2021 appropriated \$10 billion to the State Small Business Credit Initiative (SSBCI) program to provide relief to small businesses struggling to recover from the economic effects of the COVID-19 pandemic; to ensure business enterprises owned and controlled by socially and economically disadvantaged individuals have access to credit and investment opportunities; and to provide technical assistance to aid small businesses applying for various support programs;

WHEREAS, the SSBCI program was first established by the Small Business Jobs Act of 2010 to provide access to capital for small businesses. At that time, the Hawai'i Strategic Development Corporation ("HSDC") served as the lead agency for the State of Hawai'i and invested the \$13 million appropriation to kick-start the venture capital industry in Hawai'i. Subsequently, on July 1, 2019 per Act 056, Session Laws of Hawaii 2019, HSDC and its programs, including the SSBCI program, merged into the Hawaii Technology Development Corporation ("HTDC");

WHEREAS, the minimum allocation of the SSBCI appropriated to Hawai'i by the American Rescue Plan Act is \$56,234,176. Additional funds for technical assistance may potentially be available to States that are able to deliver on the program goals of reaching underserved priority businesses;

WHEREAS, on November 30, 2021, Governor David Ige designated HTDC as the state agency to implement the SSBCI program, to be known as the Hawaii Small Business Capital ("HI-CAP") Program to strengthen state programs that support private financing to small businesses, and deployed through a Collateral Support Program ("HI-CAP Collateral"), a Loan Participation Program, ("HI-CAP Loan") and a Fund of Funds Program ("HI-CAP Invest");

WHEREAS, HGIA is a partner in the implementation of the SSBCI program to create, implement and administer the HI-CAP Collateral Program and HI-CAP Loan Programs to help small businesses access private financing to support and grow their business;

WHEREAS, Act 107, SLH 2021, expanded HGIA's functions, powers and duties to include implementing and administering loan programs on behalf of other state departments or agencies through a memorandum of agreement and expend funds appropriated to the department or agency for purposes authorized by the legislature;

WHEREAS, on March 23, 2022, HTDC and HGIA executed a Memorandum of Agreement for HGIA to administer the HI-CAP Collateral Program and HI-CAP Loan Programs, and to receive and disburse SSBCI funds within said SSBCI Programs administered by HGIA;

WHEREAS, on May 19, 2022, the US Department of Treasury approved the State of Hawaii's SSBCI application;

WHEREAS, during its July 6, 2022, meeting, HTDC's Board ratified the SSBCI Application approved by the US Department of Treasury, including the creation of the Loan Participation and Collateral Support Programs under the administration of HGIA;

WHEREAS, the parties desire to set forth in this Agreement the terms and conditions of participation in the HI-CAP Collateral Program.

NOW, THEREFORE, in consideration of the recitals and mutual agreements in this Participating Lender Agreement, the Parties agree as follows:

Section 1. Program Participation Eligibility

To become a Participating Lender and participate in the HI-CAP Collateral Support Program ("HI-CAP Collateral Program") administered by HGIA, the Lender must be a qualified financial institution, and agree that its activities and offerings will comply with the terms of HI-CAP Collateral Program, which may be amended from time to time, and meet and maintain compliance with the following minimum requirements described in this Agreement.

1. **Qualified Financial Institution.** Lender is a financial institution as defined pursuant to section 412:1-109, Hawaii Revised Statutes, or a private or public lender approved by HGIA.
2. **Insurance Requirements.** Lender meets the State's Workers Compensation Insurance requirements and carries General Liability coverage with limits no less than \$1,000,000 per occurrence and \$2,000,000 in aggregate. Lender shall add HGIA as an additional insured with an endorsement to each of the Contractor's insurance policies. The endorsement shall also provide that HGIA receive thirty (30) days prior written notice of cancellation or material change in policy provision. Proof of insurance coverage shall be submitted with the executed Participating Lender Agreement and updated annually.
3. **Taxpayer Identification Number & Certification.** Lender has a valid Federal Taxpayer

Identification Number and Hawaii State General Excise Tax Number. Lender shall submit a signed IRS Form W-9 "Request for Taxpayer Identification Number & Certification" with the executed Participating Lender Agreement.

Section 2. General Program Participation Requirements

- 1. Orientation & Training.** In addition to reviewing the guidelines and requirements of the HI-CAP Collateral Program, all Lenders whose applications have qualified them for participation in the HI-CAP Collateral Program must attend a mandatory Program Orientation & Training or view the recorded training provided by HGIA before performing any work in connection with the HI-CAP Collateral Program. At least one (but more than one is encouraged) of the Lender's designated employees must attend or view Program orientation session. The Lender is responsible for educating Lender's staff concerning the program requirements and procedures.
- 2. Participating Lender Referral Directory.** HGIA will maintain a Participating Lender Directory ("Participating Lender List") that lists all Lenders participating in the HI-CAP Collateral Program on HGIA's website.

On an as needed basis, HGIA will update the database by: (a) adding the name(s) of new Lenders participating in HI-CAP Collateral Program since the last update; and (b) deleting Lenders no longer participating in the program. Lender acknowledges and agrees with HGIA that: (i) inclusion on the Participating Lender List is strictly a result of the applicable Lender having satisfied the requirements for becoming a Participating Lender under the Programs; (ii) HGIA does not endorse any particular Lender; and (iii) being listed in the directory does not guarantee a Lender any minimum volume of loans or customers that may be eligible to receive HI-CAP Collateral Program financing.

To remain listed in the directory, Participating Lenders must remain in good standing with all HI-CAP Collateral Program requirements. Lender hereby acknowledges and authorizes HGIA to include Lender on the Participating Lender List maintained on HGIA's website.

- 3. Promotion of Program Loans.** The Lender will market the availability of Program Loans to Lender's existing and potential customers, as applicable, through Lender's normal marketing channels for similar programs.
- 4. Indemnification and Hold Harmless.** HGIA, the State of Hawaii, HTDC, and their respective directors, officers, agents and employees (collectively, the "Indemnified Person(s)") shall not be liable to the Lender for any reason arising out of or related in any

way to the Loan, the Loan Documents, the HI-CAP Collateral Program Documents or this Participating Lender Agreement. The Lender shall indemnify and hold HGIA, the State of Hawaii, and HTDC and other Indemnified Person harmless against all claims asserted by or on behalf of any individual person, firm or entity (other than an Indemnified Person), arising or resulting from, or in any way connected with, the Loan, Loan Documents, HI-CAP Collateral Program Documents or this Participating Lender Agreement or any act or failure to act by the Lender, including all liabilities, costs and expenses, including reasonable counsel fees, incurred in any action or proceeding brought by reason of any such claim. The Lender shall also indemnify HGIA, HTDC and other Indemnified Person from and against all costs and expenses, including reasonable counsel fees, lawfully incurred in enforcing any obligation of the Lender arising from or under the Loan, Loan Documents, HI-CAP Collateral Program Documents or this Participating Lender Agreement. The Lender shall have no obligation to indemnify an Indemnified Person under this Section if a court with competent jurisdiction finds that the liability in question was solely caused by the willful misconduct or gross negligence of HGIA, HTDC or other Indemnified Person, unless the court finds that despite the adjudication of liability, HGIA, HTDC or other Indemnified Person is fairly and reasonably entitled to indemnity for the expenses the court considers proper. HGIA, HTDC and the Lender agree to act cooperatively in the defense of any action brought against HGIA, HTDC or another Indemnified Person to the greatest extent possible. Performance of the Lender's activities contemplated under the HI-CAP Collateral Program Documents or this Participating Lender Agreement is within the sole control of the Lender and its employees, agents and contractors, and an Indemnified Person shall have no liability in tort or otherwise for any loss or damage caused by or related to the actions or failures to act, products and processes of the Lender, its employees, agents or contractors. This Section shall survive termination of the Participating Lender Agreement indefinitely.

5. **Term and Termination.** The term of this Agreement shall commence on the Effective Date and continue in effect until the date HGIA provides Lender with written notice that HI-CAP Collateral Program has been terminated or upon sooner termination as set forth in the paragraph below. Notwithstanding the foregoing, either party may terminate this Agreement at any time prior to the termination of the HI-CAP Collateral Program, with or without cause, upon delivery of thirty (30) days written notice to the other party. Lender acknowledges and agrees that unless otherwise agreed to in writing by HGIA, the termination of this Agreement and Lender's standing as a Participating Lender prior to the

end of the HI-CAP Collateral Program does not release the Lender from any of the duties and responsibilities with respect to Loans enrolled in the HI-CAP Collateral Program that were entered into and which are outstanding as of the date of termination. If the termination relates to one or more, but not all, Programs, this Agreement shall remain in full force and effect with respect to the remaining Programs.

While it is impossible to note every type of violation or unacceptable conduct that could lead to termination, such violations may include:

- Failure to comply with any of the terms and conditions of this Agreement, Deposit Agreement, other HI-CAP Collateral Program documents, processes or SSBCI Capital Program Policy Guidelines;
- Failure to maintain “Regulatory Good Standing” with Lender’s regulatory agency.

If the Lender is in default of any term, condition, or covenant herein, any representation furnished by Lender to HGIA pursuant hereto shall prove to have been incorrect in any material respect, and/or Lender fails to follow HI-CAP Collateral Program procedures as set forth in the guidelines, HGIA may, in HGIA’s sole and absolute discretion, immediately terminate Lender’s status as a Participating Lender by providing Lender with notice of such termination (the “Notice of Termination”). Upon issuance of a Notice of Termination, this Agreement shall immediately be of no force and effect; provided, however, that such termination does not release Lender from any of the duties and responsibilities with respect to HI-CAP Collateral Program Loans entered into and which are outstanding as of the date of termination. In the event of termination, Lender agrees to waive any and all claims for damages, direct or otherwise, arising under any theory of law or equity, against the State, HGIA and their representatives.

6. **Expenses.** The expenses incurred by each party hereto incident to the execution, delivery and performance by each party under this Agreement, unless expressly provided herein, shall be paid for by each party.
7. **Amendment.** This Agreement may be amended at any time and from time to time by one or more writings executed by all parties hereto.
8. **Governing Law.** This Agreement shall be construed in accordance with the laws of the State of Hawaii.
9. **Counterparts; Facsimile/Pdf Signatures.** This Agreement may be signed in any number of counterparts, each of which when executed and delivered, shall constitute and be deemed an original and all of which together shall constitute one and the same

Agreement, with the same effect as if the signatures thereto and hereto were upon the same instrument, notwithstanding that all of the Parties are not signatories to the same original or counterpart, or that signature pages from different counterparts are combined. The signature of any Party to any counterpart shall be deemed to be a signature to and may be appended to any other counterpart. Electronically transmitted or facsimile copies of original signature pages shall be deemed to be, and shall be legally effective as, originally signed signature pages for all purposes of this Agreement.

10. **Independent Parties.** This Agreement shall not be deemed to constitute the Parties as partners or joint venturers, nor shall any party be deemed to constitute the other party as its agent.
11. **Successors and Assigns.** This Agreement shall be binding on the Parties' successors and assigns provided that this Agreement shall not be assigned by Lender without the prior written consent of HGIA.
12. **Section Headings.** The headings of the sections herein are for convenience and reference only and shall not be considered as defining or limiting in any way the scope or intent of any provision of this Agreement.

Section 3. Program Requirements. As a Participating Lender, the Lender acknowledges and agrees to the following:

1. **Participating Lenders.** Only Participating Lenders may enroll eligible Loans into the HI-CAP Collateral Program.
2. **Lender certifications, attestation and assurances. The Lender certifies, attests and provides assurances that it is and will remain in compliance with all SSBCI program requirements, including but not limited to the following:**
 - a. **Sex Offender Lender Certification.** No principal(s) of the Lender listed above has been convicted of a sex offense against a minor (as such terms are defined in 34 U.S.C. § 20911). For the purposes of this certification, "principal" means the following: if a sole proprietorship, the proprietor; if a partnership, each partner; if a corporation, limited liability company, association, development company, or other entity, each director, each of the five most highly compensated executives, officers, or employees of the entity, and each direct or indirect holder of 20 percent or more of the ownership stock or stock equivalent of the entity.
 - b. **Regulatory Good Standing.** The Lender certifies that it is not subject to a cease-and-desist order or other regulatory sanction with the appropriate federal or state

regulatory body. The Lender further agrees to immediately notify HGIA should there be a change in its regulatory standing which could impair its ability to participate in the Program.

- c. **Criminal and Civil Matters.** To the best of Lender's knowledge, neither Lender nor any of its affiliates, subsidiaries, officers, directors and any person who, directly or indirectly, holds a pecuniary interest in the Lender of 20% or more: (i) have any criminal convictions incident to the application for or performance of a state contract or subcontract, and (ii) have any criminal convictions or have been held liable in any civil proceeding that negatively reflects on the person's business integrity, including without limitation, based on a finding of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or violation of state or federal antitrust statutes.
 - d. **Passive Real Estate Investment Exception.** To the extent the Borrower is a real estate holding company using the proceeds of the Loan to acquire and hold real property and subsequently leasing the real property to an operating company, the Lender represents and warrants the following:
 - i. The Lender will require the Operating Company to be a co-borrower or a guarantor of the Loan, as applicable;
 - ii. The Lender shall require both the Borrower and Operating Company to execute all required certifications, including the Operating Company Certification;
 - iii. The Lender shall require each natural person holding an ownership interest constituting at least twenty percent (20%) of the Borrower and the Operating Company to provide a personal guaranty in favor of the Lender for the Loan;
 - iv. The Lender shall require the Borrower and Operating Company to submit a written lease with a term at least equal to the term of the Loan, including options to renew exercisable solely by the Operating Company; and
 - v. The Lender shall obtain an assurance from the Borrower that the percentage of space the Operating Company occupies, meets SSBCI requirements.
3. **Lender Compliance.** The Lender agrees to comply with all requirements of the HI-CAP Collateral Program Guidelines, the State Small Business Credit Initiative legislation (12

U.S.C. §5701-5710), the American Rescue Plan Act of 2021, the SSBCI Capital Program Policy Guidelines, and any amendments thereto, including but not limited to the following:

a. **Lender Use of Proceeds and Conflict of Interest Certification.** Funds from the State Small Business Credit Initiative (SSBCI) may only be used for certain purposes and in circumstances where the applicable conflict of interest standards are satisfied. The Lender hereby certifies the following to the participating jurisdiction:

- i. SSBCI-supported loan(s) will not be made in order to place under the protection of the HI-CAP Collateral Program prior debt that was not covered under the HI-CAP Collateral Program and that is or was owed by the borrower to the Lender or to an affiliate of the Lender.
- ii. If an SSBCI-supported loan is a refinancing, it will comply with all applicable SSBCI restrictions and requirements in Sections VII.f (Loan Purpose Requirements and Prohibitions – 12 U.S.C. §5704(e)(7)) and VIII.f (Loan Purpose Requirements and Prohibitions – 12 U.S.C. §5705(f)) of the SSBCI Capital Program Policy Guidelines regarding refinancing and new extensions of credit.
- iii. The Lender will not attempt to enroll any portion of an SBA-guaranteed loan.
- iv. The SSBCI-supported loan shall comply with all applicable SSBCI restrictions and requirements within the SSBCI Capital Program Policy Guidelines, as may be amended, including the submission of the completed and executed Borrower Application and Certification Form, executed Cash Collateral Deposit Agreement, executed Certificate and Agreement of Borrower, and other Program documents and information as may be required.

b. **Auditor, Compliance Contractor, etc.** To ensure compliance with the terms of the HI-CAP Collateral Support Program and the SSBCI Program:

- i. the Lender shall permit HGIA's Auditor (the "Auditor"), HGIA, HTDC, and the Compliance Contractor (the "Compliance Contractor"), and any representative, member, employee or agent of the foregoing to inspect the books and records, including financial records and all other information and data, relevant to the Loan, the Loan Documents, Deposit Agreement and the terms of this Agreement;

- ii. the Lender shall permit the Auditor, HGIA, HTDC, Compliance Contractor, and any representative, member, employee or agent of the foregoing to make copies or extracts from information and to discuss the affairs, finances and accounts of the Lender and Borrower related to the Loan, the Loan Documents, Deposit Agreement and this Agreement; and
- iii. the Lender shall cooperate with the HGIA and its compliance team, if contacted.

This Section shall survive for a period of three years from the effective date of termination of the Agreement.

- c. **Jurisdiction.** The Lender agrees that it shall make a good faith effort to resolve any controversies that arise regarding the HI-CAP Collateral Program Documents, the Deposit Agreements and/or this Agreement. If a controversy cannot be resolved, the Lender agree that any legal actions concerning the HI-CAP Collateral Program Documents, the Deposit Agreements and/or this Agreement shall be brought in the State of Hawaii Circuit Court of the First Circuit. This Section shall survive termination of the Agreement indefinitely.

- d. **Non-Discrimination and Unfair Labor Practices.** In connection with this Agreement, the Lender agrees not to discriminate against any employee or applicant for employment, with respect to their hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of race, color, religion, national origin, ancestry, age, sex, height, weight, marital status, physical or mental disability unrelated to the individual's ability to perform the duties of the particular job or position. The Lender further agrees that every subcontract entered into for performance of this Agreement will contain a provision requiring nondiscrimination in employment, as specified in this Agreement, binding upon each subcontractor.

At all times during the term of this Agreement, the Lender also agrees that it shall comply with all applicable federal and state labor and employment laws and regulations, and that every subcontract entered into for performance of this Agreement will contain a provision, binding on the subcontractor, requiring such compliance.

- e. **Patriot Act.** The Lender shall perform all of its obligations and duties as required under the Patriot Act of 2001, as amended, including without limitation, the provisions relating to the Customer Identification Program (CIP) and anti-terrorism,

and HGIA may so rely on the Lender's performance of any such requirements, including that the Lender is in compliance with the requirements of 31 CFR 103.121 (relative to anti-money laundering programs); and Lender acknowledges the aforesaid obligations and duties, and further certifies it is in compliance thereunder, including relative to implementation of reasonable procedures to verify the identity of any person seeking to open an account, to the extent reasonable and practicable, maintain records of the information used to verify a person's identity and determine whether the person appears on any lists of known or suspected terrorist organizations provided to the Lender by any government agency.

- f. **Creditworthiness of Loan.** The Loan must generally meet the Lender's credit underwriting criteria with an exception to loan collateral adequacy.
- g. **Headquartered in Hawaii.** At least 90% of the SSBCI funds allocated must support businesses headquartered in Hawaii.
- h. **Borrower Size.** HI-CAP Collateral Program is targeting businesses with an average of 500 employees or less. The Lender shall not enroll Loans into the HI-CAP Collateral Program to support any Borrower that has more than 750 employees.
- i. **Purpose of the Loan.** Loans enrolled into the HI-CAP Collateral Program:
 - i. Shall be only for permissible purposes.
 - ii. Will not be for SSBCI impermissible purposes
- j. **Maximum Loan Amount** shall not exceed a principal amount of \$20 million. Additionally, the maximum aggregate outstanding loan amount(s) that may be enrolled for any single borrower is \$20.0 million.
- k. **Maximum Loan Term:** Ten (10) Years.
- l. **Interest Rate** shall be the Lender's standard commercial rates, not to exceed the National Credit Union Administration's ("NCUA") interest rate cap.
- m. **Upfront Fees or charges** paid by the small business, excluding fees to the state program, may not exceed 2% for loans greater than \$25,000 or \$500 for loans under \$25,000.
- n. **Personal Guarantees** are required from any individual holding 20% or more ownership interest in the Borrower.
- o. **Lender Risk.** Lender must bear a 20% or greater risk of loss.

- p. **Fees.** The Lender agrees to pay HGIA a Closing Fee equal to the greater of 50 basis points (0.5%) of the value of the initial cash deposited into the Lender's Cash Collateral Account ("Initial Deposit") or \$50.00. Thereafter, on an annual basis, the Lender agrees to pay HGIA an Annual Fee equal to the greater of 50 basis points (0.5%) of the actual Term Loan Collateral Requirement, Revolving Loan Collateral Requirement or Draw to Term Loan Collateral Requirement, as applicable under Section 3 of the Cash Collateral Deposit Agreement multiplied by the Collateral Support Percentage required by the Lender to support the Loan or \$50.00.
- q. **SSBCI Reporting.** The Lender shall cooperate with HGIA, HTDC, and any of their representatives, to provide information necessary for HGIA to ensure effective administration and reporting of the program to the U.S. Treasury, on a bi-annual basis or upon request, including but not limited to the following:
- i. Borrower's Loan Number;
 - ii. Date of Initial Loan Disbursement;
 - iii. Loan Status;
 - iv. Current Outstanding Loan Principal Balance;
 - v. Current Outstanding Original State Participation Balance;
 - vi. Additional Financing Provided to Borrower at closing or subsequent to closing;
 - vii. Delinquent Loan Data;
 - viii. Charge-off Data;
 - ix. any other information from time to time requested by HGIA or the US Treasury.

Section 4. Notices.

Except as otherwise provided herein, whenever it is provided herein that any notice, demand, request, consent, approval, declaration or other communication shall or may be given to or served upon any of the parties by any other party, or whenever any of the parties desires to give or serve upon any other party any communication with respect to this Agreement or any of the HI-CAP Collateral Program Documents, each such notice, demand, request, consent, approval, declaration or other communication shall be in writing, delivered via electronic mail, as follows:

If to the Administrator:

Hawaii Green Infrastructure Authority
Dbedt.hicap-loans@hawaii.gov

If to the Lender:

- 1. For General Program Updates: _____

- 2. For Annual Fee Invoices: _____

- 3. For Report Data: _____

4. The giving of any notice required hereunder may be waived in writing by the party entitled to receive such notice. Failure or delay in delivering copies of any notice, demand, request, consent, approval, declaration or other communication to any Person (other than the Administrator or Lender) designated above to receive copies shall in no way adversely affect the effectiveness of such notice, demand, request, consent, approval, declaration or other communication.

Any party may designate a different address by giving notice thereof in accordance with this paragraph. Notice shall be deemed completed on the date of delivery, email or two (2) business days after the date of mailing, as applicable.

Section 5. Authorized Signer(s).

To expedite the submission of the required HI-CAP Collateral Program documents, the Lender may authorize specific employees to sign on its behalf. The Lender hereby authorizes the following employees to sign HI-CAP Collateral Program Documents on behalf of the Lender:

_____	_____	_____
(Print Name)	(Specimen Signature)	(Title)
_____	_____	_____
(Print Name)	(Specimen Signature)	(Title)
_____	_____	_____
(Print Name)	(Specimen Signature)	(Title)

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK;
SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as by their respective authorized officers or representatives as of the date and year first above written.

HAWAII GREEN INFRASTRUCTURE
AUTHORITY, an instrumentality of
the State of Hawaii

a _____

By: _____
Gwen S Yamamoto Lau
Its: Executive Director

By: _____
Name: _____
Its: _____

SAMPLE