



**HAWAII
SMALL BUSINESS
REGULATORY REVIEW
BOARD
“WORKING GROUP”**

**REPORT FINDINGS
AND RECOMMENDATIONS**

**In Compliance with
ACT 230, SLH 2008**

January 2009

**HAWAII SMALL BUSINESS
REGULATORY REVIEW BOARD
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MESSAGE FROM THE DIRECTOR



It gives me great pleasure to thank the Small Business Regulatory Review Board working group members for their hard work. I deeply appreciate the members' cooperation and hard work in coming up with their findings and recommendations outlined in this report.

Theodore E. Liu
Director

OVERVIEW

Pursuant to Act 230, SLH 2008, members of the Small Business Regulatory Review Board (SBRRB) Working Group are pleased to provide the 2009 Legislature with findings and recommendations regarding the rule-making provisions under Chapter 201M, Hawaii Revised Statutes. The report also includes the following information:

- (1) Whether the current statutes are adequate to meet the concerns of small business;
- (2) What concerns have been raised by small businesses, the small business regulatory review board, or government agencies in implementing the statutes;
- (3) The level of difficulty in adequately meeting the requirements of the statutes; and
- (4) Any other issues that may arise during the review

WORKING GROUP MEMBERS

The SBRRB Working Group was created by Act 230, SLH 2008, to review the process and procedures related to rule-making, as established under Chapter 201M, Hawaii Revised Statutes. Members include:

- 1) Lynne Woods, Working Group Chair
SBRRB Chair / Maui Real Estate Ventures, Inc.
- 2) Sharon L. Pang, Working Group Vice Chair
SBRRB Vice Chair / Care Companions and Consulting, LLC
- 3) David S. De Luz, Jr.
SBRRB member / Big Island Toyota
- 4) Donald Dymond
SBRRB member / Kalapawai Market
- 5) Dale Evans
Charley's Taxi
- 6) Tim Lyons
The Legislative Center / Hawaii Business League
- 7) Dori Palcovich
Business Advocate, Department of Business, Economic Development & Tourism
- 8) Melissa Teves Pavlicek
Hawaii Public Policy Advocates / National Federation of Independent Business
- 9) Kyle Yamashita
House Representative, 12th District
- 10) Paul Yuen
Attorney, Department of Commerce and Consumer Affairs

WORKING GROUP FINDINGS AND RECOMMENDATIONS

Pursuant to Act 230, SLH 2008, the SBRRB Working Group members are pleased to provide the 2009 Legislature with its findings and recommendations regarding the rule-making provisions under Chapter 201M, Hawaii Revised Statutes.

- (1) Whether the current statutes are adequate to meet the concerns of small business
The Current statutes are not adequate to meet the concerns of small business. The Working Group is proposing a remedial bill that includes a new section, §201M-10 Small Business Bill of Rights, as well as additional changes as submitted.
- (2) What concerns have been raised by small businesses, the small business regulatory review board, or government agencies in implementing the statutes
 - A. Concerns raised by small business
Hawaii small businesses are still not fully aware of the SBRRB's purview and its processes; particularly, §201M-6 Petition for Regulatory Review.
 - B. Concerns raised by the Small Business Regulatory Review Board
The SBRRB is limited in its authority as it is only advisory and lacks the capacity to enforce recommendations.
 - C. Concerns raised by government agencies
Government agencies have expressed concern and questioned the necessity of the SBRRB's post-public hearing reporting process when there are either no changes or no substantive changes made to the rule during the public hearing process pursuant to §201M-3 Small business statement after public hearing.
- (3) The level of difficulty in adequately meeting the requirements of the statutes
Government agencies have expressed the need for flexibility and explicit guidance as to the information the SBRRB is requesting from them. Therefore, proposed changes to the statute are expected to improve communication and flexibility of internal procedures and processes.

(4) Any other issues that may arise during the review

Other issues that arose during the review process include the adequacy of the number of existing board members. An increase in the number of SBRRB members from eleven to thirteen is proposed under §201M-5 Small business regulatory review board powers, in order to meet the SBRRB's added responsibilities.

PROPOSED LEGISLATION

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-10 Small business bill of rights

§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 or has caused 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 under the jurisdiction of the state of Hawaii and the counties therein 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.

"County" means the counties located in the state of Hawaii.

"Small business" means a for-profit enterprise consisting of fewer than one hundred full-time or part-time employees.

"State" means state of Hawaii. [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~~] declare whether the proposed rules affect small business, [~~and if so,~~] subject to determination of the small

business regulatory review board. If it is determined to affect small business, the agency shall also recommend 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]~~ that are less burdensome and restrictive 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 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]

(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 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.

[\$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 any [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~~] thirteen 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 any [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 are obsolete, duplicate, overlap, [or] conflict with, or are more burdensome than 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]

§201M-10 Small Business Bill of Rights.

- (a) The rights of small business in the State of Hawaii include but are not limited to:
- (1) The right to expect agencies to provide a prompt, accurate, and courteous response to a request for information and to work together to ensure ready access to the information needed to assist businesses in their relationships with agencies;
 - (2) The right to a clear, stable, and predictable regulatory and record-keeping environment with easily accessible information and administrative rules in as clear and concise language as is practicable, including the posting of all proposed administrative rule changes on the Internet website of the office of the lieutenant governor;
 - (3) The right to request and receive timely notice of an agency's rulemaking proceedings. The notice should be mailed to all persons who have made a written request for such a notice;
 - (4) The right to be treated equally and fairly, with reasonable access to agencies' services;
 - (5) The right to a one-stop permitting process that will,

in the long term, include a centralized Internet website-based application system. This site's goals are to have quick and responsible timeframes to process state and county permits, licenses, registrations, and approvals, when appropriate, to simplify and reduce the filing of forms affecting business;

- (6) The right to a timely response to an application for a permit, license, registration, or approval necessary to operate the small business, within the established maximum period of time for that agency in accordance with section 91-13.5, Hawaii Revised Statutes;
- (7) The right to renewal of essential permits, licenses, registrations, or approvals, absent a specific reason for nonrenewal. All issuing agencies shall take action to grant or deny any renewal application for a business or development-related permit, license, registration, or approval within the established maximum period of time for that agency. The reasons for a denial should be clearly stated and under conditions set forth in law;
- (8) Whenever a contested case hearing is provided by law, in the event a regulatory agency takes action against a business, the right to expect a timely hearing. Officials conducting such hearings should be impartial. Small businesses should be provided a full and complete hearing to present their explanation of any alleged violation, deficiency, or wrongdoing. In any hearing, there should be a presumption that the small business did not commit an alleged violation or wrongdoing until the agency proves otherwise by preponderance of the evidence. The small business should have the right to present evidence, both oral and written. This evidence must be fully considered by the agency. In the event of an unfavorable decision, the business should have the right to a judicial review pursuant to section 91-14, Hawaii Revised Statutes;
- (9) The right to privacy regarding confidential and proprietary business information when competing for state procurement contracts. Subject to Chapter 92F, HRS, no state agency shall mandate the disclosure of confidential or proprietary business information as a condition of obtaining any contract or payment under any contract when a contract is to be awarded on a firm fixed price or cost plus fixed price basis;
- (10) The right to all of the protections afforded in the

Taxpayer Bill of Rights, P.L. 104-168;

- (11) The right to submit complaints regarding a violation of these rights or any other administrative acts of state and county agencies with the office of the ombudsman, in accordance with chapter 96, Hawaii Revised Statutes;
- (12) The right to request information and an opinion from the office of information practices, in accordance with chapters 92 and 92F, Hawaii Revised Statutes, with regard to access to information from public meetings or the release of government documents;
- (13) The right to provide information to the division of consumer advocacy in accordance with chapter 269, Hawaii Revised Statutes, with regard to issues under the purview of the public utilities commission;
- (14) The right to request information from the office of consumer protection, in accordance with chapter 487, Hawaii Revised Statutes, with regard to business and consumer issues;
- (15) The right to access the small business advocate in the department of business, economic development, and tourism regarding any dispute with a state agency to ensure government resources are coordinated on behalf of small business and the rights of businesses are being upheld; and
- (16) The right to administrative rule review pursuant to the Small Business Regulatory Flexibility Act by filing a petition with the small business regulatory review board in accordance with section 201M-6, Hawaii Revised Statutes.

Small Business Regulatory Review Board

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