



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

**Review of Administrative Rules, Legislation
and
Rules Requested by Small Business**

**In Compliance with
Chapter 201M,
Hawaii Revised Statutes**

December 2008 – December 2009

HAWAII SMALL BUSINESS REGULATORY REVIEW BOARD
ANNUAL REPORT SUMMARY 2009

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Section I

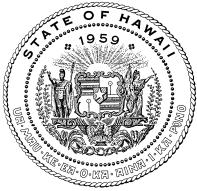
MESSAGE FROM THE DIRECTOR



As the Director of the Department of Business, Economic Development and Tourism, it gives me great pleasure to thank the members for serving on the Small Business Regulatory Review Board. This Board is very important. Without the members' continued efforts to improve the regulatory burden of small businesses, the businesses would suffer as they are the heart of Hawaii's economy.

Theodore E. Liu
Director

MESSAGE FROM THE CHAIRPERSON



Linda Lingle
Governor

Theodore E. Liu
Director, DBEDT

Mark K. Anderson
Deputy Director, DBEDT

Members
Lynne Woods
Chairperson
Maui

Charles Au
Vice Chairperson
Oahu

Richard Schnitzler
2nd Vice Chairperson
Hawaii

Dorvin Leis
Maui

Donald Dymond
Oahu

Sharon L. Pang
Oahu

Bruce E. Bucky
Oahu

Peter Yukimura
Kauai

David S. De Luz, Jr.
Hawaii



Lynne Woods, Chairperson
December 2009

The year 2009 has been one of great financial hardship for Hawaii's business community and for our State government. As businesses look to leadership from our State's administration and elected representatives, we have become painfully aware that the financial problems of the State are as great, if not greater than our own. A much deeper partnership between government and business will be needed over the next few years to bring economic stability and growth to Hawaii.

Our Small Business Regulatory Review Board worked hand-in-hand with many State departments, continuing the review of existing rules and new rules crafted during 2009. Each year brings a deeper commitment from most departments to understand the economic impact brought about by the rule-making process. The year 2009 also brought participation of rule review from Maui County, County of Kauai and the City and County of Honolulu; we thank each Mayor for their commitment to our impact review process.

This past year also produced rules for industries that have been in business in Hawaii for decades with few permit or license requirements. It has been a difficult process for all involved, particularly when our economy is so challenged. Permits and fees always threaten the well-being of a small business and some have questioned the timing of the new rules at both County and State levels.

The unwavering support of Governor Lingle and DBEDT Director Ted Liu for the work of the Board and the dedication and hard work of Business Advocate Dori Palcovich contributed greatly to the Board's ability to continue advocating on behalf of our constituents. This year will be my last full year as a member of the Small Business Regulatory Review Board. I will leave my Chairmanship and Board membership in June of 2010, with the knowledge that we have made a difference and of the friendships of my fellow board members. It has been a tremendous honor to serve the business community as a member of the SBRRB.

SMALL BUSINESS REGULATORY REVIEW BOARD

OVERVIEW

Members of the Small Business Regulatory Review Board are pleased to provide the Annual Summary for the period of December 2008 through December 2009, pursuant to the Hawaii Small Business Regulatory Flexibility Act (RFA), Chapter 201M, Hawaii Revised Statutes (HRS).

[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 (RFA), pursuant to Act 168. Subsequently, the role of the Board has been codified in Chapter 201M, HRS, as amended. (Appendix 1)

SMALL BUSINESS REGULATORY REVIEW BOARD MEMBER COMPOSITION AND RESPONSIBILITY

Statutorily, the Board is comprised of eleven current or former owners or officers of businesses from across the State. It is administratively attached to the Department of Business, Economic Development and Tourism (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 volunteer 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 agencies 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. Since its inception, the Board has had several new members and re-appointees. As of December 2009, the Board was operating with nine members. (Appendix 2)

ADMINISTRATIVE RULE REVIEW

Since its inception, the Board reviewed a total of 425 sets of proposed new and amended administrative rules. The results are categorized in Appendix 3. From December 2008 through December 2009, the Board reviewed and made recommendations on 64 sets of new and amended rules, both pre- and post-public hearing. A summary of each rule is categorized below.

Office of the Lieutenant Governor

HAR Chapter 2-71, “Agency Procedures and Fees for Processing Government Record Requests”

Comments – The Board reviewed the proposed amendments and took no other required action.

HAR Chapter 2-72, “Administrative Appeal Procedures”

Comments – The Board reviewed the proposed new rules and voted to submit the proposed rules as a RegAlert.

Department of Accounting & General Services

HAR Chapter 3-70, “Rules of the Stadium Authority”

Comments – The Board recommended that the proposed amendments proceed to public hearing. However, as there was no discernable business impact, the rules were not required to return to the Board after public hearing.

HAR Chapter 3-120, “General Provisions,” HAR Chapter 3-121, “Procurement Organization,” HAR Chapter 3-125, “Modifications

and Termination of Contracts,” HAR Chapter 3-128, “Governmental Relations and Cooperative Purchasing,” and HAR Chapter 3-131, “Compliance”

Comments – The Board recommended that these eighteen-month rules proceed to public hearing.

HAR Chapter 3-180, “State Building Code,” HAR Chapter 3-181, “State Energy Conservation Code,” HAR Chapter 3-182, “State Electrical Code,” and HAR Chapter 3-183, “State Plumbing Code”

Comments – The Board recommended that the proposed rule changes proceed to public hearing with the notation that the rules include provisions for exceptions, such as a grandfathering provision for older buildings. After public hearing, the Board unanimously recommended that each chapter, with the exception of chapter 3-181, “State Energy Conservation Code,” proceed to the Governor for adoption, pending clarification from the State Building Code Council.

Department of Agriculture

HAR Chapter 4-87, “Voluntary Registration of Service Persons”

Comments – The Board recommended that the post public hearing statement be sent to the Governor’s office for adoption.

HAR Chapter 4-96, “Schedule and Fees for Licensing Devices Susceptible of Commercial Usage and Measuring Devices and Measurement Standards for Testing Certification”

Comments – The Board supported that the proposed amendments after public hearing be sent to the Governor’s office 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

HAR Title 15, “Renewable Energy Facility Siting Process Rules”

Comments – The Board unanimously agreed to recommend that the proposed new rules proceed to the next step of approvals before going to public hearing.

HAR Chapter 15-150, “Rules Governing Special Management Areas and Shoreline Areas within Community Development Districts and Practice and Procedures before the Office of Planning”

Comments – The Board unanimously approved that the proposed amendments proceed to the Governor for adoption.

HAR Chapter 15-311, “Rental Housing Trust Fund Program,” Chapter 15-312, “Hula Mae Multi-Family Rental Housing Program,” Chapter 15-313, “Low-Income Housing Tax Credit Program,” Chapter 15-180, “Rental Housing Trust Fund Program,” and Chapter 15-168, “Low-Income Housing Tax Credit Program”

Comments – The Board unanimously approved that the proposed amendments proceed to public hearing.

Department of Commerce & Consumer Affairs

HAR Chapter 16-12, “Medicare Supplement Insurance Minimum Standard”

Comments – The Board unanimously approved that the proposed amendments proceed to public hearing. Although the Agency is required to provide the Board with a post public hearing statement, it was recommended that the Agency does not have to personally attend a Board meeting to present the “small business statement after public hearing.”

HAR Chapter 16-71, “Relating to Certified Public Accountants and Public Accountants”

Comments – The Board unanimously agreed that the proposed rules proceed to public hearing.

HAR Chapter 16-88, “Naturopaths”

Comments – The Board unanimously recommended that the proposed new rules proceed to public hearing.

HAR Chapter 16-114, “Relating to Real Estate Appraisers”

Comments – The Board unanimously recommended that the proposed rules proceed to the Governor’s office for adoption.

HAR Chapter 16-169, “Actuarial Opinion and Memorandum”

Comments – The Board unanimously approved that the proposed amendments proceed to the Governor’s office for adoption.

HAR Chapter 16-170, “Disclosure of Material Transactions”

Comments – The Board unanimously approved that the proposed amendments proceed to the Governor’s office for adoption.

HAR Chapter 16-171, Subchapter 8, “Life Settlements”

Comments – The Board unanimously recommended that the proposed rules proceed to public hearing.

HAR Chapter 16-182, “No Rules Combat or Similar Contests”

Comments – The Board unanimously recommended that because the rules have been signed and adopted by the Governor a memorandum be sent to DCCA acknowledging DCCA’s actions.

HAR Chapter 16-185, “Annual Audited Financial Reporting”

Comments – The Board unanimously recommended that the proposed rules 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

HAR Chapter 11-44, “Radiologic Technology Board/Radiologic Technology Rules”

Comments – The Board re-heard from DOH after it previously and unanimously agreed to recommend the proposed rules proceed to public hearing because the initial proposal included proposed fees. Subsequently, the Governor’s Office did not

approve the rules with the proposed fees in it. Therefore, as DOH eliminated that section of the rules, the Board's review was for "informational purposes" only.

HAR Chapter 11-54, "Water Quality Standards"

Comments – The Board unanimously agreed that the proposed amendments proceed to public hearing and after public hearing the Board recommended that the rules proceed for adoption.

HAR Chapter 11-55-38, "Historic and Burial Sites Review"

Comments – The Board unanimously agreed that the proposed amendments proceed to public hearing and then to the Governor for adoption.

HAR Chapter 11-81, "Smoking in Workplaces and Public Places"

Comments – In November 2009, the Board recommended that the rules, after public hearing, be deferred until DOH's deputy director comes before the Board at the next scheduled meeting to discuss several concerns relating to understanding the intent of the law, rule exemptions and due process rights. Subsequently, at the December 2009 meeting, the Board unanimously opposed the proposed rules and recommended that they do not proceed to the Governor for adoption, at this point in time.

HAR Chapter 11-94, "Skilled Nursing/Intermediate Care Facilities"

(repeal) and HAR Chapter 11-94.1, "Nursing Facilities" (adoption)

(DOH)

Comments – The Board unanimously agreed that the proposed amendments proceed to public hearing.

HAR Chapter 11-106, "Criminal History Record Checks"

Comments – The Board unanimously agreed that the proposed amendments proceed to public hearing.

**HAR Chapter 11-218, “Communication Access Services for
Persons who are Deaf, Hard of Hearing and Deaf-Blind”**

Comments – The Board unanimously agreed that the proposed amendments proceed to the Governor for adoption.

HAR Chapter 11-282, “Deposit Beverage Container Program”

Comments – The Board unanimously agreed that the proposed amendments proceed to public hearing with the recommendation that notice of public hearing is provided to transportation industry associations.

**HAR Chapter 11-453, “Hawaii Emergency – Community Right-
to-Know”**

Comments – The Board, at two separate meetings, agreed that rule amendments proceed to public hearing.

Department of Human Resources Development

No key matters of small business impact have been noted.

Department of Human Services

HAR Chapter 17-1711, “Application Processing Requirements”

Comments – The Board unanimously agreed that the proposed amendments proceed to the Governor for adoption.

HAR Chapter 17-1711 to 17-1735, Retroactive Medical”

Comments – The Board unanimously agreed that the rules proceed to the Governor for adoption.

**HAR Chapter 17-1714 – 17-1732, “Pregnant Women and Immigrant
Children”**

Comments – The Board unanimously recommended that the amended rules proceed to public hearing.

HAR Chapter 17-1714, “General Eligibility Requirements” and HAR Chapter 17-1722.3, “Basic Health Hawaii Program”

Comments – The Board unanimously recommended that the proposed amendments proceed to public hearing.

HAR Chapter 17-1714, “General Eligibility Requirements,” HAR Chapter 17-1722, “Special Medical Assistance Coverages and Programs,” HAR Chapter 17-1723, “Medical Assistance to Aliens and Refugees,” HAR Chapter 17-1725, “Assets,” HAR Chapter 17-1727, “Hawaii Health Quest,” HAR Chapter 17-1728, “QUEST-Net,” HAR Chapter 17-1728.1, “QUEST-Adult Coverage Expansion (ACE),” and HAR Chapter 17-1730, “QUEST-Spenddown Program”

Comments - The Board recommended that the proposed rules proceed to the Governor for adoption.

HAR Chapter 17-1721.1, “QUEST Expanded Access,” and Subtitle 12, Med-QUEST for HAR Chapters 17-1700-1735

Comments – The recommendation to adopt the rules was passed with seven members approving and two opposing. It was also recommended that the rules relating to the areas of reimbursement of the Med-QUEST program be brought forth to the Board for a formal review with eight members approving and one opposing.

HAR Chapter 17-1721 and 1725, “Medical Assistance to the Aged, Blind and Disabled”

Comments – The Board unanimously recommended that the proposed amendments proceed to public hearing.

HAR Chapter 17-1711, “Application Processing Requirements”

Comments – The Board unanimously recommended that the amended rules proceed to public hearing.

HAR Chapter 17-1711 – 17-1735, “Retroactive Medical,” Subtitle 12

Comments – The Board unanimously recommended that the amended rules proceed to the Governor for adoption.

HAR Chapter 17-1737, “Scope and Contents of the Fee for Service Medical Assistance Program”

Comments – The Board unanimously recommended that the amended rules proceed to public hearing.

Department of Labor & Industrial Relations

No key matters of small business impact have been noted.

Department of Land & Natural Resources

HAR Chapter 13-1, “Rules of Practice and Procedure”

Comments – The Board recommended that the proposed amended rules proceed to the Governor for adoption.

HAR Chapter 13-51, “Kahului Harbor Fisheries Management Area, Maui”

Comments – The Board made no comment as the rules were adopted prior to the Board meeting.

HAR Chapter 13-74, “License and Permit Provisions and Fees for Fishing, Fish, and Fish Products”

Comments – The Board unanimously recommended that the proposed amendments proceed to public hearing.

HAR Chapter 13-94, “Bottom Fish Management”

Comments – The Board unanimously recommended that the proposed amendments proceed to public hearing.

HAR Chapter 13-121, “Rules Regulating the Hunting of Wildlife on Public Lands and Other Lands”

Comments – The Board recommended that the proposed administrative rules proceed to public hearing, and after public hearing, through the proper channels for adoption.

HAR Chapter 13-122, “Rules Regulating Game Bird Hunting, Field Trails and Commercial Shooting Preserves”

Comments – The Board recommended that the new proposed administrative rules proceed to public hearing.

HAR Chapter 13-123, “Rules Regulating Game Mammal Hunting”

Comments – The Board recommended that the new proposed administrative rules proceed to public hearing.

**HAR Chapter 13-125 (repeal) and HAR Chapter 13-126 (adoption)
“Wildlife Sanctuaries”**

Comments – The Board recommended that the repeal of Chapter 13-125 and the approval of Chapter 13-126 proceed to public hearing. After public hearing, the Board recommended that the rules proceed through the proper channels for adoption.

HAR Chapter 13-146, “Hawaii State Park System”

Comments – The Board recommended that the proposed administrative rules proceed to public hearing, and then after public hearing, through the proper channels for adoption.

HAR Chapter 13-233 and 13-234, “Small Boat Harbors,” and HAR Chapter 241, “Boating”

Comments – The Board recommended that the proposed administrative rule changes proceed to public hearing. After public hearing, the Board recommended, with one reservation, that DLNR re-evaluate the temporary mooring fees, and that the rules proceed through the proper channels for adoption, subject to the Board receiving copies of the audit reports performed on DLNR; specifically, financial information regarding DLNR Harbors Division.

Department of Public Safety

No key matters of small business impact have been noted.

Department of Taxation

HAR Chapter 18-231, “Administration of Taxes”

Comments – The Board recommended that the new proposed administrative rules proceed to public hearing with one member abstaining.

Department of Transportation

HAR Chapter 19-44, “Rules Relating to Services and Procedures, Charges, Tolls and Fees”

Comments – Upon review of the proposed amendments prior to public hearing, it was determined that no quorum existed due to two members recusing themselves. As a result, no recommendations were forwarded to DOT.

HAR Chapter 19-133.2, “Periodic Inspection of Vehicles”

Comments – The Board recommended that the proposed rule amendments proceed to public hearing and because there was no negative small business impact, the rules did not need to return to this Board after public hearing.

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

Title 10-102 “Rules of Practice and Procedure for Commercial Ocean Recreational Activity Permits”

Comments – Initially reviewed in March 2008, the Board sent a memorandum to Mayor Tavares and Director Horcajo of the Maui County Department of Parks and Recreation with the following comments and recommendations to the proposed rules:

- Recordkeeping – A requirement that records be kept for all clients in a spreadsheet format, with submission of those records to the County, is above and beyond necessity. While it is not uncommon for a permit application to request a year-end financial statement, requesting an additional recordkeeping system requires information that is irrelevant to any requirements of the government. There appears to be no reason businesses must maintain these spreadsheets.
- Ratios – Rules mandating a limited amount of permits for specific beaches causes concern as the assignment of parking stalls should coordinate with the number of permits. The first-come first-served process causes disputes; this is demonstrated

by the need for permits and the neighborhoods that are closest to the beaches that will become inundated with parked vans used for passengers and equipment.

More thought needs to be put into the assigned parking stall rule.

- Environment Class – The benefit of a required environment and cultural curriculum for activity providers is understood; however, to date, no such curriculum had been developed. It was suggested that permits be granted expeditiously until the program is developed and that the curriculum be developed and offered as soon as possible if it is to be a requirement of the permit.
- Non-transferability of Permits – It was suggested that permits be issued in the business name and not the owner’s or applicant’s name. It was also suggested that the rules take into account that many of the businesses are family-owned; if the permit fee is designated to an individual and the company closes due to death or serious injury of that individual, it would deprive families of income resulting from a tragedy.
- Appeal Process – There is a need for a mechanism of an appeal process as it is unacceptable to leave the sole discretion of a fine or termination of a permit in the hands of an upcoming, unknown director without such a mechanism.

County of Kauai

“Special Management Area Rules and Regulations”

Comments: The Board recommended that the amendments proceed to public hearing.

Chapter 1, “General Provisions,” Chapter 9, “Appeals from Actions of the Planning Director,” Chapter 6A, “Nonconforming Use of Certificate Appeals”

Comments: The Board unanimously recommended that the amendments proceed to public hearing.

Department of Water, County of Kauai

Part 4, “Fixing Rates for the Furnishing of Water Service in the County of Kauai”

Comments – The Board unanimously agreed that the proposed rules proceed to 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 continues to monitor 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 2009 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 4) 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

The Board has met annually to re-establish what it stands for and to set clearly defined goals for the upcoming year. During 2009, however, the members opted not to conduct an annual planning session due to the uncertainty of the economic conditions plaguing the State of Hawaii. Instead, the Board will continue to carry out its 2008 goals throughout the year.

<u>Goal</u>	<u>Outcome</u>
Implement RegAlert Project	Implemented in September 2008 - Ongoing
Implement Public Outreach Plan	Ongoing
Implement Bill of Rights	Ongoing outreach

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 allows 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 via the Review Board.

RegAlert is intended to assist small businesses by empowering 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. It is also intended to assist this Board in responding to State and County agencies by acquiring valuable feedback from small businesses affected by the proposed rules.

During its inception, the Board welcomed the following RegAlert partners: 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.

In fiscal 2009, the following organizations were added as RegAlert partners: 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.

PROJECTS AND ACTIVITIES

The following activities were performed throughout the year.

- **Election of Officers** – In June 2009, the Board elected officers for the 2010 fiscal year. Ms. Lynne Woods was re-nominated as Chairperson for the fourth year, Ms. Charles Au was nominated as Vice Chairperson and Mr. Richard Schnitzler was nominated as Second Vice Chairperson.

- **Member Nominations and Recruitment** – The Board continues to actively recruit new members pursuant to Section 201M-5, “nominations to fill vacancies shall be made from names submitted by the review board.” Further, “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.”

To date, the Board has two vacancies representing the Islands of Kauai and Oahu; nominations for these vacancies were submitted to the Governor for approval. In

April 2009, three existing members, Ms. Sharon L. Pang and Messrs. Au and Yukimura were re-instated to new four-year terms.

▪ **Communications Plan**

In keeping in-line with the Board's communications plan created by Hastings & Pleadwell in 2007, the Board continues to strive to position itself as an experienced and responsible asset in the eyes of the Hawaii business world. During 2009, the following presentations were made by Board members: Small Business Hawaii - January; Honolulu Japanese Chamber of Commerce - January; County of Hawaii - May.

▪ **Website** - The Board continually updates its website. During 2009, approval was received to link the Board's website with Smart Business Hawaii. See - www.hawaii.gov/dbedt/business/start_grow/small-business-info/sbrrb.

▪ **Hawaii Small Business Bill of Rights Brochure** – In fiscal 2006, the Board initiated a taskforce to develop and design “Hawaii Small Business Bill of Rights” brochure. It was created from the Small Business Bill of Rights bill introduced in the 2005 legislative session (SB 1380 SD2 HD2), with the assistance of Hastings & Pleadwell. In December 2007, the brochure was formally launched.

During the 2008 legislative session, another bill was initiated by the legislation introducing the Small Business Bill of Rights, HB2637 “Relating to the Small Business Bill of Rights.” The bill was incorporated into HB 2781 “Relating to Small Business,” which not only established the Small Business Bill of Rights but directed State agencies to perform a more rigorous examination and justification of rules. The latter bill also directed the Board to convene a working group to study and make recommendations to resolve concerns related to chapter 201M, HRS, and to

report to the 2009 legislature any recommended legislation. The working group submitted its recommendations to House Representative Angus McElvey in January 2009. Subsequently, HB1428 “Relating to Small Business” was introduced along with the corresponding SB1276, of the same title. (See Section II, Legislative Review)

▪ **Press Releases and Articles** – The following press releases and articles, referencing the Board, were published during 2009:

- 1) “Medicaid health plan starts Feb. 1” – *The Honolulu Advertiser.com* – 1-22-09
- 2) “A key for agencies handcuffed to DBEDT” – *The Honolulu Advertiser.com* – 3-22-09
- 3) “Legislators consider abolishing DBEDT” – *The Honolulu Advertiser* – 3-09
- 4) “DBEDT shakeup scaled back for now” – *Honoluluadvertiser.com* – 5-01-09
- 5) “County ‘drawing a line’ in sand with park rules” – *The Maui News* – 6-21-09
- 6) Discussion between Howard Dicus and the Department of Transportation, Harbors Department - KGMB – 10-12-09
- 7) “DLNR explains fee hikes; proposed payers upset” – *The Maui News* – 11-06-09
- 8) “Small Business Regulatory Alert” – *Small Business News* – December 2009

ADMINISTRATIVE RULE REVIEW REQUESTED BY SMALL BUSINESS

In compliance with Section 201M-5 (f), HRS, the following outlines administrative rules and legislative issues requested by small business owners for the Board to review, from the period December 2008 to December 2009.

1. Dale Evans, Charley's Taxi

Ms. Dale Evans, president of Charlie's Taxi, approached this Board in November 2008, regarding the "request and notice of taxicab fuel surcharge implementation." Although Ms. Evans petitioned this Board in regards to Section 201M-2, HRS, "Determination of small business impact; small business impact statement," the statute played no role in her request. Specific concern stemmed from the City and County of Honolulu regarding a taxicab fuel surcharge that was approved by the Honolulu City Council on June 6, 2008. Due to the need to promulgate rules, the industry had been informed that implementation of the surcharge was not anticipated until January 1, 2009. As a result of the delay, Honolulu taxicab drivers continued to suffer economic losses and severe hardship from fuel cost increases.

Board Recommendation: In November 2008, the Board sent correspondence to Mayor Mufi Hannemann requesting that an emergency measure be implemented to allow taxicab drivers the ability to assess up to one dollar (\$1.00) per trip until such time that the rules were promulgated and adopted, with the requirement that all drivers maintain signage posted inside the taxicabs to inform the paying customers of such a charge. It was also recommended that the provision to implement a fuel surcharge should be optional and that the fuel surcharge not be put in the meter rate(s) so that the drivers would not have to change the meter rate settings.

Status: No further action is expected to be taken on this matter. In January 2009, correspondence from Mayor Hannemann was received explaining that, “ordinance 08-09, which became effective on June 18, 2008, states: Every six months, the director shall determine whether a fuel surcharge shall be established based on any increase in the base amount and the average fuel prices.” The public hearing amending the taxicab rules implementing Ordinance 08-09 was held on November 17, 2008; the rules became effective December 19, 2008. The correspondence further noted that when applying the rules, the average fuel cost for the period July 1, 2008, to December 31, 2008, will be compared to a base amount to establish a taxicab fuel surcharge. For taxicabs that choose to charge a fuel surcharge, surcharge is required to be shown on the taximeter with the taxicab rate card providing notice to the riding public. Additionally, charging the fuel surcharge is optional and in accordance with Section 12-1.10(c), the taxicab driver may charge less than the amount indicated on the taximeter.

2. John F. De Virgilio

Mr. John F. De Virgilio approached this Board in November 2008, requesting a regulatory review of the State’s Office of Consumer Protection (OCP) for “not following due process in its implementation of state laws regarding new post-secondary schools.” Specifically, Mr. De Virgilio requested that the Board review the practices of OCP against the now defunct start-up company, a special post-secondary institution for physical education and the martial arts.

Board Recommendation: During 2009, the Board requested and received administrative rules that govern OCP’s actions and procedures and copies of all documents sent to Mr. De Virgilio from OCP.

Status: Upon review of the requested information, no further action on this issue is necessary or required by the Board because Mr. De Virgilio's lawsuit is finalized.

3. **Ken Schmitt, Hike Maui and Maui Canyon Adventures**

In December 2008, Mr. Ken Schmitt, president of Hike Maui and Maui Canyon Adventures, contacted this Board in regards to a permit from the Board of Land and Natural Resources (BLNR) to conduct commercial hiking tours on a parcel of unencumbered State land in Maui. Mr. Schmitt explained that HAR Chapter 13-221, 'Land Management: Unencumbered Public Lands' provides that no commercial activities of any kind will be engaged in without a written permit from BLNR, or its authorized representative.

Mr. Schmitt attended the January 2009 Board meeting, explaining that the rules do not specify a permitting process, alleging that DLNR may establish its own permitting process for State lands, causing an onerous process. As a result, Mr. Schmitt requested assistance from this Board in terms of relief and indicated that in order to complete the permitting process required by Chapter 343, HRS, which requires a complete environmental assessment for any parcel of State land, it may cost up to \$100,000.

In attendance at the meeting was Mr. Steve Molmen, Supervising Land Agent from DLNR's Land Division; he explained the process of requesting a permit. In regards to Chapter 343, HRS, Mr. Molmen did not believe that exemptions were applicable to Mr. Schmitt's activity but noted that DLNR was currently working with Mr. Schmitt and will advise him as soon as the required information has been received.

Board Recommendation: The Board recommended that Mr. Schmitt continue with the appropriate process and that all parties involved communicate with each other.

Status: In May 2009, Mr. Schmitt notified the Board that the process was moving along with DLNR; a one-hundred page report was submitted to DLNR for review and approval. In October 2009, Mr. Schmitt notified this Board that DLNR developed a permitting process and proposal for BLNR for hiking tour permits entailing \$5 million per incident liability insurance coverage, an agreement to hold the State harmless and to indemnify the State against all claims, and a requirement of a \$5.00 access fee per participant.

Mr. Schmitt was very grateful to the Board for hearing his concerns. He stated that without this Board, the Hawaii Small Business Bill of Rights would mean nothing and the Board's ability to provide an objective review with powerful enforcement ability was invaluable.

4. **Ikuo Nakano, Vice Chancellor, IOND University, Tokyo, Japan regarding Hawaii State Office of Consumer Affairs**

In March 2009, Mr. Ikuo Nakano, Vice Chancellor of IOND University (IOND), approached the Board claiming that the Office of Consumer Protection (OCP) closed down IOND's initiatives while in the process of creating a small post-secondary establishment in Hawaii. As a result, the Board sent communication to Mr. Nakano requesting a chronological timeframe of events between IOND and OCP; an invitation was also extended to an IOND Hawaii representative to attend the next scheduled Board meeting.

Board Recommendation: As there had been no receipt of the requested information and because Mr. Nakano's case is currently in litigation, the Board determined that statutorily it is unable to assist with Mr. Nakano's concerns.

Status: No further action on this issue is necessary or required by the Board.

5. Hawaii Smokers Alliance & Hawaii Bar Owners Association

In March 2009, two members of Hawaii Smokers Alliance, Ms. Jolyn Tenn and Mr. David Crowley requested support from this Board on the following bills, "SB56, "Related to Enforcement of the Smoking Prohibition, and HB886, of the same name. See Section II, Legislative Review for specific information.

Section II

LEGISLATIVE REVIEW

The Review Board monitored and/or provided testimony on the following bills during the 2009 legislative session.

1. **HB 952 HD1 SD2 CD1 “Relating to Labor”**

Background: This bill certifies entities as exclusive representatives without an election where no other representatives are certified as the exclusive bargaining representatives for employers with annual gross revenue of \$5 million or more. The measure requires immediate collective bargaining between parties once entities are certified as exclusive representatives. It makes it a violation for an employer or employee to commit unfair or prohibited practices interfering with an employer's or employee's statutory rights or discriminating against an employer or an employee for exercising protected conduct, subject to a civil penalty of up to \$10,000 per violation.

Board Recommendation: The Board testified in opposition of this bill.

Status: This measure was vetoed by the Governor and over-ridden by the Legislature in a Special Session held in July 2009; the measure then became law under Act 6, SLH.

2. **HB 1622 HD1 “Relating to the Small Business Regulatory Review Board”**

Background: This bill requires the small business regulatory review board to identify rules that are amended or repealed to conform to the repeal of related statutes. It also directs the board to work with state agencies to develop a

procedure for expediting the amendment or repeal of rules when the changes are required only to comply with the repeal of statutes.

Board Recommendation: The Board supported the intent of this bill.

Status: The measure was deferred.

3. **HB 1428 HD1 “Relating to Small Business”**

Background: This bill makes various administrative and technical amendments to the small business regulatory flexibility act and codifies the small business bill of rights. The bill addresses the 2008 legislature’s requirement that the Review Board convene a working group to study and make recommendations of the process and procedures related to rulemaking, as established under Chapter 201, HRS. Working group members held their first meeting in September 2008. Members included Lynne Woods (Chairperson), Sharon L. Pang (Vice Chairperson), Donald Dymond, David S. De Luz, Jr., Representative Kyle Yamashita, Tim Lyons, Melissa Teves Pavlicek, Dale Evans, Paul Yuen, and Dori Palcovich. After several meetings, the proposed report was finalized, approved by the Review Board in November 2008, and submitted to the Legislature in December 2008.

The report outlined the working group’s findings, including that the current statutes are not adequate to meet the concerns of small business, that Hawaii small businesses are not fully aware of the Board’s purview and its processes, and that the Board is limited in its authority as it lacks the capacity to enforce recommendations. Further, it was found that government agencies have expressed the need for flexibility and explicit guidance as to the information

the Board requests from them. For these reasons, the proposed revisions to Chapter 201M, HRS, which included a new section codifying the Small Business Bill of Rights, were expected to improve communication and flexibility of the Statute's processes and procedures.

Board Recommendation: The Board strongly supported this bill.

Status: The measure did not pass. Representative Kyle Yamashita indicated that the bill will be re-introduced in the 2010 session.

4. **HB 814 HD2 SD2 CD1 “Relating to Nurse Aides”**

Background: This bill specifies the renewal period for the re-certification of nurse aides and the number of continuing education hours required for their re-certification.

Board Recommendation: The Board followed this bill but did not provide testimony.

Status: The measure became law under Act 108, SLH.

5. **HB 886 “Related to Enforcement of the Smoking Prohibition”**

Background: In March 2009, members of the Hawaii Smokers Alliance requested that the Board oppose this bill. The purpose of the bill was to enforce compliance with smoking restriction laws by nightclubs and restaurants via condition of the renewal for a liquor license. The bill also authorized the Hawaii Liquor Commission to enforce smoking laws concurrently with the Department of Health, increase fines for violation of smoking restriction law, and revoke liquor licenses for violation of the smoking law.

Board Recommendation: The Board provided testimony in opposition of the bill because it did not follow the intent of the legislation that was put into place; i.e., 201M-2 Determination of small business impact; small business impact statement (a) and (b). Testimony noted that the bill allowed for the avoidance of any administrative rules, which meant that any regulation that businesses must adhere to would bypass the Board.

Status: This measure did not pass.

6. **HB 949 HD1, “Relating to the Hawaiian Homes Commission Act”**

Background: This bill authorizes the Department of Hawaiian Home Lands to issue long-term commercial leases; effective 7/01/20.

Board Recommendation: The Board provided testimony in support of this bill.

Status: The measure did not pass.

7. **HB 999, “Relating to Meetings of Public Agencies”**

Background: This bill requires notice of state-board meetings to be posted on the central State of Hawaii Internet website; it eliminates the requirement that notice of state-board meetings be filed in the Office of the Lieutenant Governor.

Board Recommendation: The Board supported this bill.

Status: The measure was deferred.

8. **HB 1148 HD1 SD1, “Relating to Public Agency Meetings”**

Background: This bill requires State boards to electronically file meeting notices on the state calendar rather than in the Office of the Lieutenant Governor.

Board Recommendation: The Board supported this bill.

Status: The measure did not pass.

9. **HB 1728 HD1 SD1, “Relating to Fees”**

Background: This bill removes administrative agencies’ authority to establish fees and replaces administratively established fees with statutory fees.

Board Recommendation: The Board opposed this bill.

Status: The measure did not pass.

10. **SB 56, “Related to Enforcement of the Smoking Prohibition”**

Background: This bill is the partner to HB 886, “Relating to Small Business.” See above for specific information.

11. **SB 420 SD2 HD2, “Relating to Naturopathic Medicine”**

Background: In May 2009, Dr. Laurie Steelsmith requested that the Board support this bill, which amends the title of Chapter 455 to "Naturopathic Medicine," defines "naturopathic medicine," changes the name of the board of examiners in naturopathy to the board of naturopathic medicine and authorizes the board to make rules. It also authorizes temporary licenses to license out-of-state naturopathic physicians in a declared public health emergency.

Board Recommendation: The Board determined that it would submit a memorandum requesting that the Governor approve the bill because it asks for regulation of an industry that is currently not regulated.

Status: The bill was vetoed by the Governor and over-ridden by the Legislature in a Special Session held in July 2009; the measure became law under Act 22.

12. **SB 1276 SD2 HD1, “Relating to Small Business”**

Background: This bill is the partner to HB 1428, “Relating to Small Business.” See above for specific information.

13. **SB 1621 HD2, “Relating to Collective Bargaining”**

Background: This bill certifies entities as exclusive representatives without an election where no other representatives are certified as exclusive bargaining representatives. The measure requires immediate collective bargaining between parties once entities are certified as exclusive representatives.

Board Recommendation: The Board opposed this bill.

Status: This measure was carried over to the 2010 legislative session.

14. **Gubernatorial Nominee 268 – Sharon O. L. Pang**

Background: This gubernatorial nomination nominates Sharon O. L. Pang as a member to the Small Business Regulatory Review Board for a four-year term.

Board Recommendation: The Board strongly supported Ms. Pang’s nomination.

Status: Ms. Pang was ratified as a member of the Small Business Regulatory Review Board by the Senate in April 2009.

15. **Gubernatorial Nominee 280 – Peter Yukimura**

Background: This gubernatorial nomination nominates Mr. Peter Yukimura as a member on the Small Business Regulatory Review Board for a four-year term.

Board Recommendation: The Board strongly supported Mr. Yukimura's nomination.

Status: Mr. Yukimura was ratified as a member of the Small Business Regulatory Review Board by the Senate in April 2009.

16. **Gubernatorial Nominee 422 – Charles Au**

Background: This gubernatorial nomination nominates Mr. Charles Au as a member of the Small Business Regulatory Review Board for a four-year term.

Board Recommendation: The Board strongly supported Mr. Au's nomination.

Status: Mr. Au was ratified as a member of the Small Business Regulatory Review Board by the Senate in May 2009.

In December 2009, the Board was approached by the State of Hawaii's Senate to review a proposed bill that transfers this Board to another State department and provides for additional responsibilities of the members. The Board unanimously agreed to support the bill during the 2010 legislative session.

Appendices

- 1. Chapter 201M, Hawaii Revised Statutes**
- 2. Board Member Listing**
- 3. Administrative Rules Reviewed**
- 4. 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. Board Member Listing

Island	Member	Company	Address	Discussion Leader	E-mail
Maui	Lynne Woods (Chairperson)	Maui Real Estate Ventures, Inc.	373 Kolahala Drive Kula, Maui, HI 96790	Department of Commerce & Consumer Affairs, Department of Labor and Industrial Relations, Office of the Governor, Public Utilities Commission	lynne@billwoods.com
Oahu	Charles K.H. Au (Vice Chairperson)	Edwin Cabrinha & Au, LLP	598 Halekauwila Street, Honolulu, HI 96813	Department of Taxation, Department of Hawaiian Home Lands, Department of Transportation (Back-up)	charles@eca-advisors.com
Hawaii	Richard Schnitzler (2nd Vice Chairperson)	Hamakua Macadamia Nut Co.	P.O. Box 44715 Kawaihae, HI 96743	Department of Agriculture, Department of Business, Economic Development & Tourism, Department of Land & Natural Resources (Back-up)	hawwnut@hialoha.net
Maui	Dorvin Leis	Dorvin D. Leis, Co., Inc.	1100 Alakea Street, Ste 1400, Honolulu, HI 96813	Department of Accounting & General Services, Office of the Lieutenant Governor	jadel@lleisinc.com
Oahu	Donald L. Dymond	Kalapawai Market	306 S. Kalaheo Ave. Kailua, HI 96734	Department of Budget & Finance – Finance Division, Public Utilities Commission (Back-up), Department of the Attorney General	mdymond@hawaii.rr.com
Oahu	Sharon L. Pang	Care Companions & Consulting, LLC	1400 Pensacola Street, Honolulu, HI 96822	Department of Health-Medical Division, Department of Human Services, Department of Commerce and Consumer Affairs (Back-up)	carecompanions@hawaiiantel.net
Oahu	Bruce E. Bucky	Hildgund Jewelry	1188 Bishop Street, Suite 2305 Honolulu, HI 96813	Department of Human Resources (Back-up), Department of Defense, Department of Transportation	Hildgund@aol.com
Kauai	Peter Yukimura	Koa Trading Co.	PO Box 1031 Lihue, HI 96766	Department of Education, Department of Labor & Industrial Relations (Back-up)	pmyuki@hawaiian.net
Hawaii	David S. De Luz, Jr.	Big Island Toyota	811 Kaneolehua Avenue Hilo, HI 96720	Department of Labor and Industrial Relations, University of Hawaii, Department of Transportation (Back-up)	djr@bigislandtoyota.com

3. Administrative Rules Reviewed

	Month/Year	Support	Oppose	No Comment	Support w/Rec.	Sup. w/Res.	Support/Oppose	Pending
	FY 2000 to FY 2006	202	8	3	16	12	3	
FY 2007	Jul-06	3						
	Aug-06	3						
	Sep-06	1						
	Oct-06	2						
	Nov-06	8		2				
	Jan-07	3		1				
	Feb-07	3		1				
	Mar-07	9						
	Apr-07	9						
	May-07	5						
	Jun-07	3						
FY 2008	Jul-07	-						
	Aug-07	5	1					
	Sep-07	2			1			
	Oct-07	9						
	Nov-07	0						
	Jan-08	8			1			
	Feb-08	2		1				
	Mar-08	3						
	Apr-08	4						
	May-08	3		3			1	
	Jun-08	0						
FY 2009	Jul-08	6						
	Aug-08	3		1				
	Sept-08	4						
	Oct-08	4						
	Nov-08	3		1				
	Dec-08	0						
	Jan-09	7		1			1	
	Feb-09	0						
	Mar-09	7			1			
	Apr-09	7						
	May-09	2		1				
	Jun-09	5			2			
	Jul-09	5						
	Aug-09	0						
	Sep-09	12		2				
	Oct-09	0						
	Nov-09	7		1		1		
	Dec-09		1				1	
		Totals	359	10	18	21	13	6

4. Administrative Directive No. 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:



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