



**HAWAII
SMALL BUSINESS
REGULATORY REVIEW
BOARD
ANNUAL REPORT SUMMARY**

Results for Calendar Year 2012

Review of Administrative Rules, Legislation

And

Rules Requested by Small Business

In Compliance with

Chapter 201M

Hawaii Revised Statutes

HAWAII SMALL BUSINESS REGULATORY REVIEW BOARD

ANNUAL REPORT SUMMARY 2012

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Section I

MESSAGE FROM DIRECTOR



As the Director of the Department of Business, Economic Development and Tourism, it gives me great pleasure to thank the members for their service of the Small Business Regulatory Review Board. The dedicated work of the members continue to be an essential part of the rule-review process in order to lessen the regulatory burden on the small business community.

In July 2012, Governor Abercrombie signed into law Act 241, Session Laws of Hawaii. Among other changes, Act 241 amended Section 201M-5, Hawaii Revised Statutes, to provide for more specific membership requirements for the SBRRB thereby changing the process for nominating persons for appointment to the board. The change resulted in the repeal of the existing SBRRB members, which convened its last board meeting in June 2012.

At the time this report was printed, the member nominating process was not complete. Subsequently, a sufficient number of members were nominated to constitute quorum. While the new members met in December 2012, they declined to formally approve the report due to their personal unfamiliarity with the majority of the contents of the report. Therefore, while the information contained in this report was prepared by DBEDT, every effort has been made to include only a compilation of the information taken from the meeting minutes from January through June, and December 2012.

Richard C. Lim

OVERVIEW

The Small Business Regulatory Review Board is pleased to provide the Annual Report Summary for the period covered from January 2012 through June 2012.

Pursuant to the Hawaii Small Business Regulatory Flexibility Act, Chapter 201M, Hawaii Revised Statutes (HRS), the annual summary is based on the following:

[201M-5] Small business regulatory review board; powers

(f) The board shall submit an annual report to the legislature twenty days prior to each regular session detailing any requests from small business owners for review of any rule adopted by a state agency, and any recommendations made by the board to any agency or the legislature regarding the need for a rule change or legislation.

The report shall also contain a summary of the comments made by the board to agencies regarding its review of proposed new or amended rules.

ANNUAL SUMMARY

SMALL BUSINESS REGULATORY FLEXIBILITY ACT

The Small Business Regulatory Review Board was established on July 1, 1998, with the passage of the Small Business Regulatory Flexibility Act, pursuant to Act 168. Subsequently, the role of the Board has been codified in Chapter 201M, Hawaii Revised Statute (HRS), as amended. (See Appendix 1)

ADMINISTRATIVE RULE REVIEW

Statutorily, the Board is comprised of nine members - eight current or former owners or officers of businesses from across the State, and the Director of Business, Economic Development, and Tourism (DBEDT), or the Director's designated representative to serve as an "ex officio voting member." The Board is administratively attached to DBEDT and has responsibility for providing recommendations to State agencies on new and amended administrative rules that directly impact small business. The Board is also charged with reviewing existing rules upon request from small business owners or at the Board's initiative. For requests regarding County rules, the Board may make recommendations to County Council or the Mayors for appropriate action.

In addition to reviewing rules and regulations, members have in the past volunteered their time attending State agency meetings, making presentations by performing outreach activities to small business organizations, and testifying on legislation. The Board also has the power to solicit testimony from the public regarding any reports submitted by State agencies.

As an effective and efficient means of review, each member is assigned to one or more State agency as a “discussion leader,” and is responsible for the initial review of the administrative rules of that State agency prior to consideration by the full Board. As of December 2012, the Board was operating with seven members.

ADMINISTRATIVE RULE REVIEW

Since its inception, the Board reviewed a total of 551 sets of proposed new and amended administrative rules; the results are categorized in Appendix 2. During 2012, the Board reviewed and made recommendations on 25 sets of new and amended rules, both pre- and post-public hearing; a summary is categorized below.

Office of the Lieutenant Governor

No key matters of small business impact have been noted.

Department of Accounting & General Services

No key matters of small business impact have been noted.

Department of Agriculture

HAR Title 4 Chapter 72, “Plant Intrastate Rules”

Comment – The Board recommended that the proposed amendments, after public hearing, proceed to the Governor for adoption.

Department of Attorney General

No key matters of small business impact have been noted.

Department of Budget & Finance/Public Utilities Commission

Budget & Finance – No key matters of small business impact have been noted.

Public Utilities Commission – No key matters of small business impact have been noted.

Department of Business, Economic Development & Tourism

No key matters of small business impact have been noted.

Department of Commerce & Consumer Affairs

HAR Title 16 Chapter 88, “Relating to Naturopaths”

Comment – The Board recommended that the proposed amendments, after public hearing, proceed to the Governor for adoption.

HAR Title 16 Chapter 71 Section 21, “Experience”

Comment – The Board took no action upon reviewing the small business statement after public hearing.

HAR Title 16 Chapter 23, “Motor Vehicle Insurance Law”

Comment – The Board recommended that the proposed amendments proceed to the Governor for adoption.

HAR Title 16 Chapter 89, “Nurses”

Comment – The Board recommended that the proposed rule amendments proceed to public hearing.

HAR Title 16 Chapter 100, “Speech Pathologists and Audiologists”

Comment – The Board recommended that the proposed rule amendments proceed to public hearing.

HAR Title 16 Chapter 115, “Professional Engineers, Architects, Surveyors, and Landscape Architects”

Comment – The Board heard from several testifiers in support of the proposed amendments, and recommended that they proceed to public hearing.

Department of Defense

No key matters of small business impact have been noted.

Department of Education

No key matters of small business impact have been noted.

Department of Hawaiian Home Lands and the Office of Hawaiian Affairs

No key matters of small business impact have been noted.

Department of Health (DOH)

HAR Title 11 Chapter 54, “Water Quality Standards”

Comment – The Board recommended that the rules proceed to public hearing and that DOH consider implementing proposed changes recommended by the stakeholders, presented at the Board meeting.

HAR Title 11 Chapter 55, “Water Pollution Control”

Comment – The Board recommended that the rules proceed to public hearing, and that DOH consider implementing proposed changes recommended by the stakeholders, presented at the Board meeting.

HAR Title 11 Chapter 281, “Underground Storage Tank Program”

Comment – The Board recommended that the rule amendments proceed to public Hearing and that the agency provides this Board with a small business statement after public hearing. Further, the agency need not physically come back to the Board after public hearing.

Department of Human Resources Development

No key matters of small business impact have been noted.

Department of Human Services (DHS)

HAR Title 17 Chapter 1445, “Recertification of Nurse Aides in State-Licensed or State-Certified Health Care Settings”

Comment – The Board previously requested that DHS provide the proposed rules to the industry’s stakeholders and to Hawaii State Representative John Mizuno for input, and that a representative from DHS attend a subsequent board meeting to update the Board on the stakeholders’ and Representative Mizuno’s interaction. As the Board had not heard from DHS as to whether these actions were taken, the Board perceived this as a “missed opportunity” to allow the Board to assist with the rule review process.

**HAR Title 17 Chapter 1700, “Overview,” HAR Title 17 Chapter
1721, “Medical Assistance to Aged, Blind or Disabled
Individuals,” HAR Title 17 Chapter 1721.1 QUEST-Expanded
Access; HAR Title 17 Chapter 1727, “Hawaii Health QUEST,”
Title 17 Chapter 1728, QUEST-Net,” Title 17 Chapter 17.28.1,
“QUEST-ACE,” HAR Title 17 Chapter 1732, “Coverage of
Blind or Disabled Pregnant Women and Children,” HAR Title
17 Chapter 1735, “General Provisions for Fee for Service
Medical Assistance,” HAR Title 17 Chapter 1737, “Scope and
Contents of the Fee for Service Medical Assistance Program”**

Comment – The Board recommended that the proposed amendments proceed to public hearing, and to submit the small business statement after public hearing but not physically come back to the Board. Subsequently, the Board recommended that the post-public hearing statements proceed to the Governor for adoption.

HAR Title 17 Chapter 1722.3 “Basic Health Hawaii,” HAR Title 17 Chapter 1725 “Assets,” HAR Title 17 Chapter 1727 “QUEST,” and HAR Title 17 Chapter 1739.1 “Authorization, Payment and Claims in the Fee-for-Service Medical Assistance Program for Non-institutional Services”

Comment – The Board recommended that the proposed rule amendments proceed to public hearing.

Department of Labor & Industrial Relations

HAR Title 12 Subchapter 10, Boiler & Pressure Vessel, Chapter 220, “General, Administrative, and Legal Provisions,” Chapter 221, “Existing and New Boilers and Pressure Vessels,” Chapter 222, “Power Boilers,” Chapter 223, “Heating Boilers, Chapter 224, Pressure Vessels, and Chapter 225, “Pressure Systems”

Comment – The Board recommended that the proposed amendments proceed to the Governor for adoption.

Department of Land & Natural Resources (DLNR)

HAR Title 13 Chapter 77, “Oahu Aquarium Life Management”

Comment – The Board recommended that the proposed rules proceed to public hearing, and that DLNR physically come back to this Board to report on the findings of the public hearing. It was also recommended that Mr. Alton Miyasaka, Aquatic

Biologist, work closely and collaborate with the opposing testifiers to take into consideration their concerns regarding sustainability of aquatic resources and the conclusions reached by Dr. Gail Grabowsky, Professor at Chaminade University, despite their use of a common data set.

**HAR Title 13 Chapter 54, “Puako Bay and Puako Reef, Hawaii,”
Section 1 “Definitions,” Section 2 “Prohibited Activities,” Section
3 “Permitted Activities,” HAR Title 13 Chapter 57 “Keauhou
Bay, Hawaii,” Section 1 “Definitions,” Section 2 “Prohibited
Activities,” Section 3 “Permitted Activities,” and “Map of
Keauhou Bay Fisheries Management Area, Hawaii,” Repeal of
HAR Title Chapter 60.3 “West Hawaii Regional Fisheries
Management Area,” and Adoption of Title 13 Chapter 60.4
“West Hawaii Regional Fishery Management Area, Hawaii,”
and HAR Title 13 Chapter 75 Section 12.4 “Lay nets”**

Comment – The Board recommended that the proposed amended rules proceed to public hearing and that the agency physically come back to this Board to report on the results of the public hearing.

**HAR Title 13 Subtitle 14 Chapter 301, “Rules of Practice and
Procedure,” HAR Title 13 Subtitle 14 Chapter 302, “Public Land
Development Program,” HAR Title 13 Subtitle 14 Chapter 303,
Project Facility Program”**

Comment – The Board recommended that the proposed new rules proceed to public hearing and that after public hearing a small business statement is provided to the Board but that the agency need not physically return to a Board meeting.

Department of Public Safety

No key matters of small business impact have been noted.

Department of Taxation

No key matters of small business impact have been noted.

Department of Transportation

No key matters of small business impact have been noted.

University of Hawaii

No key matters of small business impact have been noted.

Counties

City and County of Honolulu

No key matters of small business impact have been noted.

County of Maui

Maui Liquor Commission

“Title 8 Chapter 101, “Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui” and Title 8 Chapter 102, “Rules Governing Administrative Practices and Procedures of the Liquor Commission and Liquor Control Adjudication Board of the County of Maui”

Comment - The Board recommended that the proposed rules proceed to public hearing, that a message be sent to the Maui Liquor Commission indicating that had a representative from the Liquor Commission attended the meeting that the comments included in the Board's correspondence would have been provided to the Commission at the meeting, that in the future a small business impact statement be included with the draft rules prior to public hearing, that after public hearing this Board is to be provided with a small business statement after public hearing, and that a representative be invited to come to the board meeting to share the findings of the public hearing with this Board.

County of Hawaii

Article IV, "rules Relating to Plastic Bag Reduction"

Comment – The proposed rules from the Department of Environmental Management at the County of Hawaii were recommended by the Board to proceed with the public hearing process.

County of Kauai

Planning Commission

"Rules of Practice and Procedure of the Kauai Planning Commission"

Comment - The Board recommended to the County of Kauai Planning Commission that the proposed amendments go to public hearing.

Department of Water – County of Kauai

"Part IV of Rules and Regulations of the Kauai County Department of Water – Section I General Use Rates, Section III – Agricultural Rates,

Section V – Private Fire Service Charges, Section VI – Public Fire Service Charges, Section X – Cost of Power Adjustment Clause”

Comment - The Board unanimously recommended that the proposed amendments proceed for adoption. Further, a letter was sent to the Department of Water thanking it for its hard work and acknowledging the receipt and review of the final report that incorporated this Board’s recommendations.

“Sunshine Market Rules”

Comment - The Board recommended that a letter be sent to the Office of Economic Development at the County of Kauai recommending that the proposed amendments proceed to public hearing and that the small business statement after public hearing be submitted after the public hearing.

“Part IV – Rules and Regulations Governing Commercial Boating Activities at County Beach Parks, and Part V – Rules and Regulations Governing Commercial Surfing and Stand-up Paddle Instructions at County Beach Parks”

Comment - The Board recommended that these proposed County rules proceed to public hearing and that a representative from the County need not physically return to a Board meeting after public hearing.

BOARD LEGISLATIVE ACTIVITY

Since its inception, the Board has supported legislation by submitting testimony on bills of interest to small business. The Board monitors legislation with both positive and negative impacts on small business. See “Legislative Review” at

the end of this report for specific legislation the Board followed during the 2012 session.

SMALL BUSINESS IMPACT STATEMENT *and* GOVERNOR'S ADMINISTRATIVE DIRECTIVE NO. 09-01

Under Section 201M-2, HRS, State agencies that want to adopt new or modified administrative rules that have an impact on small business must submit to the Board a small business impact statement showing the economic impact on those businesses. As a result, the Board reviews the small business impact statements and the Governor's Administrative Directive (AD), while working with the rule-drafting agencies on behalf of the small business community.

On October 29, 2009, AD 09-01 (Appendix 3) was issued to update the policy and procedures by which State departments and agencies request Governor's approval for a public hearing of any proposed adoption, amendment or repeal of administrative rules developed under Chapter 91, HRS.

STRATEGIC PLAN

In 2012, the Board did not convene a strategic planning session due to the lack of extra funding. However, Hastings & Pleadwell, a public relations firm that had previously worked with this Board, performed a follow-up session with the members at the March 2012 board meeting. (See Communications Plan, page 17)

REG-ALERT

In 2008, RegAlert, a small business regulatory alert system, was created in an effort to reduce the regulatory burden on Hawaii small businesses. It is intended to allow the Review Board to serve as the "voice of small business" on both new and

proposed administrative rules directly to the rule-making State and County agencies. Through RegAlert, business owners are able to keep apprised of proposed rule changes on selected rules and are given an opportunity to provide input to the agencies promulgating proposed and amended rules through the Review Board.

RegAlert is also intended to empower Hawaii's small business community to become more involved in the regulatory process and to provide business owners with the ability to comment on proposed State and County rules and regulations that affect them. In addition, it is intended to assist the Board in responding to State and County agencies by acquiring valuable feedback from small businesses affected by the proposed rules.

RegAlert partners have included Maui Chamber of Commerce, Chamber of Commerce of Hawaii, The National Federation of Independent Business, Smart Business Hawaii aka Small Business Hawaii, Kauai Chamber of Commerce, Hawaii Island Chamber of Commerce, and Kauai Japanese Chamber of Commerce, The Legislative Center, Inc., Legislative Information Services of Hawaii, Organizations Management, LLC; Hawaii Island Economic Development Board, Inc., Honolulu Japanese Chamber of Commerce, and Realtors Association of Maui, Inc.

In 2012, there was no activity on RegAlert.

PROJECTS AND ACTIVITIES

The following activities were performed in 2012.

▪ Member Nominations

Pursuant Section 201M-5 (c), "a majority of the board shall elect the chairperson. The chairperson shall serve a term of not more than one year, unless

removed earlier by a two-thirds vote of all members to which the board is entitled.”

At the February 2012 board meeting, Ms. Sharon L. Pang was elected Chairperson; Mr. Charles Au was elected as Vice Chairperson, and Mr. Richard Schnitzler as Second Vice Chairperson. Upon the resignation of Mr. Schnitzler in May 2012, Mr. David S. De Luz, Jr., was elected as the Second Vice Chairperson.

However, effective July 2012, the following new nomination process was instituted under Section 201M-5, HRS, pursuant to Act 241, Session Laws Hawaii 2012. (See Legislative Review for further information.) “The Board shall consist of nine members, who shall be appointed by the governor pursuant to section 26-34; provided that: (1) Three members shall be appointed from a list of nominees submitted by the president of the senate; (2) Three members shall be appointed from a list of nominees submitted by the speaker of the house of representatives; (3) Two members shall be appointed by the governor; (4) The director of business, economic development, and tourism, or the director’s designated representative, shall serve as an ex officio voting member of the board; (5) The appointments shall reflect representation of a variety of businesses in the State; (6) No more than two members shall be representatives from the same type of business; and (7) There shall be at least one representative from each county.”

Further, “nominations shall be solicited from small business organizations, state and county chambers of commerce, and other interested business organizations. Except for the ex officio member, all members of the board shall be either a current or former owner or officer of a business and shall not be an officer or employee of the federal, state, or county government.”

At the printing of this report, although the member nominating process was not complete, a sufficient number of members were appointed to constitute quorum. As a result, seven members attended the December 2012 board meeting. The new members are:

- Chu Lan Shubert-Kwock, ABC Mortgage and Chu Lan Properties, representing Oahu
- Howard Lum, Aloha Gourmet Products, Inc., representing Oahu
- Anthony Borge, RMA Sales, Inc., representing Oahu
- Barbara Bennett, Kauai Magazine, representing Kauai
- Leslie Mullens, Playbook Consulting Group, representing Maui
- Kyoko Y. Kimura, Beach Club Consulting Company, LLC, representing Maui
- Mary Alice Evans, Voting Ex Officio Member, representing DBEDT

▪ **Communications Plan**

In keeping in line with the Board's communications plan created with the assistance of Hastings & Pleadwell in 2007, the Board positioned itself as an experienced and responsible asset in the eyes of the Hawaii business community. In March 2012, Ms. Barbra Pleadwell, principle of Hastings and Pleadwell, attended the board meeting to provide feedback and assist the members with its outreach and communication to the community.

Ms. Pleadwell believed the Board needed to do a better job at telling the community what it has done, what case studies are worth repeating, and what benefit the Board has on the community. In order for the Board to recast itself under a new Administration, Ms. Pleadwell explained that the Board needs to position itself to be

helpful to the community. Once this is accomplished, the Board would be able to better position itself in collaboration with the Administration.

- **Website** - The Board's website is regularly updated. See:
www.hawaii.gov/dbedt/business/start_grow/small-business-info/sbrrb.

- **Press Releases and Articles** – No press releases or articles during 2012 were published.

ADMINISTRATIVE RULE REVIEW **REQUESTED BY SMALL BUSINESS**

During 2012, the Board was approached by the following small business owners in accordance with Section 201M-5 (f), HRS, regarding requests for “review of any rule adopted by a state agency.”

1. HAR Title 19 Subtitle 2 Chapter 38.1, “On-Demand Taxi Service at Public Airports”

Ms. Dale Evans, President of Charlie’s Taxi, approached the Board to assist her business regarding the City and County of Honolulu’s Taxi Licensing Division not allowing taxicab drivers to pass on airport fees to passengers.

Board Recommendation: The Board sent a letter of support to the Department of Motor Vehicles, the City Council, and the Mayor of Honolulu endorsing that the airport fee is charged on the taxicab meter and passed onto the passengers.

Subsequently, the Board sent a second letter to the City and County of Honolulu’s Licensing Administrator at the Department of Motor Vehicles requesting the status, the timeline and the nature of the amendments to Subchapter 5, “Rate of Fare, Baggage Charge and Surcharge,” Section 12-1.10, Revised Ordinance of Honolulu, 1990.

Status: To date, a subsequent response letter has not been received from the City and County of Honolulu.

2. Draft Hawaii Administrative Rules for Act 66 of 2010

Mr. John Roberts, President, and Ms. Marilyn Niwao, a member of Hawaii Association of Public Accounts (HAPA), approached the Board to assist in reviewing

the administrative rules drafted by the State Board of Accountancy on March 2, 2012 for implementation of Act 66, Session Laws of Hawaii 2010. It was HAPA's belief that the draft rules do not comply with either the letter or the spirit of Act 66.

Specifically, concerns regarding the definition of "firm," and not allowing for a level playing field regarding "peer reviews" were brought to the Board's attention.

Board Recommendation: Correspondence was sent to the State Board of Accountancy requesting draft rules, adopted on March 2, 2012, and a small business impact statement to be submitted to this Board and HAPA, prior to public hearing.

Status: The draft rules and small business impact statement were subsequently received and reviewed by this Board.

Section II

LEGISLATIVE REVIEW

The Board provided testimony for the following bills during the 2012 legislative session.

**1. Senate Bill 2739 SD2, HD1, CD1, “Relating to the Small Business
Regulatory Review Board”**

Background: This measure changed throughout the legislative session. The final version authorized the Small Business Regulatory Review Board, with good cause, to request a written response from an agency to explain the rationale used to deny public concerns within ten working days of receipt of the small business statement after public hearing. It requires the agency to respond in writing to the board’s concerns within ten working days, which specifically addresses each issue and concern raised in the board’s request for a written response, and to state that the agency considered all written and oral testimony received at the agency’s public hearing and had addressed all issues or concerns raised in the written and oral testimony.

The measure reduced the size of the Board from eleven to nine members, with three members appointed from a list of nominees submitted by the Senate President, and three members appointed from a list of nominees submitted by the House Speaker, from nominations solicited by small business organizations, state and county chambers of commerce, and other interested business organizations. Two members are also appointed by the Governor, with the Director of Business, Economic Development, and Tourism, or the Director’s designated representative, to serve as an “ex officio voting member” of the board; it requires at least one representative from each county.

In addition, the measure requires each agency to notify the Board on an annual basis of any rules that should be amended or repealed based on any new, amended, or repealed statute.

Recommendation: The Board supported this measure and submitted a memorandum to the Governor supporting the bill “with reservations” due to an apparent conflict of interest with the original intent of the statute and because it reduces the credibility of the Board within the small business community. Further, due to the deputy attorney general’s opinion that the effective date of the statute would repeal the current make-up of all the members, it was requested that one-third of the existing board members remain for continuity purposes in order to not interfere with the work of the Board; there was also concern expressed regarding the sections of the bill that reduces the size of the Board from eleven to nine members.

Status: In its final version, this bill was passed and became law pursuant to Act 241, Session Laws of Hawaii 2012. At the time this report was printed, in addition to the Director of DBEDT, there were five members appointed by the Governor on an interim basis.

2. House Bill 2078 HD2 SD2, “Relating to Taxation”

Background: Mr. Mike Marion of Waikiki-Getaway and Ms. Alicia Hopkins, President of Rental by Owner Awareness Association, approached this Board regarding small vacation rental businesses in Hawaii. Their concern was that owners of condominiums and vacation rentals who do not live in Hawaii are being “discriminated against,” as the proposed bill will enhance the collection of transient accommodations tax from out-of-state property owners.

The final version of this bill required any operator of a transient accommodation to designate a local contact residing on the same island as the transient accommodation, and to require that all advertisements and solicitations on websites for transient accommodations display registration identification numbers.

Board Recommendation: The Board recommended that the conference committee members defer this measure until 2013 in order to establish a working group to address key concerns of the small business owners not living in Hawaii.

Status: The measure, in its final version, was passed and became law pursuant to Act 326, Session Laws of Hawaii 2012.

3. **Senate Bill 2947 SD2 HD2 CD1, “Relating to Taxation”**

Background: Mr. Mike Marion of Waikiki-Getaway and Ms. Alicia Hopkins, President of Rental by Owner Awareness Association, approached this Board regarding small vacation rental businesses in Hawaii. Their concern was that owners of condominiums and vacation rentals who do not live in Hawaii are being discriminated against, as the proposed bill will enhance the collection of transient accommodations tax from out-of-state property owners.

The final version of this bill required any operator of a transient accommodation to designate a local contact residing on the same island as the transient accommodation, and to require that all advertisements and solicitations on websites for transient accommodations display registration identification numbers.

Board Recommendation: The Board recommended to the Legislature that the conference committee members defer this measure until 2013 in order to establish a

working group to address key concerns of the small business owners not living in Hawaii.

Status: The measure, in its final version, was passed and became law pursuant to Act 189, Session Laws Hawaii 2012.

1. **Governor’s Message No. 520, “Consideration and Confirmation to the Small Business Regulatory Review Board, Gubernatorial Nominee, Chu Lan Shubert-Kwock”**

Background: The purpose of this measure was to confirm Ms. Shubert-Kwock as a member of the Small Business Regulatory Review Board, for a term to expire 6-30-16.

Board Recommendation: The Board provided written testimony in support of the measure.

Status: Ms. Shubert-Kwock’s nomination was confirmed on April 18, 2012.

However, effective July 2012, pursuant to Act 241 Session Laws of Hawaii 2012, the composite and nomination process of the board members was repealed resulting in the repeal of Ms. Shubert-Kwock as a member.

2. **Governor’s Message No. 521, “Consideration and Confirmation to the Small Business Regulatory Review Board, gubernatorial Nominee, Howard West”**

Background: The purpose of this measure was to confirm Mr. West as a member of the Small Business Regulatory Review Board, for a term to expire 6-30-16.

Board Recommendation: The Board provided written testimony in support of the measure.

Status: Mr. West's nomination was confirmed on April 18, 2012. However, effective July 2012, pursuant to Act 241, Session Laws of Hawaii 2012, the composite and nomination process of the Board members was repealed resulting in the repeal of Mr. West as a member.

Appendix

1. Chapter 201M, Hawaii Revised Statutes
2. Administrative Rules Reviewed Matrix
3. Administrative Directive No. 09-01

1. Chapter 201M, Hawaii Revised Statutes

CHAPTER 201M

SMALL BUSINESS REGULATORY FLEXIBILITY ACT

Section

- 201M-1 Definitions
- 201M-2 Determination of small business impact; small business impact statement
- 201M-3 Small business statement after public hearing
- 201M-4 Advisory committee on small business; consultation process for proposed rules
- 201M-5 Small business regulatory review board; powers
- 201M-6 Petition for regulatory review
- 201M-7 Periodic review; evaluation report
- 201M-8 Waiver or reduction of penalties
- 201M-9 Executive order

§201M-1 Definitions. As used in this chapter, unless the context clearly requires otherwise:

"Advisory committee" means an advisory committee on small business as established in section 201M-4.

"Affected small businesses" or "affects small business" means any potential or actual requirement imposed upon a small business through an agency's proposed or adopted rule that will cause a direct and significant economic burden upon a small business, or is directly related to the formation, operation, or expansion of a small business.

"Agency" means each state or county board, commission, department, or officer authorized by law to make rules, except those in the legislative or judicial branches.

"Board" means the small business regulatory review board.

"Rule" shall have the same meaning as in section 91-1.

"Small business" means a for-profit enterprise consisting of fewer than one hundred full-time or part-time employees. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §§2, 5; am L 2007, c 217, §2]

§201M-2 Determination of small business impact; small business impact statement. (a) Prior to submitting proposed rules for adoption, amendment, or repeal under section 91-3, the agency shall determine whether the proposed rules affect small business, and if so, the availability and practicability of less restrictive alternatives that could be implemented. This section shall not apply to emergency rulemaking.

(b) If the proposed rules affect small business, the agency shall consider creative, innovative, or flexible methods of compliance for small businesses

and prepare a small business impact statement to be submitted with the proposed rules to the departmental advisory committee on small business and the board when the rules are essentially complete and before the rules are submitted to the governor for approval for public hearing. The statement shall provide a reasonable determination of the following:

- (1) The businesses that will be directly affected by, bear the costs of, or directly benefit from the proposed rules;
- (2) Description of the small businesses that will be required to comply with the proposed rules and how they may be adversely affected;
- (3) In dollar amounts, the increase in the level of direct costs such as fees or fines, and indirect costs such as reporting, recordkeeping, equipment, construction, labor, professional services, revenue loss, or other costs associated with compliance;
- (4) The probable monetary costs and benefits to the implementing agency and other agencies directly affected, including the estimated total amount the agency expects to collect from any additionally imposed fees and the manner in which the moneys will be used;
- (5) The methods the agency considered or used to reduce the impact on small business such as consolidation, simplification, differing compliance or reporting requirements, less stringent deadlines, modification of the fines schedule, performance rather than design standards, exemption, or any other mitigating techniques;
- (6) How the agency involved small business in the development of the proposed rules; and
- (7) Whether the proposed rules include provisions that are more stringent than those mandated by any comparable or related federal, state, or county standards, with an explanation of the reason for imposing the more stringent standard.

(c) When a proposed rule includes provisions that are more stringent than those mandated by any comparable or related federal, state, or county standards, the agency shall, in addition to the information required by subsection (b), include in the small business impact statement information comparing the costs and benefits of the standard set by the proposed rule to the costs and benefits of the standard under the comparable or related federal, state or county law. The agency shall also include an explanation of its decision to impose the higher

standard. The agency's comparison and justification shall include:

- (1) A description of the public purposes to be served by imposing the standard under the proposed rule;
 - (2) The text of the related federal, state, or county law, including information about the purposes and applicability of the law;
 - (3) A comparison between the proposed rule and the related federal, state, or county law, including a comparison of their purposes and of the standards and their application and administration;
 - (4) A comparison of the monetary costs and benefits to the implementing agency and other agencies directly affected, of imposing the proposed standard, with the costs and benefits of imposing or deferring to the related federal, state or county standard, as well as a description of the manner in which any additional fees derived from imposition of the proposed standard are to be used; and
 - (5) A comparison of the adverse effects on small businesses of the standard imposed by the proposed rule, with the adverse effects on small business of the related federal, state, or county standard.
- (d) This chapter shall not apply to proposed rules adopted by an agency to implement a statute or ordinance that does not require an agency to interpret or describe the requirements of the statute or ordinance, such as federally-mandated regulations that afford the agency no discretion to consider less restrictive alternatives. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5; am L 2007, c 217, §3; am L 2008, c230, §3]

[§201M-3] Small business statement after public hearing.

For any proposed rules that affect small business, the agency shall also submit a small business statement to the small business regulatory review board and the departmental advisory committee on small business after the public hearing is held. This section shall not apply to emergency rules. The small business statement required by this section shall provide the following information:

- (1) A description of how opinions or comments from affected small business were solicited, a summary of the public and small business comments, and a summary of the agency's response to those comments;
- (2) The number of persons who:
 - (A) Attended the public hearing;
 - (B) Testified at the hearing; and

- (C) Submitted written comments; and
- (3) If there was a request to change the proposed rule at the hearing in a way that affected small business, a statement of the reasons for adopting the proposed rule without the requested change. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5]

[\$201M-4] Advisory committee on small business; consultation process for proposed rules. (a) There may be established within and administratively attached to every department of the State or county whose rules affect small business activities, an advisory committee on small business. The advisory committee shall consist of three or more odd number of members appointed by the department and may advise more than one department. The department shall have the authority to appoint members to the advisory committee and to fill any vacancies. The members shall serve on a volunteer basis and have experience or knowledge of the effect of regulation by those departments on the formation, operation, or expansion of a small business. No person shall serve on the small business regulatory review board and an advisory committee on small business concurrently. The advisory committees shall not be subject to the requirements of chapter 91.

(b) When the agency is proposing rules that affect small business, the agency may consult with the administratively attached departmental advisory committee on small business regarding any matter related to the proposed rules prior to complying with the rulemaking requirements provided in chapter 91. Each agency shall develop its own internal management procedures for soliciting comments during the drafting of proposed rules from affected small businesses. The agency may develop creative procedures for the solicitation of comments from affected small businesses during the drafting or development of proposed rules.

(c) If necessary, any group or members of affected small businesses may also be consulted by the agency to formulate the relevant language, develop criteria, and provide any other expertise to ensure that the proposed rules will be drafted in a manner that will protect the public health, welfare, and safety without placing an undue and significant burden upon small business. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5]

§201M-5 Small business regulatory review board; powers.

(a) There shall be established within the department of business, economic development, and tourism, for administrative purposes, a small business regulatory review board to review any proposed new or amended rule or to consider any request from

small business owners for review of any rule adopted by a state agency and to make recommendations to the agency or the legislature regarding the need for a rule change or legislation. For requests regarding county ordinances, the board may make recommendations to the county council or the mayor for appropriate action.

(b) The board shall consist of eleven members, who shall be appointed by the governor pursuant to section 26-34. Nominations to fill vacancies shall be made from names submitted by the review board. The appointments shall reflect representation of a variety of businesses in the State; provided that no more than two members shall be representatives from the same type of business, and that there shall be at least two representatives from each county.

(c) All members of the board shall be either a current or former owner or officer of a business and shall not be an officer or employee of the federal, state, or county government. A majority of the board shall elect the chairperson. The chairperson shall serve a term of not more than one year, unless removed earlier by a two-thirds vote of all members to which the board is entitled.

(d) A majority of all the members to which the board is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which the board is entitled shall be necessary to make any action of the board valid.

(e) In addition to any other powers provided by this chapter, the board may:

- (1) Adopt any rules necessary to implement this chapter;
- (2) Organize and hold conferences on problems affecting small business; and
- (3) Do any and all things necessary to effectuate the purposes of this chapter.

(f) The board shall submit an annual report to the legislature twenty days prior to each regular session detailing any requests from small business owners for review of any rule adopted by a state agency, and any recommendations made by the board to an agency or the legislature regarding the need for a rule change or legislation. The report shall also contain a summary of the comments made by the board to agencies regarding its review of proposed new or amended rules. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §§3, 5; am L 2007, c 217, §4]

§201M-6 Petition for regulatory review. (a) In addition to the basis for filing a petition provided in section 91-6, any affected small business may file a written petition with the agency that has adopted the rules objecting to all or part of

any rule affecting small business on any of the following grounds:

- (1) The actual effect on small business was not reflected in, or significantly exceeded, the small business impact statement submitted prior to the adoption of the rules;
- (2) The small business impact statement did not consider new or significant economic information that reveals an undue impact on small business;
- (3) These impacts were not previously considered at the public hearing on the rules;
- (4) The rules create an undue barrier to the formation, operation, and expansion of small businesses in a manner that significantly outweighs its benefit to the public;
- (5) The rules duplicate, overlap, or conflict with rules adopted by another agency or violate the substantive authority under which the rules were adopted; or
- (6) The technology, economic conditions, or other relevant factors justifying the purpose for the rules have changed or no longer exist.

(b) Upon submission of the petition, the agency shall forward a copy of the petition to the board, as notification of a petition filed under this chapter. The agency shall promptly consider the petition and may seek advice and counsel regarding the petition from the appropriate departmental advisory committee on small business. Within sixty days after the submission of the petition, the agency shall determine whether the impact statement or the public hearing addressed the actual and significant impact on small business. The agency shall submit a written response of the agency's determination to the small business review board within sixty days after receipt of the petition. If the agency determines that the petition merits the adoption, amendment, or repeal of a rule, it may initiate proceedings in accordance with section 91-3.

(c) If the agency determines that the petition does not merit the adoption, amendment, or repeal of any rule, any affected small business may seek a review of the decision by the board. The board shall promptly convene a meeting pursuant to chapter 92 for the purpose of soliciting testimony that will assist in its determination whether to recommend that the agency initiate proceedings in accordance with section 91-3. The board may base its recommendation on any of the following reasons:

- (1) The actual effect on small business was not reflected in, or significantly exceeded, the impact statement submitted prior to the adoption of the rules;

- (2) The impact statement did not consider new or significant economic information that reveals an undue impact on small business;
 - (3) These impacts were not previously considered at the public hearing on the rules;
 - (4) The rules create an undue barrier to the formation, operation, and expansion of small businesses in the State in a manner that significantly outweighs its benefit to the public;
 - (5) The rules duplicate, overlap, or conflict with rules adopted by another agency or violate the substantive authority under which the rules were adopted; or
 - (6) The technology, economic conditions, or other relevant factors justifying the purpose for the rules have changed or no longer exist.
- (d) If the board recommends that an agency initiate rulemaking proceedings for any reason provided in subsection (c), it shall submit to the legislature an evaluation report and the agency's response as provided in subsection (b). The legislature may subsequently take any action in response to the evaluation report and the agency's response as it finds appropriate.
- (e) If the board does not recommend that an agency initiate rulemaking proceedings, the board shall notify the small business of its decision and inform the small business that the small business may submit a complaint to the ombudsman pursuant to chapter 96 regarding the decision of the agency or board.
- (f) Nothing in this section shall entitle an affected small business to a contested case hearing under chapter 91. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5; am L 2007, c 217, §5]

§201M-7 Periodic review; evaluation report. (a) Each agency having rules that affect small business shall submit by June 30 of each odd-numbered year, a list of those rules to the small business regulatory review board. The agency shall also submit a report describing the specific public purpose or interest for adopting the respective rules and any other reasons to justify its continued implementation.

(b) The small business regulatory review board shall provide to the head of each agency a list of any rules adopted by the agency that affect small business and have generated complaints or concerns, including any rules that the board determines may duplicate, overlap, or conflict with other rules, or exceed statutory authority. Within forty-five days after being notified by the board of the list, the agency shall submit

a written report to the board in response to the complaints or concerns. The agency shall also state whether the agency has considered the continued need for the rules and the degree to which technology, economic conditions, and other relevant factors may have diminished or eliminated the need for maintaining the rules.

(c) The board may solicit testimony from the public regarding any report submitted by the agency under this section at a public meeting held pursuant to chapter 92. Upon consideration of any report submitted by an agency under this section and any public testimony, the board shall submit an evaluation report to the next regular session of the legislature. The evaluation report shall include an assessment as to whether the public interest significantly outweighs a rule's effect on small business and any legislative proposal to eliminate or reduce the effect on small business. The legislature may take any action in response to the report as it finds appropriate. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5; am L 2007, c 217, §6]

§201M-8 Waiver or reduction of penalties. (a) Except where a penalty or fine is assessed pursuant to a program approved, authorized, or delegated under a federal law, any agency authorized to assess civil penalties or fines upon a small business shall waive or reduce any penalty or fine as allowed by federal or state law for a violation of any statute, ordinance, or rules by a small business under the following conditions:

- (1) The small business corrects the violation within a minimum of thirty days after receipt of a notice of violation or citation; and
 - (2) The violation was unintentional or the result of excusable neglect; or
 - (3) The violation was the result of an excusable misunderstanding of an agency's interpretation of a rule.
- (b) Subsection (a) shall not apply:
- (1) When a small business fails to exercise good faith in complying with the statute or rules;
 - (2) When a violation involves willful or criminal conduct;
 - (3) When a violation results in serious health and safety impacts;
 - (4) To violations of chapters 6E, 180, 180C, 181, 182, 183, 183C, 183D, 186, 187A, 188, 188F, 189, 190, 190D, 195, 195D, 195F, 205, 205A, 340A, 340E, 341, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P;

- (5) To violations of sections 200-9(b) and (c), 200-24(4), 200-37, and 200-38; or
 - (6) To violations of administrative rules promulgated pursuant to section 200-4(6); except for rules pertaining to matters listed in section 200-4(6)(A), (B), (C), and (D).
- (c) An agency may adopt rules to implement the requirements of this section. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5; am L 2004, c 206, §1]

[\$201M-9] Executive order. The governor may execute any executive order, memorandum, or directive necessary to implement any provision of this chapter. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5]

2. Administrative Rule Review Matrix

	Month/Year	Support	Oppose	No Comment/ No Action	Support w/Rec.	Sup. w/Res.	Support/ Oppose	Pending
FY 2000 to FY 2010		370	10	24	22	13	6	
FY 2011	Jul-10	3		2				
	Aug-10	3		1	1			
	Sep-10	0						
	Oct-10	12	2	5				
	Dec-10	4		3				
	Jan-11	0		2				
	Feb-11	3		2				
	Mar-11	2		1				
	Apr-11	1		1		1		
	May-11	2				1		
	Jun-11	4						
FY 2012	Jul-11	9		1		1		
	Aug-11	0		1		1		2
	Oct-11	5						
	Dec-11	3		8				1
	Feb-12	3		2				
	Mar-12	3		1	1			
	Apr-12	3						
	May-12	1						
	Jun-12	3			2			
	Dec-12	6						
	Totals	436	12	54	26	17	6	0

3. Administrative Directive 09-01



EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

October 29, 2009

ADMINISTRATIVE DIRECTIVE NO. 09-01

To: All Agency Heads

Subject: Policy and Procedure for the Adoption, Amendment, or Repeal of Administrative Rules

This administrative directive updates the policy and procedure by which departments or agencies shall request executive approval of any proposed adoption, amendment, or repeal of administrative rules. It rescinds Administrative Directive No. 99-02, Policy and Procedure for the Adoption, Amendment, or Repeal of Administrative Rules, dated August 2, 1999.

Legal Reference:

Section 91-3(c), Hawaii Revised Statutes, provides that, "the adoption, amendment, or repeal of any rule by any state agency shall be subject to the approval of the governor."

Hawaii Revised Statutes Chapter 201M, the "Hawaii Small Business Regulatory Flexibility Act," requires that if a proposed rule "affects small business," the department or agency shall submit a "small business impact statement" and a "small business statement" to the Small Business Regulatory Review Board. Chapter 201M does not apply to emergency rulemaking or rules adopted to comply with a federal requirement.

Policy:

Whenever any department or agency requests executive approval for the proposed adoption, amendment, or repeal of a rule, the director of the department or agency shall ensure that the proposed changes conform to existing legal provisions, including Chapter 91, Hawaii Revised Statutes. In requesting the adoption, amendment, or repeal of any rule, the director will explain or submit the following:

1. Explain the exact changes to be made and the purpose, reasons for the changes, and justification for the change. If applicable, cite the present rule and quote the proposed rule change in full without paraphrasing.

2. Describe the manner in which the proposal would affect the agency's internal and external responsibilities, programs, functions, operations, activities, and inter-relationships.
3. Identify the final result expected by instituting the proposal (e.g. a program improvement/clarification of statute).
4. Identify any program and financial impacts on the State that will arise upon the implementation of the proposal to include:
 - a. Long- and short-range program impacts, and
 - b. Anticipated program funding required for the present biennium, including a statement as to whether funds are currently budgeted to permit the implementation and enforcement of the proposed adoption, amendment, or repeal of the rule, and estimates for anticipated savings or funding shortfalls projected over the subsequent four-year planning period, and the assumptions used to arrive at the estimates.
5. Describe long- and short-term impacts to the public or the economy of the State.
6. Identify the alternatives explored in lieu of implementing the proposal.
7. Provide an explanation of whether the proposal will affect small business. For purposes of this Directive, a proposal will affect small business if the proposal will impact a for-profit enterprise consisting of fewer than 100 full-time or part-time employees and will cause a direct and significant economic burden upon a small business, or is directly related to the formation, operation, or expansion of a small business.

If a proposal affects small business, the department or agency will describe:

- a. Whether it has considered the availability and practicability of less restrictive alternatives that could be implemented in lieu of adopting the proposal;
- b. Whether it has considered creative, innovative, or flexible methods of compliance for small business in lieu of adopting the proposed rule; and
- c. Whether it has prepared a "Small Business Impact Statement" that has been submitted to the Small Business Regulatory Review Board for consideration under HRS Chapter 201M.

Procedure:

1. Approval of the Governor is required prior to any rule change proceeding to a public hearing.

Prior to formal publication of notice of public hearing on the proposed adoption, amendment, or repeal of any rule, departments and agencies will:

- a. Obtain the Attorney General's approval "as to form" prior to submitting the rule to me for approval for public hearing; provided that as to rules proposed for adoption, amendment, or repeal that are submitted by the Board of Regents of the University of Hawaii, such rules shall be first reviewed and approved as to form by the University's Office of General Counsel prior to submission to the Attorney General. The Department of the Attorney General will complete its pre-hearing review on an expeditious basis;
- b. Provide the Governor's office with a copy of the proposed rule, including the information requested in "Policy" items 1 through 7 above; and
- c. At the time the rules are submitted to the Governor's Office, concurrently provide copies to the Director of Budget and Finance (B&F) and to the Director of Business, Economic Development and Tourism (DBEDT) for their prompt review. B&F and DBEDT comments will be forwarded directly to the Governor.

2. Notice of Public Hearings.

If any proposed rule affects small business, the notice of public hearing will summarize any business impact described in the "Small Business Impact Statement," and will state any new fee or compliance burdens that will be placed on small business.

3. Final Approval After Public Hearing.

Departments and agencies will obtain the Governor's final approval for the adoption, amendment, or repeal of any rule after the required public hearing has been held. In seeking final approval, the director of the department or agency concerned shall:

- a. Indicate whether any revision is being recommended to the proposed rule, amendment, or repeal based on facts and circumstances brought out in the public hearing;
- b. If a revision or change is recommended, provide a copy of the proposed rule with revisions and changes to the Attorney General for approval "as to form" prior to resubmitting the rule to the Governor for final approval; provided that as to rules proposed for adoption, amendment or repeal that are submitted by the Board of Regents of the University of Hawaii, such rules shall be first reviewed and approved as to form by the University's Office of General Counsel prior to submission to the Attorney General.

The Attorney General's office will approve the form within two weeks of receipt if the changes are not substantive. If the changes are determined to be substantial or material by the Attorney General, an additional public hearing will be held.

If a re-hearing of a proposed rule is sought, the procedures required for approval to proceed to public hearing will again be followed;

- c. Indicate whether the proposal affects small business, and, if so, whether a "Small Business Statement," which provides the information described in HRS Chapter 201M, has been submitted to the Small Business Regulatory Review Board; and
 - d. Submit three copies of the proposal in standard format and in accordance with Chapter 91, HRS, for the Governor's final approval. The original and a copy of the rules adopted by the department or agency will be signed by the director of the department, by the chairperson of a board or commission of a principal department, or by the chairperson of a board or commission if the rule has been adopted by a board or commission which is assigned to a department for administrative purposes. The third copy may use a facsimile of the required signatures.
4. Distribution of Approved Adopted Rules.
- a. A complete set consisting of three copies approved by the Governor will be filed at the Office of the Lieutenant Governor.
 - b. The Office of the Lieutenant Governor will provide one copy to the agency adopting, amending, or repealing the rule.
 - c. Each department or agency adopting, amending, or repealing the rule will provide one file-stamped and certified copy of the rule in the Ramseyer and standard formats to the Legislative Reference Bureau.

LINDA LINGLE

APPROVED AS TO FORM:



Attorney General

***No. 1 Capitol District Building
250 South Hotel Street
Honolulu, Hawaii 96813***

Telephone – (808) 586-2594

Facsimile – (808) 586-2572

Website: <http://www.hawaii.gov/dbedt>

Email: sbrrb@dbedt.hawaii.gov