

# August 16, 2017 ~ SBRRB Meeting Checklist

Member Attendance				
	Airline Preference	From	Details	Attend
Anthony Borge, Chair	NA	Oahu	Parking Pass	Yes
<del>Blank</del>				
<del>(T) Booked</del> Kyoko Kimura	HA	Maui	Parking Pass	Yes
Harris Nakamoto <del>Vice Chair</del>	NA	Oahu	NA	Yes
Director's ex officio - Mark Ritchie	NA	Oahu	NA	Yes
Robert Cundiff, Vice Chair	NA	Oahu	Parking Pass	Yes
Nancy Atmospera-Walch	NA	Oahu	NA	No?
<del>(T) Done (attached)</del> Garth Yamanaka, 2nd Vice Chair	HA (Booked)	B.I.	Parking Pass	YES

Pre Meeting Checklist	
Conference Room #436 (Confirm each month)	X
Poll Board Attendance - in process	✓
Draft Agenda to Chair for approval 8-3-17 Approved	✓
Prepare TAF's for Director's approval - ASAP (Linda) - Group TAF Kyoko / Garth	✓
Copies of Rule Package for Lte. Gov's Office (2) and Scan for Posting on State Calendar	✓ ✓
Send Chair Minutes for Approval Approved	✓
Post approved agenda on 1) SBRRB website, 2) State Calendar, 3) Lte. Governor's Office	✓ ✓ ✓
Send Agendas to those people who requested it - IMPORTANT <del>One more needed</del> Done	✓
Upload Meeting Documents onto Board's Website in Calendar	✓ Done
Include "discussion leader" names on the agendas to Board members only.	✓
Prepare Agenda ONLY for "Chair" with Names of Attendees	✓
Mail parking permits to those Board members noted (Sent in Nov. 2016 six (6) permits)	X

Need  
Agenda

STAFF				
Dawn Apuna				Via I-pad
Dori Palcovich				

Post Meeting Checklist	
Don't Forget Retractor	
Sign - Bring to Meeting	

*(Handwritten mark)*

Visitors Sign-in-Sheet - Small Business Regulatory Review Board - August 16, 2017

	Name	Title	Organization	Email	Phone
1	JoAnn Vidinher	Administrator	Dept of Labor	joann.a.vidinher@hawaii.gov	586-9151
2	PHYLLIS DAYAO	R's Officer	DLIR	phyllis.a.dayao@hawaii.gov	586-8996
3	Janet Kaye	Researcher	DUSE	janet.m.kaye@hawaii.gov	586-9005
4	Todd Tebriana	Researcher	DLNR	Todd.k.tebriana@hawaii.gov	587 0142
5	Ed Underwood	Administrator	DLNR-DEBOR	Ed.Underwood@hawaii.gov	586-9314
6	Dye Kalili	Rev-Enhancement Mgr	DOT Harbors	dyeandee.k.kalili@hawaii.gov	587-3668
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74-425 Kealakehe Pkwy # 3-B  
Kailua Kona, HI 96740  
www.hawaiifishingandboating.com

August 3, 2017

**Testimony** on public hearing process and proposed amendments to Title 13, Subtitle 11, Ocean Recreation and Coastal Areas, Parts I, II, III, Hawaii Administrative Rules, Sections: 230, 231, 232, 233, 235, 240, 242, 243, 244, 245, 250, 251, 253, 254, 255, 256

Hawaii's boating community and ocean recreation industry were not properly informed of the availability and contents of a 132 page document containing proposed changes and additions to definitions, and amendments to many DOBOR rules, nor were they properly informed of the forthcoming series of public hearings. The process undertaken by the DOBOR violated HRS Chapter 91 in many ways, including not following the process detailed to the Board of Land & Natural Resources when DOBOR's "Request Approval to Initiate Rule Making, Including Public Hearing. . . ." was on the BLNR agenda on December 9, 2016.

HRS Chapter 91-3 requires that "the adopting agency shall: 3 – (11) Give at least 30 days notice for a public hearing." That did not happen in the way DOBOR committed to the BLNR in their request to initiate rule making, wherein DOBOR stated that the draft rules could be "reviewed in person at any small boat harbor from 8:30 am to 3:30 pm." Members of our organization checked the DOBOR offices at Keehi, Ala Wai, Honokohau and Hilo and found nothing posted about the public hearings, nor was a copy of the proposed amendments available over the counter. Because there was inadequate notice, at least 30 days in advance of the public hearing, the process should be started over and undertaken legally.

HRS Chapter 91 also states: "The notice shall be mailed to all persons who have made timely written request of the agency for advance notice of rule making proceedings." Our organization has made such a request on numerous occasions, over many years, yet we did not receive such notice.

Moreover, it was clear from the testimony given at the public hearings in Hilo, Kona and Honolulu, that knowledge of the proposed amendments was almost non-existent, further proof that the hearing was inadequately noticed and that access to the proposed amendments and definitions was difficult-to-impossible, across the State.

The definitions section of the proposed amendments is extremely poor and creates many more problems than it solves. Numerous definitions (catamaran, high seas, dive flag, litter, etc.) are convoluted or absolutely incorrect. Some even contradict federal and/or the international law of the sea. For example the proposed DOBOR amendments includes a complex definition of litter even though litter is already very concisely defined in the HRS. Why would DOBOR want a different

*will meet the  
federal  
definitions*

definition of litter than the HRS? There are proposed definitions that counter federal law including being dive flag and high seas, and rule changes that also run counter to federal law. The removal of the current requirement that DOBOR create an advisory council, is counter to good sense, and removes from the boaters and ocean recreation businesses an opportunity to participate in regular communication and contribute to improving our small boat harbors and boating facilities.

~~\*~~ always in the must meet law.  
took it out at the meeting

There are many other issues with the proposed rule amendment package, but these examples alone should suggest that the package is flawed and needs to be revisited before it is finalized. If the proposed amendments had been vetted with the boating public prior to the public hearing process being announced, many of these flaws could have been rectified. That's what public meetings are for, but DOBOR no longer holds those. Moreover there are a number of types of collaborative software available, which would allow DOBOR to hold virtual public meetings accessible to boaters and businesses across the State, prior to initiating the formal public hearing process.

DOBOR Administrator Ed Underwood has again failed to adequately inform the public about important DOBOR public hearings and to provide them with the opportunity to fully understand, and to provide reasoned input and response to proposed changes. He should be told to start this public process again, to follow the law, and to reach out to boaters through the organizations that represent them (yacht clubs, fishing clubs, associations, etc.) to assure that DOBOR's public process benefits from community input and meets the requirements of Hawaii law.

Mahalo,

Rick Gaffney, President  
Hawaii Fishing & Boating Association  
74-425 Kealahou Parkway, # 3-B  
Kailua-Kona, HI 96740

808 960-6767 (cell)  
[rgaffney@pacificboatsales.com](mailto:rgaffney@pacificboatsales.com)

# HAPTA



## HAWAII CHAPTER - AMERICAN PHYSICAL THERAPY ASSOCIATION

(800) 554-5569 x13 • [www.hapta.org](http://www.hapta.org) • [info@hapta.org](mailto:info@hapta.org)

August 16, 2017

Anthony Borge, Chair  
Small Business Regulatory Review Board  
No. 1 Capitol District Building  
250 S. Hotel Street, Conference Room 436  
Honolulu, Hawaii 96813

Chair Borge and Members of the Board:

I am Gregg Pacilio, PT and Board President of the Hawaii Chapter of the American Physical Therapy Association, a non-profit professional organization serving more than 300 member Physical Therapists and Physical Therapist Assistants. Our members are employed in hospital, outpatient clinics, rehabilitation centers, and health care facilities across the islands where we provide services for workers compensation claimants.

Access to medical and rehabilitative treatment for injured workers is restricted because few providers accept workers' compensation patients due to burdensome documentation and reporting, slow approval and payment processing, and inadequate fee reimbursements. We continue to support steps towards increasing the injured workers' access to medical care and to receive timely care for appropriate return to work.

HAPTA appreciates DLIR's consideration of last year's testimonies in opposition to the proposed rules changes and subsequent deferral, which have led to the current proposed rules.

HAPTA supports the proposed amendments to Hawaii Administrative Rules (HAR) Title 12, Chapter 15, Hawaii Workers' Compensation Medical Fee Schedule and Exhibit A, "Workers' Compensation Medical Fee Schedule and Exhibit A, "Workers' Compensation Supplemental Medical Fee Schedule". The proposed changes to Exhibit A uses the current 2017 CPT manual providing clarity with payors by removing older CPT codes (97001 and 97002), and integrating the new codes (97161, 97162, 97163, 97164). We support the changes to Exhibit A as it increases the current fee schedule.

We also support the proposed changes to allow treatment plans to be faxed and potentially reducing the gaps in treatment care for workers' compensation patients. Previous treatment plans were required to be mailed contributing to slow approval and processing, prolonging patient's ability to return to work. Faxed treatment plans will also allow electronic record of the date sent.

Thank you for the opportunity to testify. Please feel free to contact Derrick Ishihara, HAPTA's Workers' Compensation Committee Chair at 808-221-8620 for further information.

Small Business Regulatory Review Board Meeting

Wednesday, August 16, 2017

10:00 a.m.

No. 1 Capitol District Building

250 South Hotel Street, Honolulu, HI

Conference Room 436



## SMALL BUSINESS REGULATORY REVIEW BOARD

Department of Business, Economic Development & Tourism (DBEDT)  
No. 1 Capitol District Bldg., 250 South Hotel St. 5<sup>th</sup> Fl., Honolulu, Hawaii 96813  
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804  
Email: [dbedt.sbrb.info@hawaii.gov](mailto:dbedt.sbrb.info@hawaii.gov)  
Website: [dbedt.hawaii.gov/sbrb](http://dbedt.hawaii.gov/sbrb)

Tel 808 586-2594

### AGENDA

Wednesday, August 16, 2017 ★ 10:00 a.m.

No. 1 Capitol District Building  
250 South Hotel Street - Conference Room 436

David Y. Ige  
Governor

Luis P. Salaveria  
DBEDT Director

#### Members

Anthony Borge  
Chairperson  
Oahu

Robert Cundiff  
Vice Chairperson  
Oahu

Garth Yamanaka  
2<sup>nd</sup> Vice Chairperson  
Hawaii

Harris Nakamoto  
Oahu

Nancy Atmospera-Walch  
Oahu

Kyoko Kimura  
Maui

Director, DBEDT  
Voting Ex Officio

- I. Call to Order
- II. Approval of July 19, 2017 Meeting Minutes
- III. Old Business
  - A. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to Title 8, Chapter 101, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, promulgated by Department of Liquor Control, County of Maui – **Discussion Leader – Kyoko Kimura**
- IV. New Business
  - A. Discussion and Action on Proposed Amendments to Hawaii Administrative Rules (HAR) Title 12, Chapter 15, Hawaii Workers' Compensation Medical Fee Schedule and Exhibit A, "Workers' Compensation Supplemental Medical Fee Schedule," promulgated by Department of Labor and Industrial Relations – **Discussion Leader – Kyoko Kimura**
  - B. Discussion and Action on Proposed Amendments to HAR Title 19, Chapter 44, Rules Relating to Service and Procedures, Charges, Tools and Fees, promulgated by Department of Transportation – **Discussion Leader Kyoko Kimura**
  - C. Discussion and Action on Testimony, dated August 3, 2017, from Mr. Rick Gaffney, President, Hawaii Fishing & Boating Association, regarding Proposed Amendments to HAR Title 13, Subtitle 11, Ocean Recreation and Coastal Areas, as follows; promulgated by Department of Land and Natural Resources – **Discussion Leader – Mark Ritchie**
    - a. Part I - Small Boat Harbors and Other Boating Facilities
      1. Chapter 230, General Provisions
      2. Chapter 231, Operations of Boats, Small Boat Harbors, and Permits
      3. Chapter 232, Sanitation and Fire Safety
      4. Chapter 233, Motor Vehicle and Parking Rules
      5. Chapter 235, Offshore Mooring Rules and Areas
    - b. Part II – Boating
      6. Chapter 240, General Provisions
      7. Chapter 242, Accidents, Reports, Fines, Enforcement and Records
      8. Chapter 243, Vessel Equipment Requirements
      9. Chapter 244, Rules of the Road; Local and Special Rules
      10. Chapter 245, Waterway Marking Systems

c. Part III - Ocean Waters, Navigable Streams & Beaches

11. Chapter 250, General Provisions
12. Chapter 251, Commercial Activities on State Ocean Waters, Navigable Streams, and Beaches
13. Chapter 253, Registration and Permit Fees
14. Chapter 254, Local Ocean Waters
15. Chapter 255, Waikiki Beach
16. Chapter 256, Ocean Recreation Management Rules

V. Administrative Matters

- A. Discussion and Action on the Board's Nominations of Proposed Board Members for Submission to the Governor under Section 201M-5(b)(3), Hawaii Revised Statutes (HRS), including Ms. Mary Albitz
- B. Discussion and Action on Proposed Amendments to Chapter 201M, HRS for the 2018 Hawaii Legislative Session
- C. Discussion on the Board's "2008 Chapter 201M-7, HRS Report"
- D. Update on Upgrading the Board's Website
- E. Update on the Board's Upcoming Advocacy Activities and Programs in accordance with the Board's Powers under Section 201M-5, HRS

VI. Next Meeting: Scheduled for Wednesday, September 20, 2017, at 10:00 a.m., Capitol District Building, Conference Room 436, Honolulu, Hawaii

VII. Adjournment

If you require special assistance or auxiliary aid and/or services to participate in the public hearing process (i.e., sign language, interpreter, wheelchair accessibility, or parking designated for the disabled), please call (808) 586-2594 at least three (3) business days prior to the meeting so arrangements can be made.



## II. Approval of July 19, 2017 Meeting Minutes

## Small Business Regulatory Review Board

### MINUTES OF REGULAR MEETING - Draft

July 19, 2017

Conference Room 436 - No. 1 Capitol District Building, Honolulu, Hawaii

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 10:01 a.m., with a quorum present.

**MEMBERS PRESENT:**

- Anthony Borge, Chair
- Robert Cundiff, Vice Chair
- Kyoko Kimura
- Harris Nakamoto
- Nancy Atmospera-Walch
- Mark Ritchie

**ABSENT MEMBERS:**

- Garth Yamanaka

**STAFF:** DBEDT  
Dori Palcovich

Office of the Attorney General  
NA

II. **APPROVAL OF JUNE 28, 2017 MINUTES**

Mr. Nakamoto made a motion to accept the June 28, 2017 minutes, as presented. Mr. Cundiff seconded the motion, and the Board members unanimously agreed.

III. **OLD BUSINESS**

- A. Discussion and Action on the Small Business Statement After Public Hearing and Proposed New Hawaii Administrative Rules (HAR) Title 4, Chapter 161, Hawaii-Grown Industrial Hemp, promulgated by Department of Agriculture (DoAg)

Vice Chair Cundiff explained that although DoAg is not attending the meeting today, representatives were at the Board meeting prior to the public hearing and reviewed the proposed rules at that time. Fourteen people attended the public hearing with four testifying, three were in favor of the rules.

The one testifier in opposition was concerned with the cross-pollination of medical marijuana. However, in researching this issue further, Vice Chair Cundiff was told by other agricultural representatives there would not be any problems with this rule and the cross-pollination of medical marijuana; as a result, the testifier's opposition would not be a valid concern for DoAg. Overall, he believes the rules would be good for small business.

Vice Chair Cundiff made a motion to approve the proposed rules for adoption. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

#### **IV. NEW BUSINESS**

##### A. Discussion and Action on Proposed Amendments to HAR Title 11, Chapter 157, Examination and Immunization, promulgated by Department of Health (DOH)

Dr. Sarah Park, DOH's Chief of Disease Outbreak Control Division, introduced Branch Chief Mr. Ronald Balajadia, and explained the history of these rules since 2001 when they were last updated. The purpose of this proposal is to update the immunization and examination requirements for Hawaii schools and post-secondary schools. A comprehensive training initiative will also be implemented to ensure that affected businesses and organizations understand the requirement changes and that they are able to screen records appropriately.

The small businesses required to comply with the proposed rules are health care providers, and child care centers, as well as compulsory schools, and post-secondary schools. The proposal seeks to require additional immunizations at the child care, kindergarten, and 7<sup>th</sup> grade school entry levels. However, the amendments to the vaccination requirements are already routine and administered by health care providers.

The proposed changes were developed and reviewed in concert with the School Examination and Immunizations Requirements Working Group, which is comprised of representatives from private compulsory and post-secondary institutions, the American Academy of Pediatrics, and others.

The proposal is consistent with the national guidelines, the U.S. Centers for Disease Control and Prevention Advisory Committee on Immunization Practices and are comparable to and in some instances less stringent than other states' school and post-secondary school immunization and examination requirements.

Mr. Ritchie made a motion to send the proposed amendments to the Governor for public hearing. Vice Chair Cundiff seconded the motion, and the Board members unanimously agreed.

##### B. Discussion and Action on Proposed Amendments to the "Interpretative Administrative Zoning Rules and Regulations (2014) of the Kauai Planning Commission," Relating to Chapter 8, 9, and 10 of the Kauai County Code (1987), Enforcement of KPAR 8-19, Kauai County Code, Chapter 8, Article 17, Relating to Transient Vacation Rentals of the Kauai County Code, promulgated by the County of Kauai Planning Commission

Ms. Jodi Higuchi, Kauai County Deputy County Attorney, and Mr. Kaaina Hull, Deputy Director at the County of Kauai Planning, discussed the amendments and provided a summary and history of the rules, explaining that this proposal will bring the rules in-line with the requirements of Chapter 8, Article 17.

Specifically, the amendments will elaborate on the items that must be submitted to the Planning Department along with applications to renew non-conforming use certificates, the

deadlines for the applications, and repercussions for failing to submit an application by the annual expiration date.

The amendments increase the per-day fine amount for Class I and II type structural violations from \$250 to \$500, and non-compliance with the ordinance violations (including the posting of no non-conforming use certificates signs) from \$250 to \$1,000; all of which will be consistent with the County Code. Fines will continue to be deposited in a general account and used to offset administrative costs for enforcement activities. The most significant amendment eliminates the former grace period, where renewal applications were accepted 30 days past the deadline, a direct conflict with the County Code.

As many impacts and complaints of transient vacation rental impacts have arisen from neighbors, an increased fine for no nonconforming use certificates sign posting is a high priority to emphasize the importance of such notice to neighboring landowners that a non-conforming TVR use is legal. The sign is about a foot long, is placed on the front of a property and has a classification (license) number on it. Mr. Hull noted that there may be approximately 1,500 illegal operations on the Island of Kauai at any given time. Although it will be an arduous task, once nonconforming operations are found, a cease and desist order is given.

The major business impact will be to all those owners and business entities engaged in non-conforming transient vacation rental uses that are required to comply with the rules.

Vice Chair Cundiff made a motion for the amendments to proceed to public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on Proposed Amendments to Title 1, Rules of Practice and Procedure of the Kauai County Planning Commission (Codified May 2014), as follows, promulgated by the County of Kauai Planning Commission

1. Chapter 6, Agency Hearing Procedures

Mr. Hull explained that the amendments are expected to clean-up and clarify the rules for contested case proceedings. This will be done by eliminating civil style discovery, clarifying the time for filing motions and requiring resolution of motions by the presiding officer without a hearing unless the presiding officer requires otherwise. Clarification also includes specifying that no reply or supplemental memoranda will be filed unless required by the presiding officer.

Overall, the amendments are designed to avoid ambiguity and encourage an expeditious and inexpensive contested case process while providing for procedural due process at the administrative level with a focus on a more informal process rather than a full-blown procedure.

Vice Chair Cundiff made a motion to move the amendments to public hearing. Mr. Ritchie seconded the motion and the Board members unanimously agreed.

## 2. Chapter 9, Appeals from Actions of the Planning Director

Ms. Higuchi explained that the proposed amendments are intended to clarify actions of the Planning Director appealed to the Planning Commission by eliminating reference to specific articles within the Comprehensive Zoning Ordinance. The amendments also clarify that any person, not just applicants, can petition appeal actions under the Ordinance.

In addition, the amendments are intended to clarify the deadline for filing petitions to appeal for each type of action, and are designed to further clarify the process to eliminate controversies highlighted by recent contested appeals.

Vice Chair Cundiff made a motion to move the amendments to public hearing. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

## V. **ADMINISTRATIVE MATTERS**

### A. Discussion with eGovernment Services & Customer Services Representative regarding the Development and Implementation of a New Website for the Board

Ms. Rosemary Warfield, Manager at eGovernment Services & Customer Services, and Mr. Christopher Cosner, Web Designer, from Hawaii Information Consortium (HIC), explained that HIC contracts with the State of Hawaii by creating websites and providing website services. Chair Borge stated that this Board was looking to revamp its website to be more meaningful and user-friendly to the end-users, which includes Hawaii small businesses as well as State and County Agencies.

Ms. Warfield stated that the Board's current website looks the same as other State websites; it is simply laid-out, has limited content, and is up-to-date. When creating and updating a new website, two questions are asked: 1) what are the goals of the agency; and 2) who is the audience. Based on these questions, some of the suggestions made to the Board's website would be to have a "call to action" link, another link recapping legislative matters, and links to the Board's activities and its members. Additional suggestions include reconfiguring the website's content, eliminating many of the pdf's, adding photos and videos, and accepting testimonies on-line for administrative rules being heard at upcoming Board meetings.

In response to Chair Borge's inquiry regarding HIC's current work, Ms. Warfield showed the members the State's Hoisting Machine Operators Advisory Board website. She went through the site, listing the various links (i.e., operator resources, about us, news, contact us, and list of certified operators), and noted that this website's original template was the same as this Board's.

Mr. Cosner explained that in addition to creating a new website, HIC is able to restructure the way the content is managed in order to make the site more stream-lined and easier to work with. Ms. Warfield added that she has been working with the State over ten years and never heard about this Board even though it has a lot of pertinent issues impacting Hawaii businesses.

Chair Borge stated that because this Board works with small business owners, it is important that the website is practical, simple and to the point. Vice Chair Cundiff believed that it would be beneficial to have less of a "government-type" website in order for Hawaii small businesses to become comfortable using it and more active in the regulations that affect them, rather than waiting for agencies to come to them with the proposed rules. In addition, it was suggested that the website has a more marketing approach with an ability to do "email blasts."

The cost of developing a new website would be roughly \$15,000, with a monthly maintenance fee. The discussion ended by thanking Ms. Warfield and Mr. Cosner for their time and information, with the Board getting back to them with a timeframe.

#### B. Discussion and Action on Proposed Amendments to Chapter 201M, HRS

Chair Borge explained that under the Board's statute, Section 201M-5 (a), it states; "For requests regarding county ordinances, the board may make recommendations to the county council or the mayor for appropriate action." However, there have been incidences in the past where the Board members have been accused of overstepping its boundaries. As such, for clarification purposes, it is important for the members to fully understand its statutory mandates regarding county ordinances. Vice Chair Cundiff stated that County agencies' rules and regulations are created to comply with ordinances. Therefore, it would appear that as a small business advocacy board, this Board should likely have consideration in reviewing ordinances.

Vice Chair Cundiff made a motion to seek a legal opinion in writing for clarification purposes regarding the meaning of Section 201M-5 (a), Hawaii Revised Statutes. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

In regards to the Board's rule-making process, Chair Borge made reference to a study that was forwarded to this Board about a year ago, by Mr. Tim Lyons, which was written by Mr. Denver Coon, a student, at the time the paper was written, at UH's Richardson School of Law. The study, "Modernization of Hawaii's Rule-Making Procedure," reviews the existing rule-making procedures when it began in the 1950's regarding agencies being required to go to public hearings.

Chair Borge stressed that Hawaii should be no different than other states where stakeholders are engaged early on in the rule-making process; this would be more meaningful and relevant for businesses, rather than being engaged at the end of the process. Further, he believes that this study and the recommendations made within the study should be strongly considered by this Board and brought forward to the Legislature.

Mr. Ritchie suggested that a marketing piece be created on a "how to guide" created by this Board to guide and describe reaching out to small businesses. Mr. Cundiff added that it should go beyond that and require Agencies to go out to small business stakeholders.

The continuation of this discussion is deferred until the next Board meeting.

C. Update on this Board's Newly Created Position, Office Assistant III

A temporary (89-day hire) Office Assistant is in the process of being hired, prior to hiring a permanent full-time assistant, which is to be hired at the beginning of 2018.

D. Update on the Board's Upcoming Advocacy Activities and Programs in accordance with the Board's Powers under Section 201M-5, HRS

Deferred until next month.

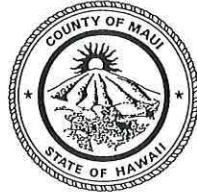
- VI. **NEXT MEETING** – The next meeting is scheduled for Wednesday, August 16, 2017, in Conference Room 436, 250 South Hotel Street, Honolulu, Hawaii at 10:00 a.m.
- VII. **ADJOURNMENT** – Ms. Kimura made a motion to adjourn the meeting and Vice Chair Cundiff seconded the motion; the meeting adjourned at 12:15 p.m.

### III. Old Business

- A. Discussion and Action on the Second Small Business Statement After Public Hearing and Proposed Amendments to Title 8, Chapter 101, **Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui**, promulgated by Department of Liquor, County of Maui



ALAN M. ARAKAWA  
MAYOR



GLENN MUKAI  
DIRECTOR

MARK T. HONDA  
DEPUTY DIRECTOR

DEPARTMENT OF LIQUOR CONTROL

C O U N T Y O F M A U I

2145 KAOHU STREET, ROOM 105 • WAILUKU, MAUI, HAWAII 96793  
PHONE (808) 243-7753 • FAX (808) 243-7558

**MEMORANDUM**

TO: Anthony Borge, Chairperson  
Small Business Regulatory Review Board

FROM: Glenn Mukai, Director *Glenn Mukai*  
Department of Liquor Control, County Of Maui

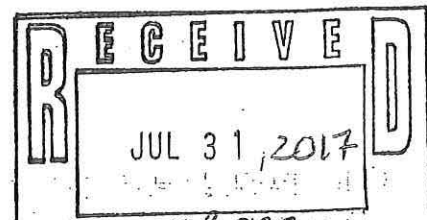
DATE: July 28, 2017

SUBJECT: Proposed Amendments to Title 08, Subtitle 01, Liquor Commission,  
Chapter 101, "Rules Governing the Manufacture and Sale of Intoxicating  
Liquor of the County of Maui"

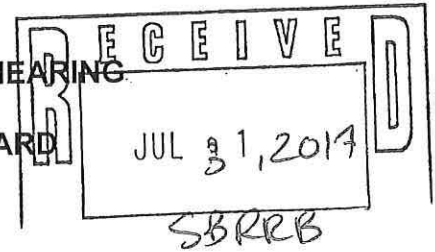
The Liquor Commission held a public hearing on July 12, 2017 for proposed rule amendments petitioned by Ms. Mahina Martin at its May 10, 2017 meeting.

Attached is the Small Business Statement "After" Public Hearing To The Small Business Regulatory Review Board form.

Should you have any questions or need clarification, please do not hesitate to contact me at (808) 243-7772.



SMALL BUSINESS STATEMENT "AFTER" PUBLIC HEARING  
TO THE  
SMALL BUSINESS REGULATORY REVIEW BOARD  
(Hawaii Revised Statutes (HRS), §201M-3)



**Department or Agency:** Department of Liquor Control, County of Maui

**Administrative Rule Title and Chapter:** Title 08, Chapter 101

**Chapter Name:** Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui

**Contact Person/Title:** Glenn Mukai, Director

**Phone Number:** (808) 243-7772

**E-mail Address:** liquor@mauicounty.gov

**Date:** July 28, 2017

A. To assist the SBRRB in complying with the meeting notice requirement in HRS §92-7, please attach a statement of the topic of the proposed rules or a general description of the subjects involved.

B. Are the draft rules available for viewing in person and on the Lieutenant Governor's Website pursuant to HRS §92-7? Yes  No

(If "Yes" please provide webpage address and when and where rules may be viewed in person.) co.mauhi.us

(Please keep the proposed rules on this webpage until after the SBRRB meeting.)

I. Rule Description: New  Repeal  Amendment  Compilation

II. Will the proposed rule(s) affect small business? Yes  No  (If "No" you do not need to submit this form.)

\* "Affect small business" is defined as "any potential or actual requirement imposed upon a small business . . . 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." HRS §201M-1

\* "Small business" is defined as a "for-profit enterprise consisting of fewer than one hundred full-time or part-time employees." HRS §201M-1

III. Is the proposed rule being adopted to implement a statute or ordinance that does not require the agency to interpret or describe the requirements of the statute or ordinance? Yes  No  (If "Yes" no need to submit this form.) (e.g., a federally-mandated regulation that does not afford the agency the discretion to consider less restrictive alternatives.) HRS §201M-2(d)

IV. Is the proposed rule being adopted pursuant to emergency rulemaking? (HRS §201M-2(a)) Yes  No  (If "Yes" no need to submit this form.)

\* \* \*

**I. Please explain how the agency involved small business in the development of the proposed rules.**

DNA Proposed amendments submitted by petition by individual pursuant to 91-6, HRS

- a. Were there any recommendations incorporated into the proposed rules? If yes, explain. If not, why not?**

None

**II. If the proposed rule(s) affect small business, and are not exempt as noted above, please provide the following information:**

1. A description of how opinions or comments from affected small businesses were solicited.

None

2. A summary of the public's and small businesses' comments.

Health and public safety concerns

3. A summary of the agency's response to those comments.

None

4. The number of persons who:

(i) Attended the public hearing: Approximately 30

(ii) Testified at the hearing: 18

(iii) Submitted written comments: 3

5. Was a request made at the hearing to change the proposed rule in a way that affected small business?

(i) If "Yes" was the change adopted? Yes  No

(ii) If No, please explain the reason the change was not adopted and the problems or negative result of the change.

No request for change

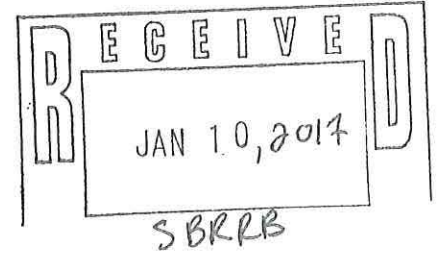
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Small Business Regulatory Review Board / DBEDT

Phone: (808) 586-2594 / Email: [sbrrb@dbedt.hawaii.gov](mailto:sbrrb@dbedt.hawaii.gov)

This statement may be found on the SBRRB Website at: <http://dbedt.hawaii.gov/sbrrb-impact-statements-pre-and-post-public-hearing>

Amendment to Title 08, Chapter 101,  
Rules Governing the Manufacture and Sale  
of Intoxicating Liquor of the County of Maui



1. Section 08-101-5, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending the definition of "condominium hotel" to read as follows:

"Condominium hotel" means an establishment consisting of one or more buildings that includes:

(a) Guest rooms that are units, as defined in section 514B-3, HRS, which are used to provide transient lodging for periods of less than thirty days under a written contract with the owner of a unit in the condominium hotel operation; and

(b) Guest rooms that are units, owned or managed by the condominium hotel operator providing transient lodging for periods of less than thirty days, which are offered for adequate pay to transient guests; and].

[(c) A suitable and adequate kitchen and dining room, where meals are regularly prepared and served to guests and other customers.]

A condominium hotel does not include a hotel that may be part of a condominium property regime established under chapter 514B, HRS, that does not have guest rooms that are separate units, as defined in section 514B-3, HRS. [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp 6/18/15; am and comp 11/29/15; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)"

2. Section 08-101-5, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending the definition of "hotel" to read as follows:

"Hotel" means a premises consisting of one or more buildings which contain at least forty separate rooms, units, or apartments, providing sleeping accommodations for adequate pay to transient or permanent guests[, and a suitable and adequate kitchen and dining room, where meals are regularly prepared and served to hotel guests and other customers]. [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp 6/18/15; am and comp 11/29/15; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)"

3. Section 08-101-5, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending the definition of "open for business" to read as follows:

““Open for business” means whenever any type of service or consumption is performed within the licensed premises; or when the licensee solicits and receives an order for; have or keep or offer or expose for sale; deliver for value or in any other way, including purely gratuitously; peddle; keep with intent to sell; or traffic in any liquor or merchandise[; or when any person other than an on-duty employee of the licensee is within the premises]. [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp 6/18/15; am and comp 11/29/15; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

4. Section 08-101-5, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending the definition of “premises” or “licensed premises” to read as follows:

““Premises” or “licensed premises” means the building and property that houses the establishment for which a license has been or is proposed to be issued; provided that in the case of a class 12 hotel license, “premises” includes the hotel premises; provided further that in the case of a class 15 condominium hotel license, “premises” includes [units,] apartments, as defined in section 514B-3, HRS, that are used to provide transient lodging for periods of less than thirty days under a written contract with the owner or owners of each unit in, and common elements for access purposes as established by the declaration of condominium property regime of the condominium hotel; and provided further that if an establishment is in a retail shopping complex the businesses of which have formed a merchants association, “premises” means the establishment. As used in this definition, “establishment” means a single physical location where the selling of liquor takes place. [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp 6/18/15; am and comp 11/29/15; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

5. Section 08-101-10, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsection (a) to read as follows:

“(a) The commission is established in accordance with the provisions of chapter 281, HRS, and chapter 13 of the [Charter of the County.] revised charter of the County of Maui (1983), as amended. The commission shall have the sole jurisdiction, power, authority, and discretion, subject to the rules of the commission and chapter 281, HRS:

- (1) To grant, refuse, suspend, and revoke any licenses for the manufacture, importation, and sale of liquors;
- (2) To take appropriate action against a person who, directly or indirectly, manufactures, sells, or [sells] purchases any liquor without being authorized pursuant to the rules of the commission; provided the liquor control adjudication board shall have the jurisdiction, power, authority, and discretion to hear and determine administrative complaints of the director regarding violations of the

liquor laws of the State or of the rules of the liquor commission, and impose penalties for violations thereof as may be provided by law;

- (3) To control, supervise, and regulate the manufacture, importation, and sale of liquors by investigation, enforcement, and education, provided that any educational program shall be limited to the commission staff, commissioners, liquor control adjudication board members, licensees, and their employees and shall be financed through the money collected from the assessment of fines against licensees; provided that fine moneys, not to exceed ten percent a year of fines accumulated, may be used to fund public liquor related educational or enforcement programs;
- (4) From time to time to make, amend, and repeal such rules, not inconsistent with chapter 281, HRS, as in the judgment of the commission seem appropriate for carrying out the provisions of chapter 281, HRS, and for the efficient administration thereof, and the proper conduct of the business of all licensees, including every matter required to be done or which may be done with the approval or consent or by order or under the direction or supervision of or as prescribed by the commission, which rules, when adopted as provided in chapter 91, HRS, shall have the force and effect of law;
- (5) Subject to chapters 76 and 77, HRS, to appoint and remove a director, who may also be appointed an investigator, and who shall be responsible for the operations and activities of the staff. The director may hire and remove hearings officers, investigators, and clerical, or other assistants as its business may from time to time require, to prescribe their duties, and fix their compensation; to engage the services of experts and persons engaged in the practice of a profession, if deemed expedient. Every investigator within the scope of the investigator's duties shall have the powers of a police officer]. A commission employee may support, advocate, or aid in the election or defeat of any candidate for public office, or run for public office; provided the employee:
  - (a) Notifies the commission in writing of the employee's intent to support, advocate, or aid in the election or defeat of a candidate for public office; and
  - (b) If a candidate for public office, takes a leave of absence in accordance with section 78-23, HRS, for a period beginning prior to the initiation of political activities related to the candidacy and ending the day following the general election for the office;Notwithstanding chapter 11, HRS, or any other law to the contrary, no commission employee shall solicit or receive contributions, or receive or transfer money or anything of value from a licensee for the purpose of supporting, advocating, or aiding in the election or defeat of a candidate for public office. Violation of this subsection shall be:
  - (a) Punishable by summary dismissal of the employee; and

- (b) Subject to fines in accordance with section 11-410, HRS];
- (6) To limit the number of licenses of any class or kind within the County or the number of licenses of any class or kind to do business in any given locality, when in the judgment of the commission such limitations are in the public interest;
  - (7) To prescribe the nature of the proof to be furnished, the notices to be given, and the conditions to be met or observed in case of the issuance of a duplicate license in place of one alleged to have been lost or destroyed, including a requirement of any indemnity deemed appropriate to the case;
  - (8) To fix the hours between which licensed premises of any class or classes may regularly be open for the transaction of business, which shall be uniform throughout the County as to each class respectively;
  - (9) To prescribe all forms to be used for the purposes of the rules of the commission not otherwise provided for in the rules of the commission, and the character and manner of keeping of books, records, and accounts to be kept by licensees in any matter pertaining to their business;
  - (10) To investigate violations of the rules of the commission, State liquor laws, State liquor tax laws, and, violations of the applicable department of health's allowable noise levels, through its investigators or otherwise, and to report such violations to the prosecuting officer for prosecution and, where appropriate, the [director] department of taxation to hear and determine complaints against any licensee;
  - (11) To prescribe by rule, the terms, conditions, and circumstances under which persons or any class of persons may be employed by holders of liquor licenses;
  - (12) To prescribe by rule, the term of any license or solicitor's and representative's permit authorized by the rules of the commission, the annual or prorated amount and the manner of payment of fees for such licenses and permits, and the amount of filing fees; and
  - (13) To prescribe by rule, the circumstances and penalty for the unauthorized manufacturing or selling of any liquor. [Eff 7/1/00; am and comp 4/22/12; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)"

6. Section 08-101-19, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:

“§08-101-19 [(Reserved)] Political activities of commission employees. (a) A commission employee may support, advocate, or aid in the election or defeat of any candidate for public office, or run for public office; provided the employee:

(1) Notifies the commission in writing of the employee's intent to support, advocate, or aid in the election or defeat of a candidate for public office; and

(2) If a candidate for public office, takes a leave of absence in accordance with section 78-23, HRS, for a period beginning prior to the initiation of political activities related to the candidacy and ending the day following the general election for the office.

(b) Notwithstanding chapter 11, HRS, or any other law to the contrary, no commission employee shall solicit or receive contributions, or receive or transfer money or anything of value from a licensee for the purpose of supporting, advocating, or aiding in the election or defeat of a candidate for public office. Violation of this subsection shall be:

(1) Punishable by summary dismissal of the employee; and

(2) Subject to fines in accordance with section 11-410, HRS. [Eff]

(Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

7. Section 08-101-21, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:

“§08-101-21 Licensee purchases from class 1 manufacturers, [and] class 3 wholesalers, class 14 brewpub licensee, class 16 winery licensee, and class 18 small craft producer pub licensee only.

(a) It shall be unlawful for any licensee, except a class 1, 3, or 10 licensee, to purchase, acquire, possess, serve, or sell any liquor from any person other than a class 1[,] manufacturers' licensee, or a class 3[,] wholesale dealers' licensee, class 14 brewpub licensee, class 16 winery licensee, and class 18 small craft producer pub licensee, or a person authorized by the commission as a solicitor or representative of a manufacturer or wholesale dealer, pursuant to this rule, except as otherwise provided in this chapter.

(b) It shall be unlawful for any licensee to obtain any liquor from a class 1[,] manufacturers' licensee, or a class 3[,] wholesale dealers' licensee, class 14 brewpub licensee, class 16 winery licensee, and class 18 small craft producer pub licensee, or a person authorized by the commission as a solicitor or representative of a manufacturer or wholesale dealer except for use under the terms of their license. [Eff 7/1/00; am and comp 4/22/12; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

8. Section 08-101-22, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:



"§08-101-22 Licenses, classes. (a) Licenses may be granted by the commission as provided in this rule.

(b) Class 1. Manufacturer license.

(1) A license for the manufacture of liquor shall authorize the licensee to manufacture the liquor therein specified and to sell it at wholesale in original packages to any person who holds a license to resell it and to sell draught beer or wine manufactured from grapes or other fruits grown in the [state] State in any quantity to any person for private use and consumption.

(2) Under this license, no liquor shall be consumed on the premises except as authorized by the commission.

(3) Of this class, there shall be the following kinds:

(A) Beer;

(B) Wine;

(C) Alcohol; and

(D) Other specified liquor.

(4) It shall be unlawful for any holder of a manufacturer license to have any interest whatsoever in the license or licensed premises of any other licensee, except as may be provided within section 08-101-106 of the rules of the commission. This subsection shall not prevent the holder of a manufacturer license under this chapter or under the law of another jurisdiction from maintaining any interest in the license or licensed premises of a wholesale dealer licensee under this chapter.

(c) Class 2. Restaurant license.

(1) A license under this class shall authorize the licensee to sell liquor specified in this section for consumption on the premises; provided that a restaurant licensee, with commission approval, may provide off-premises catering of food and liquor by applying and obtaining approval for a catering permit while performing food catering functions; provided further that the catering activity shall be directly related to the licensee's operation as a restaurant. A license under this class shall also authorize the licensee to sell beer, malt beverages, or cider for off-premises consumption, provided that the licensee has the appropriate kind of license pursuant to paragraph (4); and provided further that the beer, malt beverage, or cider is sold in a securely sealed or covered glass, ceramic, or metal container that is sold to or provided by the patron, and each sealed or covered glass, ceramic, or metal container does not exceed a maximum capacity of one-half gallon.

(2) A licensee under this class shall be issued a license according to the category of establishment the licensee owns or operates. The categories shall be:

(A) A standard bar; or

- (B) Premises in which live entertainment or recorded music is provided. Facilities for dancing by the patrons may be permitted as provided by the rules of the commission. The subcategories of this category shall be:
  - (i) Premises in which recorded background music is provided; and
  - (ii) Premises in which live entertainment or recorded music is provided; provided that facilities for dancing by the patrons may be permitted as provided by the rules of the commission.
- (3) If a licensee under class 2 desires to change the category of establishment the licensee owns or operates, the licensee shall apply for a new license applicable to the category of the licensee's establishment.
- (4) Of this class, there shall be the following kinds:
  - (A) General (includes all liquor except alcohol);
  - (B) Beer and wine; and
  - (C) Beer.
- (5) Notwithstanding section 281-57, HRS, the commission may approve at one public hearing and without notice the change to a class 2 restaurant license of a licensee holding and operating a class 5 dispenser license who meets the requirements of a class 2 license.
- (6) Restaurant license may be granted to a place, which regularly, and in a bona fide manner, is used and kept open for the serving of meals to patrons for compensation, and which has suitable State department of health and County of Maui department of fire control approved kitchen facilities within, containing the necessary equipment and supplies for cooking an assortment of foods, which may be required for ordinary meals. Additionally, the premises must have been continuously operated for one year prior to any application, and the applicant must provide a financial report of gross revenue of that year of which at least thirty percent of the establishment's gross revenue must be derived from the sale of foods.
- (d) Class 3. Wholesale dealer license.
  - (1) A license for the sale of liquor at wholesale shall authorize the licensee to import and sell only to licensees or to others who are by law authorized to resell the liquor specified by the license but are not by law required to hold a license provided that a class 3 licensee may sell samples of liquor back to the manufacturer.
  - (2) Under a class 3 license no liquor shall be consumed on the premises except as authorized by the commission.
  - (3) Of this class, there shall be the following kinds:
    - (A) General (includes all liquor except alcohol);
    - (B) Beer and wine; and
    - (C) Alcohol.

- (4) If any wholesale dealer solicits or takes any orders in any county other than that where the dealer's place of business is located, the orders may be filled only by shipment direct from the county in which the wholesale dealer holds the dealer license. Nothing in this subsection shall prevent a wholesaler from selling liquor to post exchanges, ships' service stores, army or navy officers' clubs, or like organizations located on army or navy reservations, or to any vessel other than vessels performing a regular water transportation service between any two or more ports in the [state,] State, or to aviation companies who operate an aerial transportation enterprise subject to chapter 269, HRS, and engaged in flight passenger services between any two or more airports in the [state] State for use on aircraft, or aviation companies engaged in transpacific flight operations for use on aircraft outside the jurisdiction of the [state.] State.
- (e) Class 4. Retail dealer license.
- (1) A license to sell liquor at retail or to class 10 licensees, shall authorize the licensee to sell the liquor therein specified in their original packages.
- (2) Under a class 4 license, no liquor shall be consumed on the premises except as authorized by the commission.
- (3) Of this class, there shall be the following kinds:
- (A) General (includes all liquor except alcohol);
  - (B) Beer and wine; and
  - (C) Alcohol.
- (f) Class 5. Dispenser license.
- (1) A license under this class shall authorize the licensee to sell liquor specified in this subsection for consumption on the premises.
- (2) A licensee under this class shall be issued a license according to the category of establishment the licensee owns or operates. The categories shall be:
- (A) A standard bar;
  - (B) Premises in which a person performs or entertains unclothed or in attire restricted to use by entertainers pursuant to the rules of the commission;
  - (C) Premises in which live entertainment or recorded music is provided. The subcategories of this category shall be:
    - (i) Premises in which recorded background music is provided;
    - (ii) Premises in which live entertainment or recorded music is provided; provided that facilities for dancing by the patrons may be permitted as provided by the rules of the commission; or

- (D) Premises in which employees or entertainers are compensated to sit with patrons, whether or not the employees or entertainers are consuming nonalcoholic beverages while in the company of the patrons, pursuant to the rules of the commission[. The restrictions of this category shall be:
  - (i) Employees, entertainers, or any other persons therein shall be twenty-one years of age or older.
  - (ii) There shall be no more than twelve category D, class 5, dispenser licenses in the County.]; provided that all employees, entertainers, or other persons or patrons therein shall be twenty-one year of age or older.
- (3) If a licensee under class 5 desires to change the category of establishment the licensee owns or operates, the licensee shall apply for a new license applicable to the category of the licensee's establishment.
- (4) Of this class, there shall be the following kinds:
  - (A) General (includes all liquor except alcohol);
  - (B) Beer and wine; and
  - (C) Beer.
- (5) Any licensee holding a different class of license and who would otherwise come within this class with the same or downgrade of kind or category of license, or both, shall not be required to apply for a new license.
- (g) Class 6. Club license.
  - (1) A club license shall be general only but shall exclude alcohol and shall authorize the licensee to sell liquor to members of the club, and to guests of the club enjoying the privileges of membership for consumption only on the premises kept and operated by the club; provided that the license shall also authorize any club member to keep in the member's private locker on the premises a reasonable quantity of liquor owned by the member, for the member's own personal use and not to be sold that may be consumed only on the premises. A club licensee shall be authorized to host charitable functions that are open to the general public in accordance with commission rules.
  - (2) Club licensees shall keep a complete list of its members, which list shall at all times be conspicuously posted and exposed to view, convenient for inspection on the licensed premises. The categories of this class shall be as follows:
    - (A) A standard bar; or
    - (B) Premises in which live entertainment or recorded music is provided. Facilities for dancing by the patrons may be permitted as provided by the rules of the commission. The subcategories of this category shall be:
      - (i) Premises in which recorded music is provided; or

- (ii) Premises in which live entertainment or recorded music is provided.
- (3) Any person enjoying the guest privileges of a club and to whom liquor may be sold must be a bona fide guest of a member of the club, and the member must be present at all times within the premises with his or her guest(s).
- (4) Clubs shall keep records as to registration of guests for at least one year, which records shall be produced whenever required by the director.
- (5) Licensee shall have readily available at all times a guest book on the licensed premises and shall be responsible for its member signing in his or her guest(s) at the time his or her guest(s) enter the licensed premises.
- (h) Class 8. Transient vessel license.
  - (1) A general license may be granted to the owner of any vessel for the sale of liquor (other than alcohol) on board the vessel while en route within the jurisdictional limits of the [state] State and within any port of the [state.] State.
  - (2) Sales shall be made only for consumption by passengers and their guests on board the vessel.
  - (3) The license shall be issuable in each county where the sales are to be made.
  - (4) The application for the license may be made by any agent representing the owner.
- (i) Class 9. Tour or cruise vessel license.
  - (1) A general license may be granted to the owner of any tour or cruise vessel for the sale of liquor other than alcohol on board the vessel while in the waters of the [state;] State; provided that sales be made only for consumption by passengers on board while the vessel is in operation outside the port or dock of any island of the [state,] State, unless otherwise approved by the commission.
  - (2) The license shall be issuable in the county where the home port of the vessel is situated.
  - (3) If on any vessel for which no license has been obtained under the rules of the commission, any liquor is sold or served within three miles off the shore of any island of the County, the same shall constitute a violation of the rules of the commission.
  - (4) A license under this class shall be issued a license according to the category of establishment the licensee owns or operates. The categories shall be:
    - (A) A standard bar; or
    - (B) Premises in which live entertainment or recorded music is provided. Facilities for dancing by the patrons may be permitted as provided by the rules of the commission.
- (j) Class 10. Special license.

- (1) A special license may be granted by the director for the sale of liquor for a period not to exceed three consecutive days at the same location for fundraising events by nonprofit organizations, political candidates, and political parties; provided that any registered educational or charitable nonprofit organization may sell liquor in its original package for off-premises consumption.
- (2) Special licenses shall be issued only to charitable or educational nonprofit organizations, to political parties and to candidates seeking public office from which organization no person is entitled to or takes, directly or indirectly, any share of the profits thereof. Nonprofit charitable or educational organizations shall be required to attach their U.S. Internal Revenue's section 501(c)(3), 501(c)(4), 501(c)(10), or 501(c)(19) exemption letter and political candidates shall be required to attach a copy of their organizational report filed with the [state] State campaign spending commission, to their application.
- (3) Of this class, there shall be the following kinds:
  - (A) General (includes all liquor except alcohol);
  - (B) Beer and wine; and
  - (C) Beer.
- (4) Liquor sold under a class 10 license shall be consumed on the premises.
- (k) Class 11. Cabaret licenses.
  - (1) A cabaret license shall be general only but shall exclude alcohol and shall authorize the sale of liquor for consumption on the premises.
  - (2) This license shall be issued only for premises where:
    - (A) Food is served;
    - (B) Facilities for dancing by the patrons are provided, including a dance floor of not more than one hundred square feet; and
    - (C) Live entertainment other than by a person who performs or entertains unclothed, is visible and audible to all patrons.
  - (3) Professional entertainment by persons who perform or entertain unclothed shall only be authorized by:
    - (A) A cabaret license for premises where professional entertainment by persons who perform or entertain unclothed was presented on a regular and consistent basis immediately prior to June 15, 1990; or
    - (B) A cabaret license that, pursuant to rules adopted by the commission, permits professional entertainment by persons who perform or entertain unclothed.
  - (4) A cabaret license under subparagraphs (3)(A) or (3)(B) of this subsection authorizing professional entertainment by persons who perform or entertain unclothed shall be transferable through June 30, 2000.
  - (5) A cabaret license under subparagraphs (3)(A) or (3)(B) authorizing professional entertainment by persons who perform or entertain

unclothed shall not be transferable after June 30, 2000, except upon approval by the commission, and pursuant to rules adopted by the commission.

- (6) [Notwithstanding any rule of the commission to the contrary, cabarets in] A cabaret license in a resort areas may be open for the transaction of business until 4:00 a.m. throughout the entire week.
  - (7) Any cabaret premises not located within a county zoned resort district shall operate only during the hours prescribed for dispenser premises.
  - (8) All bars in cabaret premises, in order to operate during hours prescribed for cabarets must confine liquor service to patrons within an area where live entertainment is visible and audible to all patrons. Bars in cabaret premises which do not comply with the foregoing requirements shall operate only during the hours prescribed for dispenser premises.
- (l) Class 12. Hotel license.
  - (1) A license to sell liquor in a hotel shall authorize the licensee to provide entertainment and dancing on the hotel premises and to sell all liquor, except alcohol for consumption on the premises; provided that a hotel licensee, with commission approval, may provide off-premises catering of food and liquor if the catering activity is directly related to the licensee's food service.
    - (A) A hotel licensee may be granted a catering permit while performing food catering functions.
    - (B) No catering service for the sale of liquor will be performed off the licensee's premises unless prior written application for the service has been delivered to the department and approved by the director. The director shall not approve any catered function unless it includes a written statement signed by the owner or representative of the property that the function will be subject to the liquor laws and to inspection by investigators. Application shall be submitted at least seven days prior to the catered function.
    - (C) The director will not approve catering functions on premises not zoned to allow commercial activities thereon unless the catered function is requested and hosted by the owner or the lessee or its like of the property or anyone with written authorization for the use of the property.
  - (2) Procedures such as room service, self-service [no host,] no-host minibars, or similar service in guest rooms, and service at parties in areas that are the property of, and contiguous to the hotel are permitted subject to liquor laws, rules of the commission, and the following conditions:
    - (A) Except as provided in paragraph (3) of this subsection, hotel licensees are prohibited from selling liquor as authorized by retail dealers' licenses.

- (B) Room service:
  - (i) Liquor may be sold by the individual drink, or in its original manufacturer sealed container for consumption within a registered guest's room;
  - (ii) Current prices of alcoholic beverages shall be conspicuously posted and exposed to view or within the guest's room service menu at all times within the interior of each guest room; and
  - (iii) The sale and service of liquor shall be made by an employee approved by the director.
- (3) A license to sell liquor within a hotel shall, upon written approval of the commission, authorize the sale of liquor of any kind or brand to hotel guests for consumption within their respective hotel rooms, subject to the following conditions:
  - (A) Minibars or honor bars:
    - (i) Storage of any liquor authorized for sale under this rule shall be completely enclosed in a secured cabinet or other suitable container and shall be accessible by means of a key or other similar device provided to the hotel guests;
    - (ii) A written schedule of selling prices shall be conspicuously posted in a manner convenient for inspection within the hotel rooms or selling prices shall be affixed to each bottle of liquor;
    - (iii) Retail sales shall be limited to not more than the following container sizes: distilled spirits, 50 milliliters; beer, 12 ounces; and wine, 375 milliliters; and
    - (iv) At no time nor under any circumstances shall any licensee or its employee issue the key or similar device to the enclosed liquor cabinet or other suitable liquor container to anyone under twenty-one years of age.
  - (B) At no time nor under any circumstances shall a licensee permit liquor to be furnished:
    - (i) To any person under twenty-one years of age;
    - (ii) To any person, who at the time, is under the influence of liquor; or
    - (iii) To any person when there is reasonable grounds to believe that such person is permitting any person under twenty-one years of age to consume said liquor.
  - (C) The licensee shall fully comply with any additional condition or restriction which the commission, in its discretion, may impose to protect the health, safety, and welfare of the public.
- (4) Licensees shall be restricted from selling liquor in its original packages except via room service and in minibars installed in hotel guest rooms. Said service shall be initiated at the request of the



adult guest. Minibar and room service sales shall be restricted to registered guests of the hotel of legal drinking age and consumption of liquor shall be restricted to the hotel guest room.

- (5) Unless authorized by law, hotel licensees shall not sell liquor in the manner authorized by the retail dealer's licenses.

Notwithstanding section 281-57, HRS, the commission may approve at one public hearing and without notice the change to a class 2 restaurant license(s) of a licensee holding and operating a class 12 hotel license, who meets the requirements of a class 2 license.

(m) Class 13. Caterer license.

- (1) A general license may be granted to any class 2[,] restaurant licensee, or any applicant, who is authorized to sell liquor for on-premises consumption who has on file with the department an approved one year financial report showing thirty percent of the establishment's gross revenue is derived from the sale of food that is prepared and cooked within its department of health and department of fire control approved kitchen facilities and served for consumption by patrons within its premises, and who serves food as part of their operation for the sale of liquor (other than alcohol) while performing food catering functions. At least thirty percent of the gross revenues of the catered event shall be food sales.
- (2) No catering service for the sale of liquor shall be performed off the licensee's premises unless prior written application for the service has been delivered to the department and approved by the director. Off premises catering will only be authorized upon issuance by the department and the licensee receiving a class 13[,] caterer's license. The commission shall not approve any catered function unless it includes a written statement signed by the owner or representative of the property that the function will be subject to the liquor laws and to inspection by investigators.
- (3) The commission shall not issue a caterer's license to any licensee whose original license does not authorize the licensee to sell and serve alcoholic beverages for consumption on the premises.
- (4) The commission shall not approve catering functions on premises not zoned to allow commercial activities thereon unless the catered function is requested and hosted by the owner of the property or anyone authorized the use of the property. Catered functions for which the owner or the lessee or its like of the property is being compensated for the use of the property shall be limited to properly zoned property.
- (5) The application for a caterer license shall be submitted to the department at least seven working days prior to the catered function and shall include, but not be limited to, a floor plan showing the boundaries of the proposed catered licensed premises; the date, times, and location of the event; a lease, rental agreement or authorization which allow the applicant the use and exclusive

- control of the property for the sale, service, and consumption of liquor, and obtaining a statement from the licensee that all required governmental clearances were obtained for the catered function.
- (6) A caterer license may be granted by the director for the sale of liquor for a period not to exceed one day for any occasion or location, provided a class 12[,] hotel licensee, may be granted a caterer license by the director for sale of liquor for a period not to exceed three consecutive days for any occasion or location, whose catering function is directly related to its operation and the catered group consists of permanent or transient hotel guests that registered for and provided sleeping accommodations at the licensed premises.
- (7) Catered functions for which patrons are being assessed a fee is prohibited. The privilege of catering is to permit legitimate catered functions and is not intended to be utilized to circumvent the liquor laws by allowing a licensee to operate its liquor license outside of its licensed premises. Any use of property for catered events by a licensee which appears to be an extension of the licensee's premises, place the health, safety and welfare of the public at risk, or appears to be excessive where a liquor license for class 2, class 5, or a similar class which allows consumption at its premises should be obtained, applications for use of said premises may be denied by the director.
- (8) A licensee who is authorized to provide catering shall report the gross sales of liquor and pay the applicable fees pursuant to section 08-101-50 of the rules of the commission.
- (n) Class 14. Brewpub license.
- (1) A brewpub licensee:
- (A) May sell malt beverages manufactured on the licensee's premises for consumption on the premises;
  - (B) May sell malt beverages manufactured by the licensee in brewery-sealed packages to class 3[,] wholesale dealer licensees pursuant to conditions imposed by the [county] County by ordinance or rule;
  - (C) May sell intoxicating liquor purchased from a class 3 wholesale dealer licensee to consumers for consumption on the licensee's premises;
  - (D) May, subject to federal labeling and bottling requirements, sell malt beverages manufactured on the licensee's premises to consumers in brewery-sealed kegs and growlers for off-premise consumption; provided that for purposes of this paragraph, "growler" means a glass or metal container, not to exceed one half-gallon, which shall be securely sealed;
  - (E) May, subject to federal labeling and bottling requirements, sell malt beverages manufactured on the licensee's premises in recyclable containers provided by the licensee or by the consumer which do not exceed one gallon per container and

are securely sealed on the licensee's premises to consumers for off-premises consumption;

- (F) Shall comply with all regulations pertaining to class 4 retail dealer licensees when engaging in the retail sale of malt beverages;
  - (G) May, subject to federal labeling and bottling requirements, sell malt beverages manufactured on the licensee's premises in brewery-sealed containers directly to class 2 restaurant licensees, class 3 wholesale dealer licensees, class 4 retail dealer licensees, class 5 dispenser licensees, class 6 club licensees, class 8 transient vessel licensees, class 9 tour or cruise vessel licensees, class 10 special licensees, class 11 cabaret licensees, class 12 hotel licensees, class 13 caterer licensees, class 14 brewpub licensees, class 15 condominium hotel licensees, class 18 small craft producer pub licensees, and consumers pursuant to conditions imposed by the county departments of planning, public works, and environmental management and regulations governing class 1 manufacturer licensees and class 3 wholesale dealer licensees; and
  - (H) May conduct the activities under paragraphs (A) through (G) at one location other than the licensee's premises; provided that:
    - (i) The manufacturing takes place in Hawaii; and
    - (ii) The other location is properly licensed under the same ownership.
- (2) The categories of establishments shall be as follows:
- (A) A standard bar; or
  - (B) Premises in which live entertainment or recorded music is provided. Facilities for dancing by the patrons may be permitted as provided by the rules of the commission. The subcategories of this category shall be:
    - (i) Premises in which recorded music is provided; or
    - (ii) Premises in which live entertainment or recorded music is provided; provided that facilities for dancing by the patrons may be permitted as provided by the rules of the commission.
- (o) Class 15. Condominium hotel license.
- (1) A license to sell liquor in a condominium hotel shall authorize the licensee to provide entertainment and dancing on the condominium hotel premises and to sell all liquor except alcohol for consumption on the premises; provided that a condominium hotel licensee, with commission approval, may provide off-premises catering of food and liquor if the catering activity is directly related to the licensee's food service by applying and obtaining approval for a catering permit while performing food catering functions.

- (A) A condominium hotel licensee may be granted a catering permit while performing food catering functions.
  - (B) No catering service for the sale of liquor will be performed off the licensee's premises unless prior written application for the service has been delivered to the department and approved by the director. The director shall not approve any catered function unless it includes a written statement signed by the owner or representative of the property that the function will be subject to the liquor laws and to inspection by investigators. Application shall be submitted at least seven days prior to the catered function.
  - (C) The director will not approve catering functions on premises not zoned to allow commercial activities thereon unless the catered function is requested and hosted by the owner or the lessee or its like of the property or anyone with written authorization for the use of the property.
- (2) Room service, self-service no host minibars, or similar service in apartments, and service at parties in areas that are the property of and contiguous to the condominium hotel are permitted with commission approval and subject to the following conditions:
- (A) Room ~~[Service:]~~ service:
    - (i) Liquor may be sold by the individual drink, or in its original manufacturer-sealed container for consumption within a registered guest's apartment.
    - (ii) Current prices of alcoholic beverages shall be conspicuously posted and exposed to view or within the apartment's room service menu at all times within the interior of each guest apartment.
    - (iii) The sale and service of liquor shall be made by an employee approved by the director.
  - (B) Minibars or honor bars:
    - (i) Storage of any liquor authorized for sale under this rule shall be completely enclosed in a secured cabinet or other suitable container and shall be accessible by means of a key or other similar device provided to the hotel guests[;].
    - (ii) A written schedule of selling prices shall be conspicuously posted in a manner convenient for inspection within the hotel rooms or selling prices shall be affixed to each bottle of liquor.
    - (iii) Retail sales shall be limited to not more than the following container sizes: distilled spirits, 50 milliliters; beer, 12 ounces; and wine, 375 milliliters[;].
    - (iv) At no time or under any circumstances shall any licensee or its employee issue the key or similar device

to the enclosed liquor cabinet or other suitable liquor container to anyone under twenty-one years of age.

- (3) At no time or under any circumstances shall a licensee permit liquor to be furnished:
  - (A) To any person under twenty-one years of age;
  - (B) To any person, who at the time, is under the influence of liquor; or
  - (C) To any person when there is reasonable grounds to believe that such person is permitting any person under twenty-one years of age to consume said liquor.
- (4) The licensee shall fully comply with any additional condition or restriction which the commission, in its discretion, may impose to protect the health, safety, and welfare of the public.
- (5) Licensees shall be restricted from selling liquor in its original packages except via room service and in minibars installed in condominium hotel guest rooms. Said service shall be initiated at the request of the adult guest. Minibar and room service sales shall be restricted to registered guests of the condominium hotel of legal drinking age and consumption of liquor shall be restricted to the condominium hotel guest room.
- (6) Unless authorized by law, a condominium hotel licensee shall not sell liquor in the manner authorized by a class 4 retail dealer license.
- (7) Any licensee who would otherwise meet the criteria for the condominium hotel license class but holds a different class of license may be required to apply for a condominium hotel license.
- (p) Class 16. Winery license.  
A winery licensee:
  - (1) Shall manufacture not more than twenty thousand barrels of wine on the licensee's premises during the license year;
  - (2) May sell wine manufactured on the licensee's premises for consumption on the premises;
  - (3) May sell wine manufactured by the licensee in winery-sealed packages to class 3 wholesale dealer licensees pursuant to conditions imposed by the county by ordinance or rule;
  - (4) May, subject to federal labeling and bottling requirements, sell wine manufactured on the licensee's premises to consumers in winery-sealed kegs and magnums to consumers for off-premises consumption; provided that for purposes of this paragraph, "magnum" means a glass container not to exceed one half-gallon, which may be securely sealed;
  - (5) May, subject to federal labeling and bottling requirements, sell wine manufactured on the licensee's premises in recyclable containers provided by the licensee or by the consumer which do not exceed one gallon per container and are securely sealed on the licensee's premises to consumers for off-premises consumption;

- (6) Shall comply with all rules pertaining to class 4 retail dealer licensees when engaging in the retail sale of wine; and
- (7) May sell wine manufactured on the licensee's premises in winery-sealed containers directly to class 2 restaurant licensees, class 3 wholesale dealer licensees, class 4 retail dealer licensees, class 5 dispenser licensees, class 6 club licensees, class 8 transient vessel licensees, class 9 tour or cruise vessel licensees, class 10 special licensees, class 11 cabaret licensees, class 12 hotel licensees, class 13 caterer licensees, class 14 brewpub licensees, class 15 condominium hotel licensees, and class 18 small craft producer pub licensees, pursuant to conditions imposed by the county departments of planning, public works, and environmental management and rules governing class 3 wholesale dealer licensees.
- (q) Class 18. Small craft producer pub license. A small craft producer pub licensee:
  - (1) Shall manufacture not more than:
    - (A) Sixty thousand barrels of malt beverages;
    - (B) Twenty thousand barrels of wine; or
    - (C) Seven thousand five hundred barrels of alcohol on the licensee's premises during the license year; provided that for purposes of this paragraph, "barrel" means a container not exceeding thirty one gallons or wine gallons of liquor;
  - (2) May sell malt beverages, wine, or alcohol manufactured on the licensee's premises for consumption on the premises;
  - (3) May sell malt beverages, wine, or alcohol manufactured by the licensee in producer-sealed packages to class 3 wholesale dealer licensees pursuant to conditions imposed by the [county] County by ordinance or rule;
  - (4) May sell intoxicating liquor purchased from a class 3 wholesale dealer licensee to consumers for consumption on the licensee's premises. The categories of establishments shall be as follows:
    - (A) A standard bar; or
    - (B) Premises in which live entertainment or recorded music is provided. Facilities for dancing by the patrons may be permitted as provided by commission rules;
  - (5) May, subject to federal labeling and bottling requirements, sell malt beverages manufactured on the licensee's premises to consumers in producer-sealed kegs and growlers for off-premises consumption; provided that for purposes of this paragraph, "growler" means a glass or metal container, not to exceed one half-gallon, which shall be securely sealed;
  - (6) May, subject to federal labeling and bottling requirements, sell malt beverages, wine, or alcohol manufactured on the licensee's premises in recyclable containers provided by the licensee or by the consumer which do not exceed:
    - (A) One gallon per container for malt beverages and wine; and

- (B) One liter for alcohol; and are securely sealed on the licensee's premises to consumers for off-premises consumption;
- (7) Shall comply with all regulations pertaining to class 4 retail dealer licensees when engaging in the retail sale of malt beverages, wine, and alcohol;
- (8) May, subject to federal labeling and bottling requirements, sell malt beverages, wine, and alcohol manufactured on the licensee's premises in producer-sealed containers directly to class 2 restaurant licensees, class 3 wholesale dealer licensees, class 4 retail dealer licensees, class 5 dispenser licensees, class 6 club licensees, class 8 transient vessel licensees, class 9 tour or cruise vessel licensees, class 10 special licensees, class 11 cabaret licensees, class 12 hotel licensees, class 13 caterer licensees, class 14 brewpub licensees, class 15 condominium hotel licensees, class 18 small craft producer pub licensees, and consumers pursuant to conditions imposed by county regulations governing class 1 manufacturer licensees and class 3 wholesale dealer licensees; and
- (9) May conduct the activities under paragraphs (1) through (8) at one location other than the licensee's premises; provided that:
- (A) The manufacturing takes place in Hawaii; and
- (B) The other location is properly licensed under the same ownership.

(r) Restaurants, retail dealers, dispensers, clubs, cabarets, hotels, caterers, brewpubs, condominium hotels, and small craft producer pubs licensed under class 2, class 4, class 5, class 6, class 11, class 12, class 13, class 14, class 15, and class 18 shall maintain at all times liquor liability insurance coverage in an amount not less than \$1,000,000; provided that convenience minimarts holding a class 4 license shall not be required to maintain liquor liability insurance coverage in that amount. Proof of coverage shall be kept on the premises and shall be made available for inspection by the commission at any time during the licensee's regular business hours. In the event of a licensee's failure to obtain or maintain the required coverage, the commission shall refuse to issue or renew a license, or shall suspend or terminate the license as appropriate. No license shall be granted, reinstated, or renewed until after the required insurance coverage is obtained.

(s) It shall be unlawful for any licensee to utilize any liquor, acquired or purchased from a class 1[,] manufacturers' licensee, or a class 3[,] wholesale dealers' licensee, or a person authorized by the commission as a solicitor or representative of a manufacturer or for personal or private use or consumption, except as authorized by the commission. All liquor shall be sold as authorized by the license issued.

(t) A patron may remove from a class 2 restaurant licensee, class 5 dispenser licensee, class 6 club licensee, class 12 hotel licensee, class 14 brewpub licensee, class 15 condominium hotel licensee, and class 18 small craft producer pub licensee, licensed premises, who has on file with the department a current yearly approved financial report that shows at least thirty percent of

establishment's gross revenue is derived from the sale of food that is prepared and cooked at the time of ordering within its State of Hawaii department of health and County of Maui, department of fire and public safety approved kitchen facilities, any portion of wine, liquor, or beer that was purchased on or brought onto the premises of the licensee, for consumption with a meal; provided that it is recorked or resealed in its original container as provided in section 281-31(u), HRS. A licensee wishing to exercise this privilege shall inform the patron of the State of Hawaii "open container" law as stated in sections 291-3.1, 291-3.2, 291-3.3 and 291-3.4 of the Hawaii Revised Statutes. [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp 6/18/15; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)"

9. Section 08-101-25, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsection (a) to read as follows:

"(a) Hours during which licensed premises may be open for the transaction of business shall be as follows:

- (1) Dispensers, restaurants, clubs, transient vessels, tour or cruise vessels, and specials: any hour of the day from ~~[8:00]~~ 6:00 a.m. to 2:00 a.m., the following day.
- (2) Cabarets: any hour of the day from ~~[8:00]~~ 6:00 a.m. to 4:00 a.m., the following day.
- (3) Hotels and condominium hotels: any hour of the day ~~[from 6:00 a.m. to 4:00 a.m., the following day]~~.
- (4) Retailers: any hour of the day ~~[from 6:00 a.m. to 11:00 p.m.]~~.
- (5) Manufacturers and wholesalers: any hour of the day ~~[from 6:00 a.m. to 9:00 p.m.]~~.
- (6) ~~[Brewpub:]~~ Brewpubs: any hour of the day from ~~[8:00]~~ 6:00 a.m. to 2:00 a.m., the following day for on-premises consumption liquor sales and 6:00 a.m. to 11:00 p.m. for off-premises retail liquor sales.
- (7) Small craft producer ~~[pub:]~~ pubs: any hour of the day from ~~[8:00]~~ 6:00 a.m. to 2:00 a.m., the following day for [of-premise] on-premises consumption liquor sales, any hour of the day for manufacture and wholesale, and 6:00 a.m. to 11:00 p.m. for [off-premise] off-premises retail liquor sales.
- (8) Caterers: any hour of the day from 6:00 a.m. to 2:00 a.m., the following day.
- (9) Wineries: any hour of the day for manufacture and wholesale, and from 6:00 a.m. to 11:00 p.m. for off-premises retail sales and on premises wine tasting activities. [Eff 7/1/00; am and comp 6/18/15; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)"

10. Section 08-101-28, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:



“§08-101-28 Special conditions for class 4[,] retail dealer's licenses. (a) Every retail licensee shall display and expose for view, within the liquor sales area of the licensed premises, a price for each size of each brand of liquor sold.

(b) If a retail dealer's licensed premises are open to the public during hours when the sale of liquor is not permitted, the licensee shall post conspicuous signs in the area or areas where liquor sales are usually made, giving notice to customers that the sale of liquor is prohibited during that time.

(c) Customers making purchases at retail premises must enter the licensed premises to purchase liquor. The drive-in method whereby the customer orders from a motor vehicle or the licensee delivers liquor to the vehicle, or both, is prohibited.

(d) This section shall not be construed to prohibit assistance to any person who is physically unable to walk, lift, or carry purchases of liquor due to a disability, or allowing the delivery of liquor product to a physically challenged person's vehicle or primary residence. Liquor orders may be made on the licensee's website or by telephone call to the licensed premises. Deliveries of liquor products to private residences or businesses with a bona fide order from the purchaser by a class 4[,] retail dealers' licensee is permitted, provided:

- (1) An employee of the licensee, who is approved by the director pursuant to section 08-101-70 of the rules of the commission, makes the delivery of the liquor product directly to the purchaser;
- (2) That the employee ensures that the person receiving the delivery is twenty-one years of age or older, licensee produces a receipt of delivery signed by a person verified to be of legal age and the person receiving the product is not under the influence of liquor or drug(s) at the point of delivery; and
- (3) The licensee or employee is not in violation of any rules or State laws.

(e) It shall be unlawful for any holder of a retail dealers' license, or any person acting as an agent or representative for any holder of a retail dealers' license, directly or indirectly, or through any subsidiary or affiliate to solicit or obtain any financial assistance, or anything of value from any industry member.

(f) Retail licensee shall be permitted to offer discounts on liquor in connection with the sale of the same or other liquor provided the discount price shall be posted and liquor shall not be sold below cost of liquor. Cost of liquor shall mean the licensee's wholesale purchase price including any tax, shipping, and handling cost. [Eff 7/1/00; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

11. Section 08-101-30, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsection (a) to read as follows:

“(a) Applications for liquor licenses, renewals, transfers, management agreement, solicitor's permit, or change of partner(s) in a partnership, limited

liability partnership, member, manager, organizer or any person of a limited liability company, or officer(s), director(s), and stockholder(s) owning or controlling twenty-five percent or more of the outstanding stock or ownership of a corporation, thereof, and all notices of public hearing sent, and affidavits filed by applicants in connection with and part of such applications, shall be in the respective original forms and accompanied by the following necessary documentation and any other original forms or documents which may be prescribed from time to time by the commission, which shall be considered as part of the application.

- (1) Department of health clearance;
- (2) State and federal tax clearances or that the applicant has entered into and is complying with an installment plan agreement with the department of taxation for the payment of delinquent taxes in installments;
- (3) Floor plans (not construction plans) drawn to scale;
- (4) Tax map (drawn to scale) and list of all tax map key numbers, names and addresses of property owners, and lessees and owners of record of shares in a cooperative apartment situated within a radius of five hundred feet of the proposed premises;
- (5) Personal history statement;
- (6) Verification of any corporation, partnership, association, limited liability company, limited liability partnership, or any other entity;
- (7) Affidavit of mailing of notices of public hearing and certificate of mailing as verified by the United States Postal Service;
- (8) Transferor's gross sales report;
- (9) Transferor's endorsement of transfer;
- (10) Executed copy of agreement of sale, lease, rental agreement, which states that the premises and its operation must be under the licensee's exclusive control at all times;
- (11) Additional fee assessment agreement;
- (12) Coast guard documentation;
- (13) Zoning clearance;
- (14) Building permit;
- (15) Criminal history record check;
- (16) Stockholder's list;
- (17) Certificate of occupancy, miscellaneous inspection report, and clearance from the department of fire control (miscellaneous inspection report and clearance from the department of fire control shall indicate that all governmental regulations and administrative rules have been complied with);
- (18) Guaranty or bond; and
- (19) Copy of a federal or [state] State governmental picture identification and social security card for each person. [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)"

12. Section 08-101-30, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsections (e) and (f) to read as follows:

“(e) The director may reject, refuse to accept, or return any application or request that is incomplete, illegible, or does not meet any requirement(s) of or not in compliance with any rule of the commission or section of chapter 281, HRS, or revoke any action taken after discovering that any information contained within the application, any document submitted or affidavit is false.

(f) Licensee shall apply for and secure the commission's approval, in writing, prior to a change in ownership of any number of shares of the stock which results in a person thereof becoming the owner of twenty-five percent or more of the outstanding voting capital stock. In addition, the partnership, limited liability partnership, limited liability company, corporate licensee, or any other person, or any person in a subdivision, or management agreement thereof, shall, on the proper application forms and the filing of all required documents, within thirty days from the date of admission, election, or withdrawal of any partner in a partnership or limited liability partnership, officer, or director of a corporation, or member, manager, organizer, or person of a limited liability company, or any other person, or any person within a subdivision, or management agreement thereof, notify the commission in writing of the change. If the commission finds any partner in the partnership, limited liability partnership, member, manager, organizer, or any other person of a limited liability company, or officer, director, or any person owning or controlling twenty-five percent or more of the outstanding stock of the corporation, or any subdivision, or management agreement thereof, an unfit or improper person to hold a license in their own right pursuant to section 281-45, HRS, or the rules of the commission, it may revoke the license or suspend the license until a new transfer of such capital stock or ownership is effected to a fit or proper person pursuant to section 281-45, HRS, or the rules of the commission, or until the unfit or improper partner, officer, member, manager, organizer, director, or any person, or any person in a subdivision, or management agreement thereof, is removed or replaced by a fit and proper person pursuant to section 281-45, HRS, or the rules of the commission.

Application for the admission, election, or withdrawal of any officer, director, or a person owning or controlling twenty-five percent or more of the corporate stock, member of a limited liability company, or partner in a partnership or limited liability partnership, or any person, or any person of a subdivision, or management agreement thereof, shall include, but not limited to, the application form, corporate minutes, secretary's certification of the minutes, or its like submitted by the licensee which shall include the listing of all the officers, directors, and any person owning or controlling twenty-five percent or more of the corporate stock, members in a limited liability company, or partners of a partnership or limited liability partnership, or any person, or any subdivision or any person of a subdivision, or management agreement thereof, and all other

requirements. [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)”

13. Section 08-101-31, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:

“§08-101-31 No license issued, when. No license shall be issued:

- (1) To any minor or to any person who has been convicted of a felony and not pardoned, or to any other person not deemed by the commission to be a fit and proper person to have a license; provided that the commission may grant a license under the rules of the commission to a partnership, trust, association, limited liability partnership, limited liability company, corporation, or any other person, that has been convicted of a felony where the commission finds that the partner, member, manager, organizer, or any person of a limited liability partnership, limited liability company or organization’s officers, directors, and any person owning or controlling twenty-five percent or more of the outstanding stock are fit and proper persons to have a license;
- (2) To any partner in a partnership, or a corporation, trust or association, the officers, directors, or any other person of which, or any of them, would be disqualified under subsection (1) from obtaining the license individually, or any person of which, owning or controlling twenty-five percent or more of the outstanding capital stock, or any other person, would be disqualified under such subsection (1) from obtaining the license individually;
- (3) To any applicant for a license, or a renewal of a license, or in the case of a transfer of a license, where both the transferor and the transferee, failed to present to the issuing agency a [signed] tax clearance certificate from the [director] department of taxation, and from the Internal Revenue Service showing that the applicant or the transferor and transferee do not owe the State or federal governments any delinquent taxes, penalties, or interest; or that the applicant, or in the case of a transfer of a license, the transferor or transferee, has entered into an installment plan agreement with the department of taxation and the Internal Revenue Service for the payment of delinquent taxes in installments and that the applicant is or the transferor or transferee is, in the case of a transfer of a license, complying with the installment plan agreement;
- (4) To any applicant who has a partner in the partnership, limited liability partnership, member, manager, agent, organizer, or any person owning or controlling twenty-five percent or more of a limited liability company, or any officer, director or any person owning or controlling twenty-five percent or more of the outstanding stock of any corporation, trust, or association, or any other person, who has had any liquor license revoked less than two years previous to the

date of the application for any like or other license under the rules of the commission;

- (5) To any person owning or controlling twenty-five percent or more of the outstanding stock of the corporation, trust, or association of a licensee, who is currently delinquent in filing the gross liquor sales report of any license that was issued, or currently owing any fees or monies due to the department, or both. "Any fees or monies" shall include but not be limited to license fees, publication fees, and any assessment of a penalty imposed by the department, commission, or board. Any licensee, who has any person, or person owning or controlling twenty-five percent or more of the outstanding stock of a corporation, trust, or association of a licensee, who is delinquent in filing the gross liquor sales report of any other license that was issued, or currently owing any fees or monies to the department, shall not exercise its license until the gross sales report is filed and percentage fee paid;
- (6) To a limited liability company, the members, managers, organizers, or any person, of which or any of them, would be disqualified under subsection (1) from obtaining the license individually, would be disqualified under that paragraph from obtaining the license individually;
- (7) To a limited liability company, partnership, limited liability partnership, or corporation, that may consist of a limited liability company, partnership, limited liability partnership, corporation, or any other person or any combination thereof, the members, managers, organizers, partners, officers, directors, or any person thereof, of which any of them would be disqualified under subsection (1) from obtaining the license individually, or a person owning or controlling twenty-five percent or more of the outstanding stock of such corporation would be disqualified under that paragraph from obtaining the license individually; or
- (8) To an applicant for a class 2, class 4 except for convenience minimarts, class 5, class 6, class 11, class 12, class 13, class 14, class 15, or class 18 license, unless the applicant for issuance of a license or renewal of a license, both the transferor and the transferee, present to the issuing agency proof of liquor liability insurance coverage in an amount of \$1,000,000. [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp 6/18/15; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)"

14. Section 08-101-32, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsection (b) to read as follows:

"(b) No license shall be transferred unless the transferor's licensed premises was operated and open for business throughout the year prior and up

to the filing of the application for transfer, except for good cause shown to the commission. [Eff 7/1/00; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

15. Section 08-101-33, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsection (a) to read as follows:

“(a) Other than for good cause, the renewal of an existing license shall be granted upon the filing of a completed application, payment of the basic fee, submission of State and [Federal] federal tax clearances, and other required documents. State and federal tax clearances shall be dated within sixty days of the acceptance of the application by the department. [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp 6/18/15; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

16. Section 08-101-41, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:

“§08-101-41 Criminal history record check. (a) The commission shall request a background check on an applicant for a liquor license. For the purposes of this section, "criminal history record check" means an examination or search for evidence of an individual's criminal history by means of:

- (1) A search for the individual's fingerprints in the national criminal history record files and, if found, an analysis and any other information available pertaining thereto; and
- (2) A criminal history record check conducted by the Hawaii criminal justice data center, Maui police department, or any governmental agency; provided that the Hawaii criminal justice data center, Maui police department, or any other governmental agency may charge a reasonable fee for criminal history record checks performed.

The background check, at a minimum, shall require the applicant to disclose whether:

- (A) The applicant has been convicted in any jurisdiction of a crime that would tend to indicate the applicant may be unsuited for obtaining a liquor license; and
- (B) The judgment of conviction has not been vacated.

For the purpose of this section, the criminal history disclosure made by the applicant may be verified by the commission by means of information obtained through the Hawaii criminal justice data center, Maui police department, or any other governmental agency. The applicant shall provide the Hawaii criminal justice data center, Maui police department, or any other governmental agency with personal identifying information which shall include, but not limited to, at a minimum, the applicant's name, social security number, date of birth, sex, and the applicant's fingerprints. This information shall be

secured only for the purpose of conducting the criminal history record check authorized by this section.

(b) The applicant shall submit to the commission:

- (1) A statement signed under penalty of perjury whether the applicant has ever been convicted of a crime other than a minor traffic violation;
- (2) Written consent to the commission to request and obtain criminal history record information for verification;
- (3) Permission to be fingerprinted and completed fingerprint card; and
- (4) Any reasonable fee assessed for criminal history record checks performed by the Hawaii criminal justice data center, Maui police department, or any governmental agency, which shall be submitted at the time of the submittal of application and made payable to the governmental agency performing the criminal history record check.

(c) The commission shall obtain criminal history record information through the Hawaii criminal justice data center, Maui police department, or any other governmental agency on the applicant. The information obtained shall be used exclusively for the stated purpose for which it was obtained and shall be subject to applicable State or [Federal] federal laws or rules currently or hereafter in effect.

(d) Any applicant, including but not limited to, all persons, partners in the partnership or limited liability partnership, officers, directors, or persons owning or controlling twenty-five percent or more of the applicant's outstanding corporate stock, members, managers, organizers, or any persons of a limited liability company, or any person, or entity or any person within an entity or its subdivision, that is in good standing and can legally do business in the State is required to submit all completed criminal history request(s) and fingerprint card(s) at the time of filing of the application to the department and to have local, [state,] State, and national criminal law enforcement agencies provide such person's criminal history abstract directly to the department, if said abstracts cannot otherwise be obtained by the department. The commission may waive this requirement upon the applicant showing of good cause. Good cause shall include, but not limited to, applicant's inability to obtain the necessary clearance after due diligence, or have on file with the department a criminal record check that is less than [one year] two years old, had the criminal record check process through the Federal Bureau of Investigation "Rap Back" program, or the applicant's fingerprints are not adequate for accurate classification and/or identification due to applicant's age, medical reason, disfigurement, or other abnormalities.

(e) Fingerprint cards. All fingerprint cards submitted by the applicant shall contain the required fingerprints and be completely filled out. Those fingerprinted by any personnel other than from the department or the Maui police department, must be accompanied by a letter from the fingerprint technician which contains the following:

- (1) Fingerprint technician's name, signature, address, telephone number, and fingerprint technician's certification issued by a law

enforcement agency; and identity, social security number, and date the person was fingerprinted; [or]

- (2) The identity of the law enforcement agency that the fingerprint technician represents, the law enforcement agency's address, and telephone number; or
- (3) Fingerprint technician's name, signature, address, telephone number, identity of the entity the fingerprint technician represents, and a letter of certification issued by a law enforcement agency that the entity the fingerprint technician is employed at is in good standing and have provided fingerprinting service to, and the fingerprints have been accepted by the law enforcement agencies within the [state.] State.

(f) The department may utilize criminal history record clearance obtained from an approved governmental agency.

(g) Licensee or any applicant shall submit, within thirty [calender] calendar days, a completed fingerprint card of any person whose fingerprints appearing on the fingerprint card that was not adequate for accurate classification and/or identification by the Federal Bureau of Investigation and the required processing fee, upon receipt of notification. Any licensee who fails to comply shall not exercise the license until said completed fingerprint card is duly processed by the department.

(h) The license applicant or licensee shall be responsible to ensure that every person named in an application discloses to the commission any felony conviction. The obligation to disclose such information shall be continuing even after the license is issued. [Eff 7/1/00; am and comp 4/22/12; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)"

17. Section 08-101-50, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsections (c) and (d) to read as follows:

“(c) Temporary, solicitors', representatives', duplicate license, certificate for registration of employee approved by the director, minor, employee of class 5, category D, or any duplicate thereof, alcohol, and other fees.

- (1) Temporary license. The fee for a temporary license of any class and kind shall be \$200 for an initial period of one hundred twenty (120) days, or any part of such initial period, and an additional \$200 for one additional one hundred twenty (120) day renewal or any part of such renewal period of such license.
- (2) The fees for solicitors' and representatives' permits shall be for each license year commencing July 1 and ending on the succeeding June 30 or fraction thereof and shall be in the following amounts:
  - (A) General \$1,800
  - (B) Beer and Wine \$1,200
  - (C) Alcohol \$ 200



Every individual solicitor and or representative is required to obtain an individual permit in his or her name.

- (3) The annual fee for a permit to purchase alcohol for non-beverage purposes shall be \$50 for each fiscal year, commencing July 1 and ending the succeeding June 30, or a fraction thereof. The director may waive the fee for a permit to purchase alcohol for non-beverage purposes for any County or State governmental agencies.
- (d) Percentage fee.
- (1) Licensees in classes 2(A), (B) and (C), 4(A) and (B), 5(A), (B) and (C), 6, 9, 11, 12, 13, 14, 15, 16, 18, and temporary license, as defined in subsection (b) of this section, shall be subject to the basic fee plus a percentage fee. Licensees in class 1 (other than a class 1 manufacturer, whose wine is manufactured from fruits grown in the State), and class 3, as defined in subsection (b) of this section, shall be subject to basic fee plus the percentage fee of retail liquor sales to any person for private use and consumption. Licensees in class 9, as defined in subsection (b) of this section, shall be subject to basic fee plus percentage fee of four times the total amount of liquor purchased from class 1[,] manufacturers' licensee, class 3[,] wholesale dealers' licensee, class 14[,] brewpub licensee, class 16[,] winery licensee, and class 18[,] small craft producer pub licensee. Licensee shall report the retail value of any complimentary drinks or donated liquor, or both, in their annual gross sales report.
- (2) The percentage fee for each current fiscal year shall be based upon the following formula, which shall establish the percentage to be applied to the gross sales or four times the total amount of liquor purchased of each licensee:

$$\frac{EE - BF - C}{EGS} = \text{Percentage}$$

EE = Estimated Expenditures (current fiscal year)

BF = Basic Fees (current fiscal year)

C = Carryover (prior fiscal year)

(Carryover in excess of twenty per cent as provided in section 281-17.5, HRS)

EGS= Estimated Gross Sales (prior fiscal year)

- (3) Licensees in the above-mentioned classes shall file with the director on a form prescribed by the commission a report showing true and accurate gross sales of liquor and any other pertinent record or records requested therein. The form shall be furnished by the director and shall be completed, filed at, and accepted by the department not later than 4:30 p.m. on July 31 after the date of expiration of such licenses, and at such other times or intervals as the director may require. If the 31st of July falls on Saturday, Sunday, or legal County of Maui holiday, the last day for the filing

of the gross liquor sales report shall be 4:30 p.m. on the first County of Maui working day following. The gross sales of liquor report shall be on the original form(s) and contain the original signature; duplicates or copies shall not be accepted.

The director may reject, refuse to accept, or return any gross liquor sales report that is inaccurate, incomplete, illegible, or does not meet any requirement(s) of or not in compliance with any rule of the commission or chapter 281, HRS.

- (4) After a tally of all total gross liquor sales filed by the due date by the licensees, the percentage fee due and payable shall be assessed each licensee and shall be paid within thirty-one calendar days of receipt of said assessment.
- (5) In case of transfer of such licenses, the report shall be filed and paid by the transferor immediately after approval by the commission and before the actual transfer of the license and the business of the licensee-transferor. The percentage fee based on the current applicable percentage fee shall be paid prior to the issuance of the license.
- (6) Any licensee who fails to file the report or fails to pay the percentage fee due on or before the due date shall not exercise his license after the due date and until said report has been filed or percentage fee paid, or both.
- (7) Where licenses are revoked, expired, or canceled, or the licensee closes out the business for which the license is held, the report shall be filed and the percentage fee due paid within five calendar days of the revocation, expiration, cancellation or closing out the business. The percentage fee due shall be based on the current applicable percentage.
- (8) Any licensee who fails to pay the percentage fee by the due date shall be assessed a late charge of five percent per month on the balance due until such fees are paid in full. The five percent late charge shall be a flat fee (not be prorated) that will be charged for any portion of the month payment is due.
- (9) Any licensee who fails to pay the percentage fee within ninety days of the due date, shall be notified and scheduled for hearing. Upon satisfactory proof of such prohibited activity, the license shall be revoked.
- (10) No licensee shall fail to accurately report revenues from gross liquor sales or to properly complete the gross liquor sales report. It shall be the licensee's responsibility to maintain complete and accurate records in order to properly complete and submit the gross liquor sales report pursuant to the rules of the commission. Records shall be maintained for a period of four years.
- (11) All licensees shall have available for inspection within the County, books or records, or both, showing all income, purchases, and expenses of their liquor license business. These books and records,

including but not limited to daily sales records, price lists, employee time sheets, and invoices, shall be made available for inspection or auditing, or both, by the department, through its auditor(s) or otherwise, at any time upon demand and shall be preserved for a period of four years, except that the commission may, in its discretion, consent to destruction of such books and records within such period or may require that they be kept longer. Licensee or its employees shall record the sale of liquor at the time of the transaction on its daily sales records.

- (12) Any licensee who fails to pay any fee due on or before the due date or when any check, money order, or the like that is utilized by the licensee for payment of such fee is returned by any financial institution for non-payment due to insufficient funds or for any other reason, shall not exercise the license until said fee and any related service charges are paid in cash, certified check, or money order, and such payment is duly processed by the department.
- (13) Any licensee who failed to file the gross sales of liquor report by the due date, shall be assessed the percentage fee equal to the highest percentage fee due and payable by the licensee of the same class or the highest percentage fee due and payable by any licensee if there is no licensee in the same class. [Eff 7/1/00; am and comp 7/15/02; am and comp 6/18/15; am and comp 9/3/16; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)”

18. Section 08-101-63, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsections (a) and (b) to read as follows:

“(a) No licensee shall have any illegal liquor or liquor not purchased from a class 3[,] wholesale dealers’ licensee, or a class 1[,] manufacturers’ licensee, class 14 brewpub licensee, class 16 winery licensee, and class 18 small craft producer pub licensee, or a person authorized by the commission as a solicitor or representative of a manufacturer or wholesale dealer, on any portion of the licensed premises; provided that a class 2 restaurant licensee, class 5 dispenser licensee, class 12 hotel licensee and class 15 condominium hotel licensee may allow patrons to bring wine onto the licensed premises for consumption with a meal.

(b) The finding of any illegal liquor or liquor not purchased through the liquor license issued from a class 3[,] wholesale dealers’ licensee, [or a] class 1[,] manufacturers’ licensee, class 14 brewpub licensee, class 16 winery licensee, or class 18 small craft producer pub licensee, on a licensed premises under circumstances warranting the belief that it is being kept, served, or distributed by the licensee shall be sufficient evidence for summary suspension or revocation of the license covering such premises. [Eff 7/1/00; am and comp 4/22/12; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)”

19. Chapter 101, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by adding a new section to be appropriately designated and to read as follows:

“§08-101-65.1 Obstructing departmental operations. No licensee shall allow the obstruction, hampering, or interfering with investigation and inspections or any of the department’s operation in any way, including but not limited to, the sounding of alarms, flashing of lights, or use of a public address system or other advance warning announcing the arrival or presence of the department’s liquor control officers. [Eff] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

20. Section 08-101-69, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsection (a) to read as follows:

“(a) No licensee of any premises licensed to sell liquor for consumption on the premises shall:

- (1) Sell, advertise, or offer to sell "all the liquor you can drink", or more than two drinks of alcoholic beverage for a fixed price; or encourage, sponsor, permit or have any promotion, game or contest that involves the consumption of liquor or the awarding of liquor as a prize;
- (2) Serve an unlimited amount of liquor during a set period of time for a fixed price, provided this provision does not apply to class 2, class 9, and class 12 licensees:
  - (A) When such function is not open to the general public and for which a hosted bar is utilized such as weddings, private parties, and fundraising functions; [or]
  - (B) Where champagne may be inclusive with brunch; [or]
  - (C) Where liquor may be inclusive with luaus; or
  - (D) Where liquor may be inclusive with tour or cruise vessel operations;
- (3) Employ any person for the purpose of selling, furnishing or serving liquor under any scheme, plan, or arrangement involving the payment for such services on the basis of any commission, percentage, or such similar method of payment without the prior approval of the commission. [Eff 7/1/00; am and comp 4/2/07; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)”

21. Section 08-101-82, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:

“§08-101-82 Rules available at all times. Every licensee shall have a copy of the current rules of the commission and chapter 281, HRS, available at all

times on the licensed premises for examination by employees and customers. [Eff 7/1/00; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)”

22. Section 08-101-84, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:

“§08-101-84 Preparation of drinks; clearing of tables. (a) On the premises licensed for the sale and consumption of liquor thereon, liquor service to a customer shall be made by the licensee or an employee of the licensee, except by special permit.

(b) No more than two drinks of any liquor at one time to an individual shall be permitted; provided however, distilled spirits may be served in container(s) up to one quart in capacity for any special occasion upon obtaining a special permit therefor from the director. Beer or wine may be served in a container, not to exceed the U.S. liquid measurement of one quart (.946 liter) to two or more persons.

(c) Any drink consisting of one kind of liquor and a mixer or water without other ingredients, which is prepared, served, sold, or offered for sale by any licensee upon whose premises liquor is permitted to be sold or consumed, shall contain not less than one fluid ounce of liquor, when said liquor is poured into the service glass by the licensee or any employee the drink shall be presumed to have been prepared for service or sale, notwithstanding the fact that the mixer or water has not been added. A measuring device which measures not less than one fluid ounce shall be utilized at all times in the preparation of any drink consisting of any liquor. The foregoing requirement shall not apply to a drink served in a jigger as a straight drink with or without a chaser. Any straight drink shall be served in a jigger of not less than one fluid ounce capacity.

(1) Any drink consisting of one kind of liquor and a mixer or water without other ingredients, which is prepared, served, sold, or offered for sale by any licensee upon whose premises liquor is permitted to be sold or consumed, may contain not less than one-half fluid ounce of liquor, when the following apply:

(A) The patron requests a drink that contains less than one fluid ounce of liquor and is informed at the time of service that the drink does contain less than one fluid ounce of liquor and the fraction of ounce of liquor that the drink contains; or

(B) When all of the following apply:

(i) The licensee lists all alcoholic beverages that contains less than one fluid ounce of liquor, which shall at all times be conspicuously posted and exposed to view of patrons within the interior of the licensed premises authorized to sell liquor for consumption on the premises. The listing shall clearly state the fraction of ounce of liquor each drink contains. For the purpose of this rule, either legible posters, signs, menus, or table tents are acceptable;

- (ii) The patron requests a drink that contains less than one fluid ounce of liquor; and
- (iii) The licensee or employee must inform the patron at the time of ordering and time of service that the drink contains less than one fluid ounce of liquor and the fraction of ounce of liquor that the drink contains.

(d) If the portion of the licensed premises open to customers is equipped with a bar, the preparation of all drinks shall be on the top surface of the bar in such manner as to permit any interested customer or customers to have a clear and unobstructed view of the bartender's operations.

(e) All empty glasses and containers shall be removed by the persons serving the customers at the time of or before serving another drink. Any and all containers of liquor including, but not limited to, glasses, cups, or open bottles, shall be removed from all areas of the licensed premises which are open to the public no later than the legal closing time for liquor sales.

(f) All mixed alcoholic drinks shall be freshly made for immediate consumption. Pre-mixed drinks may be utilized by obtaining a permit, pursuant to subsection (b), or an approval letter from the Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, or both, and filing such document(s) with this department.

[(g) A patron may remove from any class of licensed premises any portion of wine, liquor, or beer that was purchased on or brought onto the premises of the licensee engaged in meal service for consumption with a meal; provided that it is recorked or resealed in its original container.

(h) The licensee may store a bottle of distilled spirits or wine purchased from the licensee at the guest's request, properly labeled identifying the bottle to be for the guest only, for future use by the guest provided that licensee obtains a Bottle Service permit from the director. Pouring of the bottle of liquor (along with any mixers) or wine may be made at the guest's table provided that an on-duty employee of the licensee provides this service and that guests shall not serve their own drinks.] [Eff 7/1/00; am and comp 7/15/02; am and comp 4/22/12; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)"

23. Sections 08-101-88 and 08-101-89, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, are amended to read as follows:

"[§§08-101-88 to 89 (Reserved)] §08-101-88 Posting of license. The original license issued and in effect under this chapter shall at all times be conspicuously posted and exposed to view, convenient for inspection, and on the licensed premises. For failure thereof the license may be suspended or revoked by the liquor commission or liquor control adjudication board pursuant to section 281-71, HRS. [Eff] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)

§08-101-89 Posting of HRS sanctions. All licensed premises shall post a sign in or about the premises containing and notifying all customers and other

persons of the possible sanctions that may be imposed for operating a vehicle under the influence of an intoxicant under sections 291E-41 and 291E-61, HRS. The sign shall be conspicuously positioned in order to be seen by an ordinarily observant person. [Eff] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)”

24. Section 08-101-94, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsection (a) to read as follows:

“(a) All licensed premises, authorized to sell and serve liquor for consumption on premises, shall contain separate and adequate toilet facilities for males and females which have been approved by the State department of health, provided the commission may approve the use of toilet facilities located outside the licensed premises if located within a reasonable distance from the licensed premises. The entire walkway to the approved outside bathroom facilities shall be properly well lighted. Approval of use of toilet facilities located outside of the licensed premises shall be subject to the applicant or licensee obtaining the necessary [clearance] clearances from the [state,] State department of health, and other governmental agencies. [Eff 7/1/00, am and comp 7/15/02; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

25. Section 08-101-99, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended by amending subsection (b) to read as follows:

- “(b) Additional non-consumption areas for class 12 hotel licensees:
- (1) Parking areas;
  - (2) Roadways;
  - (3) Main lobby areas up to ten feet from check-in counter;
  - (4) Retail outlets;
  - (5) [Swimming pools, spas] Swimming pool slides and saunas, except by commission approval[, and excluding all grassed, paved, tiled and other surfaced areas abutting a swimming pool]; and
  - (6) Tennis courts. [Eff 4/22/12; am and comp] (Auth: HRS §§91-2, 281-17, 281-78) (Imp: HRS §281-17)”

26. Section 08-101-100, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:

“§08-101-100 Deliveries by manufacturers, wholesalers, retailers; peddling prohibited; exception.

(a) Except as specifically allowed herein, peddling in any sense is strictly prohibited. Before removing any liquor from a licensed premises for delivery to a customer under the manufacturer's or wholesaler's and/or retail dealer's license, the licensee must have in hand in his office, store, or warehouse, a bona fide order therefor. Provided, however, duly licensed wholesale dealers

may, without a bona fide and specific order therefor, remove beer from licensed premises to delivery vehicles for the purpose of selling said beer directly to persons who may lawfully sell liquors at retail in their original packages or dispense liquor for consumption on the premises.

(b) A manufacturer or wholesaler licensee shall deliver any liquor ordered or purchased by a retailer into the retailer's premises. Delivery of any liquor to any other location except the retailer's licensed premises is strictly prohibited. Provided, however, any retailer or its duly authorized employee may pick up any order of liquor directly from the wholesaler's or manufacturer's licensed premises, and such liquor must come to rest within the retailer's premises prior to any sale.

(c) Deliveries to a licensee's catered or other location by permit. [Eff 7/1/00; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)"

27. Section 08-101-106, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, is amended to read as follows:

"§08-101-106 Manufacturer, brewpub, and wholesale dealer licensees; special restrictions. The control of alcoholic beverages in the County has been established by the commission, as a "three-tier system." The three tiers of this system are designated as manufacturer, wholesaler, and retailer. Each of these three tiers shall operate separately and apart from each other for the purpose of control. In order for this control to be effectively administered, it is necessary to prevent any type of direct interlocking interest by and between the three separate levels.

(a) It shall be unlawful for any person holding a manufacturers' license, or a wholesale dealers' license, within or without the County or State, or any person acting as an agent or representative for any manufacturer or wholesale dealer licensee, within or without the County or State, directly or indirectly, or through any subsidiary or affiliate, to:

- (1) Acquire or hold any interest in any license of a retailer;
- (2) Acquire any interest in the real or personal property owned, occupied, or used by a retailer in the conduct of its business, unless the holding of such interest is permitted under the rules of the commission[.];
- (3) Furnish, give, rent, lend, or sell to any licensee any equipment, fixtures, signs, supplies, money, services or anything of value, subject to the exceptions contained in this section. Any service or anything of value as provided by the exceptions contained in this section, shall be offered to all retailers on the same terms without business reasons present to justify the difference in treatment[.]; or
- (4) Deliver, traffic in, ship or cause to be shipped, any liquor to any person who is not a liquor licensee within the County for display, sampling, or tasting on a not-for-sale basis, who:



(A) Is not permitted or authorized to receive such shipments of liquor, pursuant to chapter 281, HRS, or the rules of the commission; and

(B) Who has not applied for and received approval from the commission or its director to receive such shipment of liquor.

Liquor shipped into the County under this subsection shall be in 750 milliliter-sized containers, be appropriately marked "Sample - Not For Resale," and shall come to rest at the warehouse of a holder of a class 3[,] wholesale dealers' licensee, within the County, and be held in the licensed premises for at least forty-eight hours before delivery to or picked up by the person who was issued a permit to receive such liquor.

(b) It shall be unlawful for any person holding a brewpub license from within or without the County or State, to:

(1) Acquire or hold any interest in any license of a class 3[,] wholesale dealers' license, or a class 2 or class 4 through 13 license; or

(2) Acquire any interest in the real or personal property owned, occupied, or used by a class 3[,] wholesale dealers' license, or a class 2 or class 4 through 13 license in the conduct of its business, unless the holding of such interest is permitted under the rules of the commission or statement thereof has been filed with and approved by the commission.

(c) Non-beer manufacturer licensee. Section 08-101-22(b)(4) of the rules of the commission shall not apply to the holder of a non-beer manufacturer license under the rules of the commission, chapter 281, HRS, under the law of another jurisdiction, or from within or without the County, from maintaining an indirect interest in the license or licensed premises of a wholesale dealer licensee. The holder of any non-beer manufacturer license, from within and without the State, is prohibited from having a direct ownership of a wholesale dealers' license, or direct ownership of a partnership share, one or more shares of stock, or similar proprietary stake in the wholesale dealers' license; or having any interlocking officers or directors in the corporation, managers or members in any limited liability company, partner in a partnership, or its like, in the establishment, maintenance, or operations in the business of any wholesaler; except as may be provided in the rules of the commission, or in section 281-97, HRS[; or].

(d) Beer manufacturer licensee. Section 08-101-22(b)(4) of the rules of the commission shall not apply to the holder of a beer manufacturer license under the rules of the commission, chapter 281, HRS, under the law of another jurisdiction, or from within or without the County or State, from maintaining an indirect interest in the license or licensed premises of a beer and wine wholesale dealers' licensee. Any beer manufacturer from within and without the State, is restricted to maintaining an indirect interest in the license or licensed premises of a beer and wine wholesale dealer, who shall be limited to wholesale distribution of beer. The holder of any beer manufacturer license, from within and without the State, is prohibited from having a direct ownership of a

wholesale dealers' license, or direct ownership of a partnership share, one or more shares of stock, or similar proprietary stake in the wholesale dealers' license; or having any interlocking officers or directors in the corporation, managers or members in any limited liability company, partner in a partnership, or its like, in the establishment, maintenance, or operations in the business of any wholesaler; except as may be provided in the rules of the commission, or in section 281-97, HRS[; or].

(e) No manufacturer or wholesaler, within or without the County or State, shall have any financial interest, directly or indirectly, by stock ownership, or through interlocking partners, officers, directors, or any person owning outstanding stock in the corporation, any member or manager of a limited liability company, partner in a partnership or its subdivision thereof, or otherwise in the establishment, maintenance, or operation in the business of any retail licensee, except as may be provided in section 281-97, HRS, or this section. No manufacturer or wholesaler, within or without the County or State, shall acquire, by ownership, leasehold, mortgage, or otherwise, directly or indirectly, any interest in the premises of a retailer.

(f) No employee of an industry member from within or without the State, shall be employed by a retailer in any managerial capacity or in a position where such employee, directly or indirectly, place orders for, orders, or purchase any liquor from any industry member, or representative or solicitor of an industry member.

(g) No industry member, within or without the County or State, shall:

- (1) Directly or indirectly pay or credit any retailer for using or distributing point of sale advertising materials or consumer advertising specialties.
- (2) Require a retailer to take and dispose of any quota of distilled spirits, wine, or malt beverages.
- (3) Sell, offer to sell, or contract to sell to any retailer or for any such retailer to purchase, offer to purchase, or contract to purchase any liquor product that have any back end discounts on liquor products sold. All discounts shall be given or credited directly to the licensee's account at the time of the initial purchase. Back end discount shall mean any discount given after the time of the initial purchase of the liquor product by the retailer or any discount offered or given contingent on the amount of liquor sold.
- (4) Sell, offer to sell, or contract to sell to any retailer, or for any such retailer to purchase, offer to purchase, or contract to purchase any liquor products on consignment; or under conditional sale; or with the privilege of return; or on any basis other than a bona fide sale, except as provided in this section.
- (5) Rearrange or reset of all or part of a retail dealers' licensee's store or department.
- (6) Block access in a retailer's premises to other manufacturer's or wholesaler's product.

- (7) Subsection (g) applies only to transactions between industry members and retailers. It does not apply to transaction between industry members, for example, manufacturer and a wholesaler.
- (8) Furnish, give, rent, lend, or sell, directly or indirectly, equipment, fixtures, signs, supplies, money, services, or other things of value by an industry member to a third party, where the benefits resulting from such things of value flow to individual retailers, and such act(s) is considered furnishing of things of value within the meaning of the rules of the commission. Furnishing of a thing of value includes, but is not limited to, making payments or furnishing any thing of value for advertising to a retailer association, any media company, a display company, or any person where the resulting benefits flow to individual retailers, or the industry member's payment or furnishing any thing of value to a third party, where the thing of value benefits an individual retailer.
- (9) Directly or indirectly, furnish or pay for any advertising for, or with respect to, any one or more retailer by means of radio, television, magazine, or any type of media advertising, or pay for any media announcements of any on-site product sales promotion.
- (10) Deliver or ship to any licensee any liquor product that was not ordered by the licensee. Upon receiving notification by the licensee of receiving liquor product not ordered, the industry member shall, within five calendar days, retrieve the liquor products, return monies to, credit, or adjust the billing of the licensee for products delivered that were not ordered. Industry member shall not assess any cost for shipping, handling, restocking or its like to any licensee for any products delivered that were not ordered. Industry member shall be responsible for any cost, including, but not limited to, shipping, handling, transportation, labor or its like which the retailer may incur to return any product delivered that was not ordered. Any product that was delivered and not ordered by the licensee which has not been retrieved by the wholesale dealers' licensee or the manufacturers' licensee within five calendar days from the date of notification by the retailer, shall become the property of the retailer without cost.
- (h) Manufacturers' or wholesale dealers' licensee, may:
  - (1) Furnish or give a sample of distilled spirits, wine or malt beverages to a retailer who has not purchased the brand from that industry member within the last twelve months. Industry member may give a sample of not more than three gallons of malt beverage, not more than three liters of any brand of wine, and not more than three liters of distilled spirits, which shall be invoiced and clearly marked "sample" on each container.
  - (2) Conduct tasting and sampling activities at a licensed premises authorized for on-premises consumption. Industry member must purchase the products used from the licensee, but may not

- purchase them from the licensee for more than the ordinary retail price. Industry members may, conduct tasting and sampling activities upon its licensed premises for the introduction of new products, upon obtaining a permit from the director.
- (3) Give or sponsor educational seminars for employees of retailers either at the wholesaler's or manufacturer's premises or at the retailer's premises. Examples would be seminars dealing with the use of a retailer's equipment, training seminars for employees of retailers, or tours of wholesaler's or manufacturer's premises. This section does not authorize the wholesaler or manufacturer to pay a retailer's or its employee's expense in conjunction with an educational seminar such as travel and lodging, nor does it allow the consumption of liquor by any on-duty employee. This does not preclude providing nominal hospitality during the event.
  - (4) Give or sell point of sale advertising specialties to a retailer if these items bear advertising matter and are primarily valuable to the retailer as point of sale advertisement. These items include such things as posters, placard, designs, inside signs (electric, mechanical or otherwise), window decorations, trays, coasters, mats, menu cards, meal checks, paper napkins, foam scrapers, backbar mats, thermometers, clocks, t-shirts, hats, and calendars. An industry member may add the name or name and address of the retailer to the advertising specialty.
    - (A) The total value of all advertising specialties furnished by an industry member to a retailer may not exceed \$300 per brand in any one calendar year per licensed premises. The value of the advertising specialty is the actual cost of that item to the industry member who initially purchased it. Transportation and installation costs are excluded;
    - (B) Industry members may not pool or combine their dollar limitation in order to provide a retailer with retail advertising specialties valued in excess of \$300 per brand;
    - (C) All point of sale advertising materials and consumer advertising specialties must bear conspicuous and substantial advertising matter about the product or the industry member which is permanently inscribed or securely affixed; or
    - (D) Industry members and retailers are required to keep and maintain records on the licensed premises for a three-year period of all items furnished to retailers.
  - (5) Accept the return of any liquor product from a retailer for "ordinary and usual commercial reasons" after the product has been purchased, so long as the product meets the following conditions and limitations for such returns:

- (A) Defective products which are unmarketable due to product deterioration, leaking containers, damaged labels, or mutilated and missing strip stamps;
- (B) Error in products delivered where there is a discrepancy between products ordered and delivered may be corrected within a reasonable period of time of not more than five calendar days;
- (C) Products which may no longer be lawfully sold due to a change in law or regulation, a particular size or brand is no longer permitted to be sold; or there is a change in the formula, proof, label or container of the product, or where the industry member has discontinued the production or importation of a product; or
- (D) Termination of business where the licensee may return products on hand at the time the licensee terminates the operation of the business.

An industry member is under no obligation nor required to accept the return of products for the reasons listed.

- (6) Give or sell product displays to a retailer, subject to the following limitations:
  - (A) The total value of all product displays furnished by an industry member under this section may not exceed \$300 per brand in use at any one time in any one retail establishment. The value of a product display is the actual cost to the industry member who initially purchased it with transportation and installation costs excluded;
  - (B) Product display means any wine racks, bins, barrels, casks, shelving and the like from which distilled spirits, wine, or malt beverages are displayed on and sold;
  - (C) Industry member may not pool or combine their dollar limitations in order to provide a retailer a product display in excess of \$300 per brand;
  - (D) Product display shall bear conspicuous and substantial advertising matter; and
  - (E) Industry member may assist a retailer in setting a product display in a retail premises.
- (7) Give or sell outside signs to a retailer, providing:
  - (A) The sign must bear conspicuous and substantial advertising matter about the product or the industry member which is permanently inscribed or securely affixed;
  - (B) The retailer is not compensated, directly or indirectly, such as through a sign company, for displaying the signs; and
  - (C) The cost of the signs may not exceed \$400.
- (8) Provide a recommended shelf plan or shelf schematic for distilled spirits, wine or malt beverages.

(i) Manufacturers' or wholesale dealers' licensee, shall, at all liquor establishments, stock, rotate, and affix the prices to distilled spirits, wine, or malt beverages which they sell, and check for outdated or spoiled liquor products, at least once a month and at the time of delivery of any liquor product, unless the retailer requests in writing that this service not be provided or be discontinued. [Eff 7/1/00; am and comp 7/15/02; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)"

28. Material, except source notes, to be repealed is bracketed. New material is underscored.

29. Additions to update source notes to reflect these amendments are not underscored.

30. These amendments to Chapter 101, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, shall take effect ten days after filing with the Office of the County Clerk.

Adopted this \_\_\_\_\_ day of \_\_\_\_\_, 2017, at Wailuku, Maui,  
Hawaii.

By \_\_\_\_\_  
ROBERT TANAKA  
Chairperson  
LIQUOR COMMISSION

Approved this \_\_\_\_ day of  
\_\_\_\_\_, 2017.

\_\_\_\_\_  
ALAN M. ARAKAWA  
Mayor, County of Maui

APPROVED AS TO FORM  
AND LEGALITY:

\_\_\_\_\_  
GARY Y. MURAI  
Deputy Corporation Counsel  
County of Maui

Received this \_\_\_\_\_ day of  
\_\_\_\_\_, 2017.

\_\_\_\_\_  
Clerk, County of Maui

CERTIFICATION

I, ROBERT TANAKA, Chairperson of the Liquor Commission of the Department of Liquor Control, County of Maui, do hereby certify:

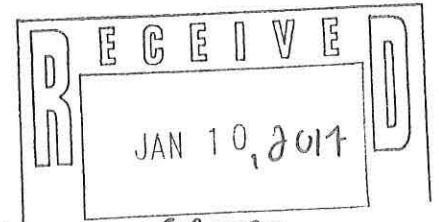
1. That the foregoing is a copy of the amendments to the Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, drafted in Ramseyer format, pursuant to the requirements of Section 91-4.1, Hawaii Revised Statutes, which were adopted on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by affirmative vote of the proper majority following a public hearing on February 8, 2017, and filed with the Office of the County Clerk.

2. That the notice of public hearing on the foregoing amendments to the rules was published in The Maui News and The Honolulu Star-Advertiser on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

COUNTY OF MAUI

\_\_\_\_\_  
ROBERT TANAKA  
Chairperson  
LIQUOR COMMISSION





Amendment to Title 08, Chapter 102,  
Rules Governing Administrative Practices and Procedures  
of the Liquor Commission and Liquor Control Adjudication Board  
of the County of Maui

1. Section 08-102-27, Rules Governing Administrative Practices and Procedures of the Liquor Commission and Liquor Control Adjudication Board of the County of Maui, is amended by amending subsection (c) to read as follows:

“(c) The commission shall maintain a list of names and addresses of persons who request notification of meetings and shall mail, electronic mail (email), or send by facsimile a copy of the notice to such person at their last recorded address, email address, or facsimile number no later than the time the agenda is filed at the office of the county clerk. The list of names and addresses, email addresses, or facsimile numbers of persons who request notification of meetings shall be valid only for the calendar year of the request received. Notification for renewal shall be mailed, emailed, or facsimiled in November to all persons on the existing list. [Eff 2/7/00; am and comp] (Auth: HRS §§91-2, 281-17) (Imp: HRS §281-17)”

2. Section 08-102-31, Rules Governing Administrative Practices and Procedures of the Liquor Commission and Liquor Control Adjudication Board of the County of Maui, is amended by amending subsection (c) to read as follows:

“(c) Unless a commission member states that the member is disqualified or excused from voting pursuant to section 08-102-33 of the rules of the commission, the member’s silence or refusal to vote shall be recorded as an [affirmative vote.] abstention, an abstention is not a vote and is not counted as a vote. [Eff 2/7/00; am and comp 4/26/02; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

3. Section 08-102-71, Rules Governing Administrative Practices and Procedures of the Liquor Commission and Liquor Control Adjudication Board of the County of Maui, is amended to read as follows:

“§08-102-71 Charges against commission or board members. Any charges herein called complaints or inquiries of the conduct against [the] commission or [the] board members shall be documented and forwarded to the:

- (1) Mayor;
- [(2) Board of ethics;
- (3)](2) Corporation counsel;

[(4)(3) Prosecuting attorney, [if applicable,] for investigation [and] and/or disposition. [Eff 2/7/00; am and comp] (Auth: HRS §§ 91-2, 281-17) (Imp: HRS §281-17)”

4. Material, except source notes, to be repealed is bracketed. New material is underscored.

5. Additions to update source notes to reflect these amendments are not underscored.

6. These amendments to Chapter 102, Rules Governing Administrative Practices and Procedures of the Liquor Commission and Liquor Control Adjudication Board of the County of Maui, shall take effect ten days after filing with the Office of the County Clerk.

Adopted this \_\_\_\_\_ day of \_\_\_\_\_, 2017, at Wailuku, Maui,  
Hawaii.

By \_\_\_\_\_  
ROBERT TANAKA  
Chairperson  
LIQUOR COMMISSION

Approved this \_\_\_\_ day of  
\_\_\_\_\_, 2017.

\_\_\_\_\_  
ALAN M. ARAKAWA  
Mayor, County of Maui

APPROVED AS TO FORM  
AND LEGALITY:

\_\_\_\_\_  
GARY Y. MURAI  
Deputy Corporation Counsel  
County of Maui

Received this \_\_\_\_\_ day of  
\_\_\_\_\_, 2017.

\_\_\_\_\_  
Clerk, County of Maui

CERTIFICATION

I, ROBERT TANAKA, Chairperson of the Liquor Commission of the Department of Liquor Control, County of Maui, do hereby certify:

1. That the foregoing is a copy of the amendments to the Rules Governing Administrative Practices and Procedures of the Liquor Commission and Liquor Control Adjudication Board of the County of Maui, drafted in Ramseyer format, pursuant to the requirements of Section 91-4.1, Hawaii Revised Statutes, which were adopted on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by affirmative vote of the proper majority following a public hearing on February 8, 2017, and filed with the Office of the County Clerk.

2. That the notice of public hearing on the foregoing amendments to the rules was published in The Maui News and The Honolulu Star-Advertiser on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

COUNTY OF MAUI

\_\_\_\_\_  
ROBERT TANAKA  
Chairperson  
LIQUOR COMMISSION

2016-1770  
2017-01-06 Admin Rules Chapter 102

## IV. New Business

C. Discussion on Testimony, dated August 3, 2017, from Mr. Rick Gaffney, President, Hawaii Fishing & Boating Association, regarding Proposed Amendments to HAR Title 13, Subtitle 11, **Ocean Recreation and Coastal Areas**, listed below, promulgated by DOBOR / DLNR:

### **i. Part I - Small Boat Harbors and Other Boating Facilities**

1. Chapter 230, General Provisions
2. Chapter 231, Operations of Boats, Small Boat Harbors, and Permits
3. Chapter 232, Sanitation and Fire Safety
4. Chapter 233, Motor Vehicle and Parking Rules
5. Chapter 235, Offshore Mooring Rules and Areas

### **ii. Part II – Boating**

6. Chapter 240, General Provisions
7. Chapter 242, Accidents, Reports, Fines, Enforcement and Records
8. Chapter 243, Vessel Equipment Requirements
9. Chapter 244, Rules of the Road; Local and Special Rules
10. Chapter 245, Waterway Marking Systems

### **iii. Part III - Ocean Waters, Navigable Streams & Beaches**

11. Chapter 250, General Provisions
12. Chapter 251, Commercial Activities on State Ocean Waters, Navigable Streams, and Beaches
13. Chapter 253, Registration and Permit Fees
14. Chapter 254, Local Ocean Waters
15. Chapter 255, Waikiki Beach
16. Chapter 256, Ocean Recreation Management Rules

## Palcovich, Dori

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**From:** Rick Gaffney <rgaffney@pacificboatsales.com>  
**Sent:** Friday, August 04, 2017 12:17 PM  
**To:** DBEDT Webmaster; DBEDT SBRRB  
**Subject:** DOBOR rules amendments  
**Attachments:** Rule test 8-17.doc

I would like the SBRRBs to weigh-in on possible violations of Chapter 91 during the course of the DLNR-BOR's effort to amend Title 13, Subtitle 11 Ocean Recreation and Coastal Areas. . .

My testimony on the proposed amendments is attached. It refers to a number of perceived violations of Chapter 91. My spoken testimony at the public hearing in Kona contained additional details about my personal experience trying to get information on the proposals and the hearing at the Honokohau DLNR-BOR office.

We have seen this sort of failure on the part of DLNR-BOR before, so often in fact that we believe it is intentional on the part of the administrator, Ed Underwood.

Please note in the attachment appended below, that I previously registered a complaint with the SBRRB and your response was to suggest to DLNR-BOR that our organization be included in the process. That suggestion was ignored by DLNR-BOR, even though they were reaching out to the Ocean Tourism Coalition.

Please share this email with the members of the SBRRB Board.

Your assistance in this matter will be greatly appreciated.

Mahalo,  
Rick

Rick Gaffney, President  
Hawaii Fishing & Boating Association  
74-425 Kealakehe Parkway, # 3-B  
Kailua-Kona, HI 96740

808 960-6767 (cell)  
[rgaffney@pacificboatsales.com](mailto:rgaffney@pacificboatsales.com)

### SBRRB March 2017 minutes excerpt:

Ms. Maria Gaydos, Legal Fellow from DOBOR at DLNR, introduced intern/law clerk Mr. Todd Tashima who assisted in promulgating the rule amendments.

Ms. Gaydos believes that DOBOR/DLNR did a significant amount of public outreach over the past two years, having worked with Ocean Tourism Coalition, Trilogy Excursions, etc., and **many of the stakeholders** on the neighbor islands. She added that Ocean Tourism Coalition provided recommendations to the dive flag rules, of which DLNR made changes to the rules.

The biggest business impact the commercial boaters will have is filing for a commercial permit, which requires certain documentation requirements such as a letter of good standing, articles of incorporation, etc. **It was noted that Mr. Gaffney**, President of Hawaii Fishing & Boating Association, who provided written testimony to this Board, was **given a copy of the rules; he also provided feedback on the amendments.** **Vice Chair Nakamoto**

***requested that Mr. Gaffney be notified of both public hearings that will be held on the Big Island and that the organization he represents receive copies of the proposed rules package.***

Ms. Gaydos stated that although the law requires having only one public hearing, because the changes and the impact of the rules are statewide, a public hearing will be held on all the islands as well as two hearings on the Big Island; there will also be a press release and posting on DLNR's website. She added that, in the near future, administrative rules proposing an increase in fees, which will have a significant impact on small business, will be forth coming to this Board.

Mr. Ritchie made a motion for the amendments to move to public hearing.

Mr. Cundiff seconded the motion, and the Board members unanimously agreed.



74-425 Kealahou Pkwy # 3-B  
Kailua Kona, HI 96740  
[www.hawaiiifishingandboating.com](http://www.hawaiiifishingandboating.com)

August 3, 2017

**Testimony** on public hearing process and proposed amendments to Title 13, Subtitle 11, Ocean Recreation and Coastal Areas, Parts I, II, III, Hawaii Administrative Rules, Sections: 230, 231, 232, 233, 235, 240, 242, 243, 244, 245, 250, 251, 253, 254, 255, 256

Hawaii's boating community and ocean recreation industry were not properly informed of the availability and contents of a 132 page document containing proposed changes and additions to definitions, and amendments to many DOBOR rules, nor were they properly informed of the forthcoming series of public hearings. The process undertaken by the DOBOR violated HRS Chapter 91 in many ways, including not following the process detailed to the Board of Land & Natural Resources when DOBOR's "Request Approval to Initiate Rule Making, Including Public Hearing. . ." was on the BLNR agenda on December 9, 2016.

HRS Chapter 91-3 requires that "the adopting agency shall: 3 – (11) Give at least 30 days notice for a public hearing." That did not happen in the way DOBOR committed to the BLNR in their request to initiate rule making, wherein DOBOR stated that the draft rules could be "reviewed in person at any small boat harbor from 8:30 am to 3:30 pm." Members of our organization checked the DOBOR offices at Keehi, Ala Wai, Honokohau and Hilo and found nothing posted about the public hearings, nor was a copy of the proposed amendments available over the counter. Because there was inadequate notice, at least 30 days in advance of the public hearing, the process should be started over and undertaken legally.

HRS Chapter 91 also states: "The notice shall be mailed to all persons who have made timely written request of the agency for advance notice of rule making proceedings." Our organization has made such a request on numerous occasions, over many years, yet we did not receive such notice.

Moreover, it was clear from the testimony given at the public hearings in Hilo, Kona and Honolulu, that knowledge of the proposed amendments was almost non-existent, further proof that the hearing was inadequately noticed and that access to the proposed amendments and definitions was difficult-to-impossible, across the State.

The definitions section of the proposed amendments is extremely poor and creates many more problems than it solves. Numerous definitions (catamaran, high seas, dive flag, litter, etc.) are convoluted or absolutely incorrect. Some even contradict federal and/or the international law of the sea. For example the proposed DOBOR amendments includes a complex definition of litter even though litter is already very concisely defined in the HRS. Why would DOBOR want a different



definition of litter than the HRS? There are proposed definitions that counter federal law including dive flag and high seas, and rule changes that also run counter to federal law. The removal of the current requirement that DOBOR create an advisory council, is counter to good sense, and removes from the boaters and ocean recreation businesses an opportunity to participate in regular communication and contribute to improving our small boat harbors and boating facilities.

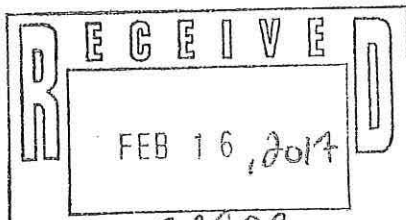
There are many other issues with the proposed rule amendment package, but these examples alone should suggest that the package is flawed and needs to be revisited before it is finalized. If the proposed amendments had been vetted with the boating public prior to the public hearing process being announced, many of these flaws could have been rectified. That's what public meetings are for, but DOBOR no longer holds those. Moreover there are a number of types of collaborative software available, which would allow DOBOR to hold virtual public meetings accessible to boaters and businesses across the State, prior to initiating the formal public hearing process.

DOBOR Administrator Ed Underwood has again failed to adequately inform the public about important DOBOR public hearings and to provide them with the opportunity to fully understand, and to provide reasoned input and response to proposed changes. He should be told to start this public process again, to follow the law, and to reach out to boaters through the organizations that represent them (yacht clubs, fishing clubs, associations, etc.) to assure that DOBOR's public process benefits from community input and meets the requirements of Hawaii law.

Mahalo,

Rick Gaffney, President  
Hawaii Fishing & Boating Association  
74-425 Kealakehe Parkway, # 3-B  
Kailua-Kona, HI 96740

808 960-6767 (cell)  
[rgaffney@pacificboatsales.com](mailto:rgaffney@pacificboatsales.com)



PRE-PUBLIC HEARING  
SMALL BUSINESS IMPACT STATEMENT  
TO THE  
SMALL BUSINESS REGULATORY REVIEW BOARD  
(Hawaii Revised Statutes §201M-2)

Department or Agency: Department of Land and Natural Resources, Division of Boating and Ocean Recreation

Administrative Rule Title and Chapter: See attached

Chapter Name: See attached

Contact Person/Title: Maria Gaydos, Legal Research Specialist

Phone Number: (808) 587-0142

E-mail Address: maria.r.gaydos@hawaii.gov Date: February 15, 2017

A. To assist the SBRRB in complying with the meeting notice requirement in HRS §92-7, please attach a statement of the topic of the proposed rules or a general description of the subjects involved.

B. Are the draft rules available for viewing in person and on the Lieutenant Governor's Website pursuant to HRS §92-7? Yes  No  (If Yes, please provide webpage address and when and where rules may be viewed in person)

<http://dlnr.hawaii.gov/dobor/draft-rules>

(Please keep the proposed rules on this webpage until after the SBRRB meeting.)

I. Rule Description: New  Repeal  Amendment  Compilation

II. Will the proposed rule(s) affect small business? Yes  No  (If No, no need to submit this form.)

\* "Affect small business" is defined as "any potential or actual requirement imposed upon a small business . . . 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." HRS §201M-1

\* "Small business" is defined as a "for-profit enterprise consisting of fewer than one hundred full-time or part-time employees." HRS §201M-1

III. Is the proposed rule being adopted to implement a statute or ordinance that does not require the agency to interpret or describe the requirements of the statute or ordinance? Yes  No  (If Yes, no need to submit this form.)

(e.g., a federally-mandated regulation that does not afford the agency the discretion to consider less restrictive alternatives.) HRS §201M-2(d)

IV. Is the proposed rule being adopted pursuant to emergency rulemaking? (HRS §201M-2(a)) Yes  No  (If Yes, no need to submit this form.)

\* \* \*

**If the proposed rule affects small business and are not exempt as noted above, please provide a reasonable determination of the following:**

1. Description of the small businesses that will be required to comply with the proposed rules and how they may be adversely affected.

The proposed amendments will affect small businesses holding commercial operator permits due to changes in administrative rule definitions and administrative documentation requirements for permit issuance. One proposed amendment requires permit applicants to provide their ownership structure for any entity that would own or control a mooring permit, which could result in businesses needing to provide more information than under current administrative rules.

2. 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.

No fine or fee increases. Indirect costs to small businesses could include those related to changes in commercial activities or operations in order to comply with administrative rule definition amendments.

If the proposed rule imposes a new or increased fee or fine:

- a. Amount of the current fee or fine and the last time it was increased.

N/A

- b. Amount of the proposed fee or fine and the percentage increase.

N/A

- c. Reason for the new or increased fee or fine.

N/A

- d. Criteria or methodology used to determine the amount of the fee or fine (i.e., Consumer Price Index, Inflation rate, etc.).

N/A

3. The probable monetary costs and benefits to the agency or 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.

Probable costs to DOBOR include those related to outreach in order to communicate the effect of the amendments and explain to small businesses their obligations under the amendments. Benefits to DOBOR include better enforcement and compliance due to making administrative rules clearer and more understandable. Because there are no fine increases or additions, DOBOR does not expect any increases in collections from fines.

4. 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 other mitigating techniques.

The proposed amendments consolidate DOBOR administrative rule definitions into one section. Some DOBOR administrative rule sections currently contain duplicative and conflicting definitions. Therefore the proposed amendments will help to reduce confusion and enforcement complications. Some proposed definitions are also updated to conform to State and Federal precedent for better clarity and enforceability.

5. The availability and practicability of less restrictive alternatives that could be implemented in lieu of the proposed rules.

There is no practicable less restrictive alternative available to DLNR at this time to make the proposed amendments.

6. Consideration of creative, innovative, or flexible methods of compliance for small businesses. The businesses that will be directly affected by, bear the costs of, or directly benefit from the proposed rules.

DLNR has worked with the community and businesses in drafting the proposed rules and has determined that the proposed amendments are the most equitable way to accommodate affected members of the public while still attaining the goals that DLNR desires.

7. How the agency involved small business in the development of the proposed rules.

In addition to gathering comments and feedback from community members, DOBOR met with small business owners to gather input and suggestions. DOBOR subsequently incorporated helpful suggestions from the public in its proposed amendments.

- a. If there were any recommendations made by small business, were the recommendations incorporated into the proposed rule? If yes, explain. If no, why not.

DOBOR received suggestions from small business owners and chose to incorporate some of the suggestions. E.g., DOBOR included proposed language from small business owners regarding dive flag rules.

8. 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.

The proposed amendments do not include provisions that are more stringent than Federal, State, or County standards. As much as possible, DOBOR attempted to conform to State, County, and Federal laws to ensure enforceability. E.g., proposed shoreline boundary definitions conform to State legal precedent, proposed alcohol sale and consumption rules conform to County language, and various proposed definitions are updated to conform to US Coast Guard regulation language.

If yes, please provide information comparing the costs and benefits of the proposed rules to the costs and benefits of the comparable federal, state, or county law, including the following:

Pre-Public Hearing Small business Impact Statement

Page 4

- a. Description of the public purposes to be served by the proposed rule.

N/A

- b. The text of the related federal, state, or county law, including information about the purposes and applicability of the law.

N/A

- c. A comparison between the proposed rule and the related federal, state, or county law, including a comparison of their purposes, application, and administration.

N/A

- d. A comparison of the monetary costs and benefits of the proposed rule with the costs and benefits of imposing or deferring to the related federal, state, or county law, as well as a description of the manner in which any additional fees from the proposed rule will be used.

N/A

- e. A comparison of the adverse effects on small business imposed by the proposed rule with the adverse effects of the related federal, state, or county law.

N/A

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Small Business Regulatory Review Board / DBEDT

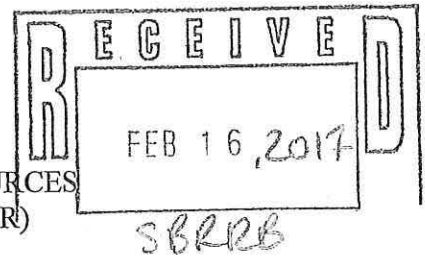
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This Statement may be found on the  
SBRRB Website at:

<http://dbedt.hawaii.gov/sbrrb/small-business-impact-statements-pre-and-post-public-hearing>

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation (DOBOR)  
Honolulu, Hawaii 96819



Summary of DOBOR Administrative Rules Amendment Package

The proposed rules package is an effort by DOBOR to make its administrative rules more accessible to the public, streamline future rule changes and minimize unnecessary or redundant provisions in the HAR which can cause difficulties in enforcement of the rules for enforcement officials and staff as well as in interpretation of the rules by the general public. The complete text of the proposed rule package can be viewed online at: <http://dlnr.hawaii.gov/dobor/draft-rules/>

The proposed rules package has been sent to all DOBOR staff, Division of Conservation and Resources Enforcement, Division of Aquatic Resources as well as to the Hawaii Ocean Tourism Coalition and other private stakeholders for informal comment and feedback. The Division of the Attorney General, Land and Transportation Division and the Board of Land and Natural Resources ("Board") has reviewed the draft rules and approved them to proceed to public hearing pending approval from the Office of the Governor pursuant to Hawaii Revised Statutes, Chapter 91. DOBOR anticipates public hearing on these rules in April or May 2017.

The proposed rules package contains the following amendments:

1. Consolidates all definitions sections in Title 13, Subtitle 11, Hawaii Administrative Rules into HAR §13-230-8. In the current DOBOR rules, there are multiple definition sections as well as definitions within other non-definition sections. Definitions are being consolidated to provide one convenient section containing all definitions generally applicable in DOBOR administrative rules. Certain sections will continue to have dedicated definitions when such definitions are particularly applicable within the context of that section. With this amendment, those searching for generally applicable definitions will not need to search through multiple sections. Consolidation also helps to avoid conflicting definitions for identical terms in separate sections. Finally, consolidation also assists in any future amendment of the rules. The proposed rule package:
  - a. Consolidates all general definitions into HAR §13-230-8 from the following HAR sections: §13-230-21, §13-231-3, §13-231-25, §13-231-45, §13-231-56, §13-231-70, §13-232-8, §13-232-10, §13-232-30, §13-232-57, §13-235-5, §13-240-5, §13-243-4, §13-244-19, §13-245-2, §13-245-9, §13-250-5, §13-253-1.3, §13-254-1, §13-255-5, §13-256-8, §13-256-12.
  - b. Removes terms & definitions that were moved from the above HAR sections and consolidated in HAR §13-230-8.
  - c. Adds "abandon" and its definition to DOBOR rules. The definition specifically applies in the context of animals.
  - d. Adds "camping" and its definition to DOBOR rules.
  - e. Adds "colony" and its definition to DOBOR rules. The definition specifically applies to cat colonies.
  - f. Adds "feral" and its definition to DOBOR rules.

- g. Adds “wildlife” and its definition to DOBOR rules.
2. Updates definitions to conform to State statutory language and legal precedent as well as Federal requirements. Conforming to State statutory language and legal precedent helps to avoid conflicting language if DOBOR attempts to enforce its rules in court. Conforming to Federal requirements allows for more effective enforcement and coverage by adapting already-established US Coast Guard regulations. The proposed rule package:
- a. Removes term, definition, and references to “personal partner” in DOBOR rules. Amends language throughout DOBOR rules to replace “personal partner” with the appropriate legal term, “reciprocal beneficiary.”
  - b. Removes term, definition, and references to “motor vessel” in DOBOR rules. Amends language throughout DOBOR rules to replace “motor vessel” with “motorboat.”
  - c. Clarifies definition of “shoreline” to conform to State legal precedent.
  - d. Removes term, definition, and references to “humpback whale cow/calf area.”
  - e. Increases the damage cost threshold in HAR §13-242-4 where a report is required after a recreational boating accident from \$200 to \$2,000 to conform to US Coast Guard regulations per 33 C.F.R. § 173.55.
3. Amends permitting language in HAR §13-231-3 to clarify the minimum documents required to apply for a commercial use permit and/or a catamaran registration certificate. This includes the requirement that applicants provide the division with documentation of ownership structure for any entity that would own or control a mooring permit. This amendment is to ensure that DOBOR will be able to track all owners or parties with an interest in a permit.
4. Amends HAR §13-232-57, regarding pets at State harbors. This amendment is to address issues with domestic pets at State small boat harbors and facilities. The proposed amendment removes language in HAR §13-232-57, which inadvertently causes that the section to only be applicable in Ala Wai and Keehi boat harbors.
5. Adds a new section, HAR §13-232-57.1, prohibiting feeding of wildlife or feral animals at any property under the jurisdiction of the department. This new section is being added to DOBOR rules in response to people feeding feral animals and consequently creating potentially unsafe and unsanitary conditions at State boat harbors and facilities. Currently, there are issues with feral animals such as cats being fed in harbors as well as dumping fishing bycatch and fish parts into the water at small boat harbors which causes water pollution as well as potentially attracts sharks.
6. Adds a new section, HAR §13-232-57.2, prohibiting abandoning animals and creating or contributing to colonies at any property under the jurisdiction of the department. This new section is being added to address the issue of people abandoning and dumping animals on department property. Abandonment and creation/contribution to colonies create potentially unsanitary conditions and add to the existing problem of controlling stray and feral animal populations.

7. Amends sleeping & camping prohibitions in HAR §13-232-58. This amendment is intended to clarify the definitions of sleeping and camping to assist in citation and prosecution for unauthorized use of department property and to address the issue of people camping or sleeping at State boat harbors and facilities when not on board a vessel.
8. Amends alcohol serving, sale, and consumption rules in HAR §13-232-60 to conform to the county definition for open container rules, which assists with citation for unlawful possession and consumption of alcohol on department property.
9. Removes language in HAR §13-233-13, "Operation, Parking, or Storage of Bicycles or Play Vehicles," which inadvertently states that the section is only applicable in Ala Wai and Keehi boat harbors.
10. Amends language in HAR §13-235-9 to prohibit mooring in an Ocean Recreation Management Area (ORMA) or a non-designated area for a cumulative period of time exceeding seventy-two hours within any fourteen-day period. This amendment is intended to address the issue of people attempting to circumvent the previous time limit language by temporarily moving their vessels to another location then returning.
11. Repeals HAR §13-243-5, which prohibits enforcement personnel from stopping and boarding any vessel properly displaying a valid United States Coast Guard Auxiliary Courtesy Marine Examination decal except upon reasonable belief that the vessel is being operated in violation of HAR provisions or other regulations or laws. USCG Marine Examination decals are no longer in use, rendering this provision unnecessary.
12. Updates rules regarding diver's flags under HAR §13-245-9.
  - a. Clarifies applicability to snorkelers, free divers, and SCUBA divers who are not accompanied by a host vessel, who surface more than one hundred feet from their host vessel, or who are engaged in snorkeling or diving activities more than one hundred feet from their host vessel. The amendment will require groups of 2 or more snorkelers/free divers/SCUBA divers to tow a dive flag and will require any member of the group to remain within 100 feet of a dive flag.
  - b. Clarifies rules on illuminating a diver's flag during certain times of the day.
13. Amends HAR §13-255-6 to clarify the boundaries that define "Waikiki Beach."
14. Repeals the requirement for establishment of a Recreation Advisory Committee (RAC) pursuant to administrative rule under HAR §13-256-3. RACs are a valuable tool for collecting community feedback on DOBOR rules and DOBOR intends to continue forming committees statewide. However, the existence of an administrative rule makes the creation of a RAC unduly burdensome to the department by making these informal advisory committees subject to Sunshine Law. DOBOR has management authority to form informational and advisory committees without administrative rulemaking and intends to do so.



15. Updates HAR §§13-256-16 & 13-256-17, regarding thrill craft.
  - a. Amends HAR §13-256-17 to allow exemptions from thrill craft restrictions in HAR §13-256-17. These exemptions are for the purpose of allowing activities such as clean up of marine debris using thrill craft as well as the use of thrill crafts as escort vessels for various marine regattas and other special events. This amendment is in response to a legislative mandate to DOBOR to write administrative rules allowing the use of thrill craft for marine debris clean-up as well as community feedback.
  
16. Repeals HAR §13-256-35, regarding reporting requirements for address or vessel possession changes. The provisions of HAR §13-256-35 will be incorporated into other sections through this amendment package to eliminate duplicate provisions.

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FEB 16, 2017  
SBRNB

§13-230-4

DEPARTMENT OF LAND AND NATURAL RESOURCES

Amendments to chapters 13-230, 13-231, 13-232, 13-233,  
13-235, 13-240, 13-242, 13-243, 13-244, 13-245, 13-  
250, 13-251, 13-253, 13-254, 13-255, 13-256,  
Hawaii Administrative Rules

[Date of adoption by agency]

1. Section 13-230-4, Hawaii Administrative Rules, is amended to read as follows:

"§13-230-4 Penalties and prosecution. (a) Violation of rules, penalty. Any vessel, its agent, owner, or crew that violates the rules of the department, including vehicular parking or traffic movement and unauthorized discharge, dumping, or abandoning of any petroleum product, hazardous material, or sewage in violation of the state water quality standards established by the department of health, [~~shall~~] may be fined or deprived of the privilege of operating or mooring any vessel in state waters for a period of not more than thirty days, in accordance with section 200-14, Hawaii Revised Statutes.

(b) General administrative penalties. Except as otherwise provided by law, the board is authorized to set, charge, and collect administrative fines and to recover administrative fees and costs, including attorney's fees and costs, or bring legal action to recover administrative fines and fees and costs, including attorney's fees and costs, or payment for damages or for the cost to correct damages resulting from a violation of subtitle 8 of title 12 or any rule adopted thereunder in accordance with section 200-14.5, Hawaii Revised Statutes. Each day or instance of violation shall constitute a separate offense." [Eff 2/24/94; am and comp 12/7/13; am \_\_\_\_\_]  
(Auth: HRS §§200-2, 200-3, 200-4, 200-14, 200-14.5)  
(Imp: HRS §§200-2, 200-3, 200-4, 200-14, 200-14.5)

2. Section 13-230-8, Hawaii Administrative Rules, is amended to read as follows:

"§13-230-8 Definitions. When used in these rules promulgated pursuant to chapter 200, Hawaii Revised Statutes, unless otherwise specifically provided or the context clearly indicates otherwise:

"Abandon" when applied to animals, means to leave an animal at any location, whether intentionally, recklessly, or negligently, without the owner intending to return for the animal and without the permission of the public or private property owner.

"Adult" means a person who has reached majority.

"Agreement" means the agreement between the boat owner and the State as required by section 13-231-2.

"Anchoring device" means a device made of metal or similar material, attached by rope or chain to a vessel, which can be deployed to submerged land to secure the vessel in a particular place.

"Approved" means that a fitting, appliance, apparatus, or item of equipment to be fitted or carried in a vessel, or by any particular arrangement, is sanctioned by the commandant of the Coast Guard, unless otherwise stated by the department.

"Approved backflow prevention device" means a backflow prevention device that meets the requirements contained in standard 1001, American Society of Sanitary Engineers or the Uniform Plumbing Code adopted by the Uniform Plumbing Code adopted by the International Association of Plumbing and Mechanical Officials (IAPMO).

"Approved marine surveyor" means a person who has been approved by the chairperson to inspect a vessel for an owner seeking a permit to moor a vessel in a small boat harbor in accordance with sections 13-231-45(h) and 13-231-45(i).

"Approved vessel inspector" means an employee of the department who has been designated by the chairperson to inspect a vessel for compliance with criteria necessary to obtain a mooring permit.

"Assigned berth" means a berth that is assigned to a permittee by a valid regular mooring permit.

"Background" means that portion of the hull or superstructure, or a specially provided backing plate, upon which the numbers are placed, but shall not include any border, trim, outlining or shading of the numerals or letters.

"Barge" means a non-self-propelled vessel.

"Berth" means any place where a vessel is anchored, moored, or made fast or laid alongside a dock, quay, catwalk or pier.

"Bicycle" means every device propelled by human power upon which any person may ride, having two tandem wheels which are sixteen inches in diameter or greater, and including any device generally recognized as a bicycle though equipped with two front or two rear wheels.

"Boat" means a small vessel propelled by oars or paddles or by sail or power.

"Boat dealer" means a person engaged wholly or partly, for gain or compensation, in the business of selling vessels or offering vessels for sale, buying or taking in vessels for the purpose of resale, or exchanging vessels.

"Boat livery" means a person or entity who is engaged in the business of renting, leasing, or chartering vessels.

"Boat manufacturer" means a person engaged in:

- (1) The manufacture, construction, or assembly of boats or associated equipment;
- (2) The manufacture or construction of components for boats and associated equipment to be sold for subsequent assembly; or
- (3) The importation into the United States for sale of boats, associated equipment, or components thereof.

"Boat owner" means the legal owner of a vessel where there is no security interest held by anyone on the vessel, a buyer under a purchase money security interest, a debtor under any security interest, a demise charterer of a vessel, or a lessee or charterer of a vessel under lease or charter which provides the lessee or charterer with exclusive right to possession

of the vessel to the exclusion of the lessor or the person from whom the vessel is chartered. The documentation of ownership must meet the requirements of section 13-241-5(c).

"Recreational boating accident":

- (1) Means a collision, accident, or other casualty involving:
  - (A) A person's death;
  - (B) The injury to a person requiring medical treatment beyond first aid;
  - (C) Damage to a vessel amounting to \$2,000 or more;
  - (D) Complete loss of a vessel; or
  - (E) The disappearance of a person from a vessel under circumstances indicating death or injury to that person.
- (2) Includes damage to a vessel or its equipment, loss of life, or injury to any person or object:
  - (A) On board a vessel;
  - (B) Caused by a moving vessel's wake, wash, or waves, or by a vessel's capsizing, or collision with another vessel or object;
  - (C) Caused by flooding, fire, or explosion;  
or
  - (D) Caused when a person falls overboard.

"Bona fide fishing tournament" means a fishing tournament sponsored by a boat club, fishing club or yacht club, or a business or non-profit organization formed for the primary purpose of sponsoring a fishing tournament where participation is invited from the general public.

"Buoy" means any floating aids to navigation moored to the seabed and used to convey a message.

"Business" [~~includes all professions, trades, occupations, and callings carried on for a profit or livelihood, every kind of commercial enterprise, and the operation of games, machines, or mechanical devices~~] means any and all activities engaged in or caused to be engaged in by any person or legal entity, including, but not limited to, solicitations and

advertisements, with the object of making a profit or obtaining an economic benefit either directly or indirectly.

"C.F.R." means the Code of Federal Regulations.

"Camping" means the use and occupation of any portion of a State small boat harbor, boat launching facility or any other property managed by the department as a temporary or permanent dwelling place or sleeping place (including the laying down of bedding for the purpose of sleeping). Camping includes being in possession of a backpack, tents, blankets, tarpaulins, or other obvious camping paraphernalia, or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.

"Canoe" means outrigger canoe.

"Carrying passengers for hire" means the carriage of any person or persons by a vessel for compensation flowing, whether directly or indirectly, to the owner, charterer, operator, agent, or any other person interested in the vessel.

"Catamaran" means a multi-hulled vessel with a broad, flat deck that is affixed on top of closed cylinders which are used for buoyancy, the basic design of which is usually implemented with two rows of floats as a catamaran or with three rows of floats as a trimaran.

"Certificate" means a certificate of number issued by the department for an undocumented vessel.

"Chairperson" means the chairperson of the board of land and natural resources of the State of Hawaii or the chairperson's duly authorized representative or subordinate.

"Civil union" means a union between two individuals established pursuant to chapter 572B, Hawaii Revised Statutes.

"Civil union partner" means an individual who is a party to a civil union established pursuant to chapter 572B, Hawaii Revised Statutes.

"Coast Guard" means the United States Coast Guard, or its successor agency.

"Colony" means a collective of free-roaming, abandoned, stray, or feral cats.

"Commercial Activity" means [the use of or activity for which compensation is received by any person for goods or services or both rendered to customers or participants in that use or activity. Display of merchandise or demanding or requesting gifts, money, or services, shall be considered a commercial activity] to engage in any action or attempt to engage in any action designed for profit, which includes, but is not limited to, the exchange or buying and selling of commodities; the providing of services relating to or connected with trade, traffic, or commerce in general; any activity performed by the commercial operator or its employees or agents in connection with the delivery of such commodities or services; and the soliciting of business, including the display or distribution of notices, business cards, or advertisements for commercial promotional purposes.

"Commercial fishing motorboat" means a motorboat used for taking fish for profit or gain or as a means of livelihood.

"Commercial high speed boating" means the use of an open ocean racing boat to provide high speed rides to passengers who pay compensation for the rides.

"Commercial high speed boating" does not include:

- (1) The use of an open ocean racing boat during an official racing competition; or
- (2) The use of an open ocean racing boat while practicing for a racing competition; provided that no passenger pays compensation for riding the boat during the practice.

"Commercial motorboat" means any motorboat used for hire, profit or gain.

"Commercial ocean recreation activities" means any ocean recreation activity offered for a fee.

"Commercial purposes" includes the staging, loading and discharge of passengers or supplies at a State boating facility for further transport to a vessel's offshore location by means of a water taxi or any other vessel, or provisioning a vessel before or after a voyage involving the carriage of passengers for hire.

"Commercial vessel" means a vessel engaged in any trade, business, or commercial activity, including, but not limited to, carrying passengers for hire, charter fishing, bare boat (demise) or any type of charter maintenance, harvesting coral or similar resources, construction, towing, tow-boating, or other trade or business wherein the vessel is used in any manner to promote the venture, or is registered with the State or documented by the United States Coast Guard for commercial use.

"Compensation" means any valuable consideration.

"Contrivance" means any man-made object or artificial arrangement not used or intended to be used for transportation which may be floated upon or suspended [~~with in~~] within or on the water.

"Department" means the department of land and natural resources of the State of Hawaii.

"Dinghy" means a small open boat under thirteen feet in length, which may be propelled by oars, sails or an outboard motor and carried on or towed by a larger boat or yacht [~~it may be propelled by oars, sails or an outboard motor~~].

"Display area" means the area on a sign or buoy used for display of a waterway marker symbol.

"Diver's flag" means a red flag with a white diagonal running from the masthead to lower outside corner.

"Division" means the department of land and natural resources division of boating and ocean recreation.



"Documented vessel" means any vessel which has a valid marine document issued by the Coast Guard, in accordance with the Code of Federal Regulations, Subchapter G, Part 67, Documentation of Vessels.

"Dormant vessel" means a vessel or contrivance, other than a houseboat, that has not been navigated from or has not vacated an assigned mooring or facility within or offshore of a [state] State small boat harbor at least once within a ninety-day period, or cannot be made seaworthy upon thirty days' notice to the owner.

"Enforcement officer" means a police officer and any other State or county officer charged with the enforcement of State laws.

"Federal laws and requirements" means all statutes, regulations, and other laws of the United States, which may be applicable to these rules.

"Feral" means having escaped or been released from domestication and reverted to a wild state and any offspring resulting therefrom.

"Firm" includes a business organization such as a sole proprietorship, partnership or corporation which is licensed to engage in or conduct business in the State.

"Foreign built vessel" means any vessel whose hull was constructed in a country other than the United States.

"Forward half of the vessel" means any portion of the vessel in front of a point equidistant from the stem and stern of the vessel.

"Free diver" means a person who is using a mask and snorkel, other than for SCUBA diving, who submerges under water or breaks the surface of the water.

"Global Positioning System" (GPS) means the method of terrestrial navigation using a GPS electronic instrument, receiving data from a network of orbiting satellites to locate one's position by latitude and longitude.

"Gross receipts" means all moneys paid or payable to the account of the commercial use permittee or catamaran registration certificate holder, for

services rendered, or resulting from trade, business, commerce, or sales by the vessel or water sports equipment owner when the services, trade, business, commerce, or sales have a direct relationship to the vessel or permitted activity.

"Guardian" means a person invested by a court of law with the power, and charged with the duty, of taking care of a person and of managing the property of that person.

"Hanai" means a child who is taken permanently to be reared, educated, and loved by someone other than natural parents -- traditionally a grandparent or other relative. The child is given outright; natural parents renounce all claims to the child. Usually the child is given at infancy.

"Handboard" means any type of surf riding board that is (a) with or without skegs, (b) worn on one or both of the operator's hands, (c) is less than 16 inches in overall length, and (d) is used for the sport of wave riding.

"Harbor resident" means the owner, co-owner, or their spouse [~~of each,~~] and their legal dependents authorized by the department to reside on board a vessel used as the principal habitation of the owner.

"Hearing officer" means a person appointed by the chairperson to hear appeals.

"High seas" means all parts of the sea that are not included in the exclusive economic zone, in the territorial sea, or in the internal waters of the United States.

"Highway" means "street" as defined in this section.

"Houseboat" means any vessel which is fitted for use as a permanent or temporary place of habitation, and is either stationary or [~~to be~~] capable of being moved by oars, sweeps, or towing.

"Hull" means the shell, frame, or body of a vessel, exclusive of masts, yards, sails, riggings, machinery, and equipment.

"Immediate family" means any person and his or her spouse and dependent children under twenty-one years of age.

"Inland waters" mean the waters shoreward of the territorial sea baseline.

"Interest" includes any claim of right, title, ownership of stock, shares, profit, benefit or gain in a corporation, partnership, joint venture or any other business entity that has a use permit.

"Kayak" means a watercraft that has an open or covered top and is designed to hold one or more participants and propelled by use of a single- or double-bladed paddle.

"Launch" means a small motorboat that is open or that has the forepart of the hull covered.

"Legal dependent" or "dependent" means those persons who are defined as dependents by law, e.g., a spouse or minor child, or who are defined as dependents under Internal Revenue Service regulations or by the Armed Forces of the United States, or any of the following persons who are dependent upon a permittee for all or a substantial portion of the person's living expenses:

- (1) Spouse;
- (2) A son or daughter who is
  - (A) Unmarried and under eighteen years;
  - (B) Unmarried and under twenty years if a full-time student at a high school, business school, or technical school[~~r~~ ~~or~~];
  - (C) [~~unmarried~~] Unmarried and under twenty-two years if a full-time undergraduate student at a college; or
  - [~~(C)~~] (D) Unmarried and physically handicapped so as to be incapable of self-support;
- (3) A parent or grandparent if physically handicapped so as to be incapable of self-support;
- (4) A grandchild, brother, or sister under eighteen years of age.

"Legal owner" includes a person who holds unencumbered title to a vessel or is a secured party under a security interest for the vessel.

"Length" [means "vessel length" as defined in this section] when applied to vessels covered by these rules, means the measurement of a vessel from end to end over the deck. It is a straight-line measurement of the overall length from the foremost part of the vessel measured parallel to the centerline.

Bowsprits, boomkins, rudders, motor brackets, and similar fittings or attachments or sheer are not to be included in the measurement.

In case of a vessel of an open type or with a cockpit, the measurement is taken between the foremost and aftermost extremities of the hull exclusive of sheer.

In vessels having more than one deck, it is the length measured from the foremost part of the bow to the aftermost part at the stern exclusive of sheer.

"Lienholder" means a person holding a recorded security interest in a vessel.

"Lifeboat" means a boat carried aboard a vessel and used solely for lifesaving purposes, but not including dinghies, tenders, speedboats, or other types of craft carried aboard a vessel and used for other than lifesaving purposes.

"Liquor" or "intoxicating liquor" shall mean the same as defined in section 281-1, Hawaii Revised Statutes.

"Litter" means any and all types of debris and substances, whether liquid or solid, and materials such as garbage, refuse, rubbish, glass, cans, bottles, paper, wrappings, fish or animal carcasses, or any other nauseating or offensive matter or any machinery, appliance or automobile, or parts thereof, or any other substances which render small boat harbor lands or facilities unsightly, noxious, or otherwise unwholesome to the detriment of the public health and welfare or the enjoyment of the small boat harbor for recreational purposes.

"Livery boat" means a vessel which is rented, leased, or chartered by a person who is engaged in the business of renting, leasing, or chartering vessels.

"Living aboard" means the substantial use of a vessel as a place of abode, dwelling, living quarters,

or residence, including, but not limited to, the regular use for such purposes during weekends.

"Machinery" means all internal combustion engines located within the vessel and all motor or mechanical devices capable of propelling vessels.

"Majority" means the age specified under section 577-1, Hawaii Revised Statutes.

"Minor" means a person who has not reached the age of majority.

"Moor" means to secure a boat by making it fast with cables, lines or anchors.

"Mooring" means a [device for holding a vessel in place, when an anchor, concrete block or similar device is placed or dropped on submerged land with a rope or chain attached to a buoy to which the vessel is attached] buoy attached by rope or chain to a permanently placed weight or structure situated within a submerged land area and to which a vessel can be made permanently or temporarily secured.

["Mooring device" means the use of a buoy attached by rope or chain to a permanently placed weight or structure situated within a submerged land area and to which a vessel can be made permanently or temporarily secured.]

"Motorboat" means any vessel which is equipped with propulsion machinery, including steam. This term includes, but is not limited to, wet bikes, motorized surfboards, and any other vessel temporarily or permanently equipped with a motor.

"Navigable streams" means the waters of estuaries and tributaries of the streams of each island of the State, where boating and water related activities, recreational or commercial, may be carried on, whether the mouths of said streams are physically opened or not to ocean waters for intra or interstate commerce or navigation.

"Nonresident" means a person who is not a resident of the State of Hawaii.

"Ocean recreation management area" (ORMA) means ocean waters of the State that have been designated for specific activities as described in Chapter 13-

256, Hawaii Administrative Rules, Ocean Recreation Management Rules and Areas.

"Ocean waters" means all waters seaward of the shoreline within the jurisdiction of the State.

"Open ocean racing boat" means a motorized vessel which:

- (1) Is designed, modified, or restored for the primary purpose of high speed board racing; and
- (2) Has the capacity to carry not more than the operator and five passengers.

"Operate" means to navigate or otherwise use a vessel on or in the waters of the State.

"Operator" means a person who operates, or who has charge of the navigation or use of, a vessel.

"Operator permit" means the permit issued by the department which authorizes either the direct operation or the offering for a fee of surfboards and sailboards or any vessel, watercraft or water sports equipment on the ocean waters and navigable streams of the State.

"Outrigger canoe" means a canoe having the inclusion of a rig known as an outrigger which acts as a counterpoise or balance, rigged out from the side of the canoe. A number of spars (iako), usually two but up to as many as ten depending on the canoe's origin and purpose, are lashed across and to the canoe gunwales, extending outwards for a given distance and truncating with the attachment of a flotation device (ama).

"Owner" shall be synonymous with the word "boat owner" as defined in this section.

"Paddleboard" means any type of board that is (a) without skegs, (b) does not exceed four feet in length, and (c) is used for the sport of surfriding.

"Paipo board" shall be synonymous with the word "paddleboard" as defined in this section.

"Parasailing" means the activity in which an individual is transported or carried aloft by a parachute, sail, or other material attached to a towline, which is towed by a vessel.

"Parent" includes legal guardian and legal adoptive parent, except where the guardianship or adoption was acquired primarily to obtain resident status for the ward or adopted child. It shall also include a person who can legally claim an unmarried minor as a dependent for federal income tax purposes, but only when such person has been in loco parentis to the minor for the twelve-month period immediately preceding the residence determination date.

"Park" or "parking" means the standing of a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers.

"Passenger" means every person carried on board a vessel other than:

- (1) The owner or the owner's representative;
- (2) The operator;
- (3) Bona fide members of the crew engaged in the business of the vessel who have contributed no consideration for their carriage and are paid for their services; or
- (4) Any guest on board a vessel which is being used exclusively for pleasure purposes who has not contributed any consideration, directly or indirectly, for the guest's carriage.

"Person" means any individual, firm, partnership, corporation, trust, association, joint venture, organization, institution, or any other legal entity.

"Personal flotation device" is a technical term for a life preserver that has been approved and certified by the United States Coast Guard and capable of providing at least ninety per cent of factory-rated flotation capacity.

~~["Personal partner" is an individual considered to be a "personal partner" of the principal habitation permittee who is not a relative by biology or adoption to the principal habitation permittee. While living together on the vessel, the principal habitation permittee and personal partner shall not have a landlord-tenant relationship.]~~

"Pet owner" means any person owning, harboring or keeping a dog, cat, or other domestic pet, or having custody thereof.

"Power driven catamaran" means a catamaran propelled by machinery whether under sail or not.

"Power-driven vessel" means any vessel propelled by machinery.

"Pram" means a small lightweight nearly flat-bottomed boat with a broad transom and usually square-bow often used as a dinghy.

"Principal owner" means a person whose name appears on a certificate of number as the primary owner or who is named as managing owner of a Coast Guard documented vessel.

"Principally used" means a measurement of the time when a vessel is on the waters of the United States, a state, territory, province, or country and includes the time when the vessel is not in motion, as for instance when the vessel is moored or at anchor, as well as the time when the vessel is being navigated.

"Reciprocal beneficiary" means [~~two adults who are parties~~] an adult who is a party to a valid reciprocal beneficiary relationship and [~~meet~~] meets the requisites for a valid reciprocal beneficiary relationship as set forth in chapter 572C, Hawaii Revised Statutes.

"Recreation" means activities in which there is direct and intimate contact with water including, but not limited to, fishing, swimming, surfing, boating, water skiing, and viewing or enjoying historical, archeological, scenic, or scientific sites.

"Recreational vessel" means any vessel that is being used for pleasure and not for conducting commercial activity.

"Regatta" or "marine parade" means an organized water event of limited duration which is conducted according to a prearranged schedule.

"Registration sticker(s)" means a pair of stickers, plates, tabs, or other devices issued by the department with certificates of number and renewals thereof to be affixed to the vessel to indicate that



the vessel's certificate of number is current and valid.

"Regular permittee" means a person holding a valid regular mooring permit.

"Regulatory marker" means a waterway marker which indicates the existence of regulatory areas, speed zones or restricted areas and which has no equivalent in the United States Coast Guard system of navigational aids.

"Residence" or "residence status" means a combination of physical presence in a place and the intent to make such place one's permanent home.

"Residency determination date" means:

- (1) The date a person applies for a use permit or for application renewal;
- (2) The date of issuance or renewal of a use permit;
- (3) The date the department makes a residency status determination following the receipt of a completed questionnaire submitted by a person classified as a nonresident pursuant to the provisions of section 13-230-27; or
- (4) The date of a hearing officer's decision on a petition submitted to the department as prescribed in section 13-230-28.

"Roadway" means that portion of a street or highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways, the term "roadway" shall refer to each roadway separately but not to all such roadways collectively.

"Rules" means the rules governing small boat harbors, facilities under the jurisdiction of the division, and State ocean waters as set forth in ~~[this part]~~ the Hawaii Administrative Rules, Title 13, Subtitle 11 - Ocean Recreation and Coastal Areas.

"Rules of the road" means the federal statutory and regulatory rules governing navigation of vessels. These rules are published by the Coast Guard in pamphlet form and known as Navigation Rules - International - Inland COMDTINST M16672.2B.

"Sailboard" means any type of board that exceeds four feet in length and is propelled by a detachable sail apparatus.

"Sailing vessel" means any vessel propelled by sail only. Every power-driven vessel which is under sail and not under power is to be considered a sailing vessel, and every vessel under power, whether under sail or not, is to be considered a power-driven vessel.

"SCUBA" means self-contained underwater breathing apparatus and includes all forms of self-contained underwater breathing apparatuses, e.g., re-breathers, open-circuit, semi-closed or closed circuit or surface-supplied breathing apparatuses.

"Security interest" means an interest in a vessel reserved or created by agreement and which secures payment or performance of an obligation. The term includes the interest of a lessor under a lease intended for security. A security interest is "perfected" when it is valid against third parties generally, subject only to specific statutory exceptions contained in article 9, chapter 490 and section 490: 1-201, Hawaii Revised Statutes.

"Sheer" means the longitudinal upward curve of the deck, gunwales, and lines of a vessel, when viewed from the side.

"Shore waters" or "shores" means any shores or waters between the three nautical mile limit and the shoreline of the islands of the State of Hawaii.

"Shoreline" means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.

"Sign" means any device for carrying a message which is attached to another object such as a piling, buoy, structure or land itself.

"Skeg" means any fin-like projection.

"Sleeping place" means a place used by a person for the purpose of sleeping, where the person is or may be asleep inside a tent, sleeping bag, or some

form of temporary shelter or is or may be asleep atop of or covered by materials such as a cot, mat, bedroll, bedding, sheet, blanket, pillow, bag, cardboard, or newspapers.

"Slow-no-wake" means as slow as possible without losing steerage way and so as to make the least possible wake. This would almost always mean speeds of less than five miles an hour.

"Small boat harbor" means those harbors or portions of harbors, and any interest in property, whether real, personal, or mixed connected therewith under the care and control of the department, which are[~~7~~] used as described in section 200-9, Hawaii Revised Statutes[~~, as constructed, maintained, and operated for the primary purpose of promoting recreational boating activities and the landing of fish~~].

"Snorkeler" shall be synonymous with the word "free diver" as used in this section.

"Spouse" means a marriage partner, reciprocal beneficiary, or civil union partner of an individual.

"Stand" or "standing" means the halting of a vehicle whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in receiving or discharging passengers.

"State" means the State of Hawaii.

"State aid to navigation" means a waterway marker which is the equivalent of a United States Coast Guard aid to navigation.

"Stay aboard" or "staying aboard" means a person or persons aboard any vessel with prior notice to the department or a stay aboard permit between the hours of 12:00 midnight and 6:00 A.M., while the vessel is moored in a [~~state~~] State small boat harbor or offshore mooring area.

"Stop" or "stopping", when prohibited, means any halting, even momentarily, of a vehicle, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer or traffic control sign or signal.

"Stray" means any dog, cat, or other animal without a microchip or other registered owner-identifier or is living or roaming off its owner's property without permission to be on other public or private property. Strays may also be feral or abandoned.

"Street" means the entire width between boundary lines of every way publicly maintained in any small boat harbor when any part thereof is open to the public for purposes of vehicular traffic.

"Surfboard" means any type of board that exceeds four feet in length and is used for the sport of surfing.

"Symbols" means geometric figures such as a diamond, circle, or rectangle, used to convey a basic message.

"Tahiti moor" means the mooring of a vessel where one end of the vessel is moored by a rope or chain attached to a buoy that is attached to a pile or device that includes, but is not limited to, an anchor, concrete block or similar device placed or dropped on submerged land. The other end of the vessel is moored to the facility that includes, but is not limited to, breakwaters, catwalk, piers, and docks where direct access can be made from the facility to the vessel either by gangway, plank, or stepping onto the vessel.

"Temporarily assigned berth" means a berth that is allocated to a permittee by a valid temporary mooring permit for interim use of the facility.

"Temporary mooring" means mooring pursuant to a temporary use permit. Calculation of the allowable period for temporary mooring shall include cumulative days moored with and without a permit.

"Temporary permittee" means a person holding a valid temporary mooring permit for the interim use of a berth or offshore mooring.

"Tender" means a dinghy or a larger launch used to carry persons and supplies to and from large vessels.

"Territorial sea baseline" means the line from which the territorial sea is measured, which is

generally the low water line along the coasts including the coasts of islands and special closing lines drawn tangent to the headlands across the mouths of rivers, bays, inlets, and other similar indentations.

"Thrill craft" means any motorized vessel that falls into the category of personal watercraft, which:

- (1) Is generally less than thirteen feet in length as manufactured;
- (2) Is generally capable of exceeding a speed of twenty miles per hour;
- (3) Can be operated by a single operator, but may have the capacity to carry passengers while in operation; or
- (4) Is designed to provide similar operating performance as a personal watercraft through a combination of small size, power plant, and hull design.

The term includes, but is not limited to, a jet ski, waverunner, wet bike, surf jet, miniature speed boat, hovercraft, and every description of vessel which uses an internal combustion engine powering a water jet pump as its primary source of motive propulsion, and is designed to be operated by a person or persons sitting, standing, or kneeling on, or being towed behind the vessel.

"Tow-in surfing" means utilizing a surfboard, often equipped with foot straps, to surf waves with the assistance of a thrill craft that is equipped with a rescue sled, bow tow-line, and a tow-in-rope.

"Transient vessel" means any vessel visiting the State for a period of less than ninety days.

"Ultralight or experimental float equipped aircraft" means an aircraft of light weight construction and limited range, generally carrying not more than two individuals, able to land on water surfaces using floats.

"Unassigned berth" means a berth that is not assigned to a permittee by a regular mooring permit.

"Underway" means the vessel is not at anchor, aground, or made fast to shore.

"Undocumented vessel" means any vessel which does not have a valid marine document issued by the Coast Guard, in accordance with the Code of Federal Regulations, Subchapter G, Part 67, Documentation of Vessels.

"Use permit" as used in these rules, means the authorization by the department to utilize [~~state~~] State boating facilities, offshore mooring areas, offshore moorings [~~and state ocean waters~~], State ocean waters, and navigable streams, as evidenced by the fully executed "agreement" described in section 13-231-2, Hawaii Administrative Rules.

"Vacation" means a period spent away from home or business in travel or recreation.

"Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, but excludes mopeds, devices moved by human power, or devices used exclusively upon stationary rails or tracks.

"Vessel" means all description of watercraft, used or capable of being used as a means of transportation on or in the water, except a seaplane.

"Vessel carrying passengers for hire" means any vessel which [~~is used for the carriage of any person or persons for a valuable consideration whether~~] carries any person or persons for a valuable consideration that goes directly or indirectly [~~flowing~~] to the owner, charterer, operator, agent, or any person who has [~~a lien on~~] an interest in the vessel.

"Vessel engaged in fishing" means any vessel fishing with nets, lines, trawls, or other fishing apparatus which restrict maneuverability, but does not include a vessel fishing with trolling lines or other fishing apparatus which do not restrict maneuverability.

"Vessel length" means the end-to-end measurement of a vessel, taken over the deck, parallel to the waterline from the foremost part of the bow to the aftermost part of the stern; provided, that hull platings, plankings, and extensions aside from the hull proper, such as a bowsprit, are not to be

included in the measurement; provided further, that an open-type vessel or one with a cockpit shall be measured as if a complete deck existed at the upper level of the hull.

"Vessel length overall" means the distance between the fore-and-aft extremities of a vessel including hull platings, plankings and any extensions beyond the hull proper, such as bowsprit, [~~bumpkin~~] boomkin, steering device, or other extensions.

"Vessel used as a place of principal habitation" means a vessel on which any person remains overnight ninety times or more in a calendar year while the vessel is moored in a [~~state~~] State small boat harbor.

"Visiting vessel" means a vessel [~~having a mooring within the State and~~] temporarily moored in [~~another state~~] a State small boat harbor while having a use permit applicable to a different State small boat harbor or other boating facility under the jurisdiction of the division.

"Water sledding" means the activity in which an individual is transported or carried over the surface of the water on an apparatus attached to a towline and towed by a vessel.

"Water sports equipment" means any equipment, contrivance, frame or other device that one or more persons may wear, lie, sit, or stand upon or in, and which is primarily for use in or on the water for pleasure, recreation or sports, and not necessarily for transportation.

"Waters of the State" means any waters within the jurisdiction of the State, the marginal seas adjacent to the State, and the high seas when navigated as part of a journey or ride to or from the shores of the State.

"Water taxi operations" means the shuttling of persons or cargo to or from the small boat harbor facility or a shoreside location authorized for such use under chapter 13-256, Hawaii Administrative Rules, to a destination or vessel located outside the small boat harbor boundary.

"Waterway marker" means any device designed to be placed in, or near, the water to convey an official

message to a boat operator on matters which may affect health, safety, or well-being, except that such devices of the United States or an agency of the United States are excluded from the meaning of the definition.

"Wildlife" means any member of any non-domesticated species of the animal kingdom, and game mammals and game birds living in a wild and non-domesticated state, whether reared in captivity or not, including any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof."  
[Eff 2/24/94; am 4/27/02; am 6/16/03; am and comp 12/7/13; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-4, 200-10, 200-22, 200-24) (Imp: HRS §§200-2, 200-4, 200-9, 200-10, 200-22, 200-24)

3. Section 13-230-21, Hawaii Administrative Rules, is repealed.

~~"§13-230-21 [Definitions. For the purpose of this subchapter:~~

~~"Adult" means a person who has reached majority.~~

~~"Dependent" means those persons who are defined as dependents by law, e.g., a spouse or minor child, or who are defined as dependents under Internal Revenue Service regulations or by the Armed Forces of the United States.~~

~~"Guardian" means a person invested by a court of law with the power, and charged with the duty, of taking care of the person and of managing the property of that person.~~

~~"Hanai" means a child who is taken permanently to be reared, educated, and loved by someone other than natural parents -- traditionally a grandparent or other relative. The child is given outright; natural parents renounce all claims to the child. Usually the child is given at infancy.~~



~~"Hearing officer" means a person appointed by the chairperson to hear appeals concerning the determination of residency status.~~

~~"Majority" means the age specified under section 577-1, Hawaii Revised Statutes.~~

~~"Minor" means a person who has not reached majority.~~

~~"Nonresident" means a person who is not a resident of the State of Hawaii.~~

~~"Parent" includes legal guardian and legal adoptive parent, except where the guardianship or adoption was acquired primarily to obtain resident status for the ward or adopted child. It shall also include a person who can legally claim an unmarried minor as a dependent for federal income tax purposes, but only when such person has been in loco parentis to the minor for the twelve-month period immediately preceding the residence determination date.~~

~~"Personal partner" is an individual considered to be a "personal partner" of the principal habitation permittee who is not a relative by biology or adoption to the principal habitation permittee. While living together on the vessel, the principal habitation permittee and personal partner shall not have a landlord-tenant relationship.~~

~~"Residence" or "residence status" is a combination of physical presence in a place and the intent to make such place one's permanent home.~~

~~"Residency determination date" means:~~

- ~~(1) The date a person applies for a use permit or for application renewal;~~
- ~~(2) The date of issuance or renewal of a use permit;~~
- ~~(3) The date the department makes a residency status determination following the receipt of a completed questionnaire submitted by a~~

~~person classified as a nonresident pursuant to the provisions of under section 13-230-27; or~~

~~(4) The date of a hearing officer's decision on a petition submitted to the department as prescribed in section 13-230-28~~

~~[Eff 2/24/94; am 8/8/11] (Auth: HRS §§200-2, 200-4, 200-10) (Imp: HRS §§200-2, 200-4, 200-10)] REPEALED."~~

~~[R \_\_\_\_\_]~~

4. Section 13-230-25, Hawaii Administrative Rules, is amended to read as follows:

"§13-230-25 Particular categories. (a) Adults. The resident status of every adult shall be established by the adult's own acts and intentions and shall not be derived from any other person, except as specifically provided otherwise in these rules.

(b) Minors.

- (1) Unemancipated minor. The residence of an unemancipated minor is the residence of the minor's father, if living, or the residence of the minor's mother, if the father is deceased.
- (2) Divorced parents. If the parents of an unemancipated minor are divorced, the minor's residence is that of the person to whom the minor's custody has been awarded by the court. If no award of custody has been made, the minor's residence is that of the father. However, if the minor maintains the minor's primary abode with the parent not having legal custody, residence of the minor is determined by that parent with whom the minor's primary abode is maintained.

- (3) Separated parents. If the parents of an unemancipated minor are separated, without a divorce having been granted or custody award having been made, the minor's residence is that of the father if the minor is not living with either parent. If the minor maintains primary abode with a parent, the minor's residence is the residence of that parent.
- (4) Death of a parent who had custody. The residence of an unemancipated minor becomes that of the surviving parent upon the death of the parent who had the minor's custody.
- (5) Both parents deceased. If both parents are deceased, the residence of the unemancipated minor remains that of the last parent to die until changed by court order. Upon court appointment of a guardian for the minor, the residence of the minor becomes that of the guardian.
- (6) A nonresident unemancipated minor attending an institution of higher learning outside of Hawaii or on active duty with the United States Armed Forces, whose parents become residents of Hawaii, and who would reach majority before deriving Hawaiian residence from the minor's parents' new status, may be classified as a resident for fee purposes when the minor's parents have completed twelve consecutive months of residence; provided that such classification will be lost if actions inconsistent with resident status are taken after leaving such institution or discharge from the military (e.g., failure to promptly make a home in Hawaii).

- (7) If an unemancipated minor's parents lose their Hawaii residence, the minor will be classified as a nonresident at the next residence determination date. However, if the parents' change of residence is due to obedience to active-duty military orders, the minor shall continue to pay only resident fees and charges as long as one of the minor's parents remain on active duty and in a Hawaii resident status.
- (8) Emancipated minors. An emancipated minor shall be considered an adult for purposes of residence hereunder. The following shall constitute indications of emancipation, no one of which is controlling:
  - (A) Financially independent or self-supporting.
  - (B) Subsistence not provided by parent or legal guardian.
  - (C) Prior military service.
  - (D) Other primary and secondary indications of residence enumerated under section 13-230-24.
  - (E) Any other conduct inconsistent with parental control and custody.
- (9) Hanai. A person may base the person's residency on that of other than the parent or legal guardian, provided that the relationship between the person and the person or persons other than the parent or legal guardian is that of "hanai".
  - (c) Aliens. In addition to all other requirements herein, an alien shall be classified as a resident only upon the alien's admission to the United States for permanent residence (immigration visa). Residence of a minor alien can only be derived from

another person (e.g., a parent) when both that person and the minor achieve resident status.

(d) Military personnel. Service in the armed forces of the United States shall not of itself negate establishment of residence in Hawaii. For instance, a nonresident member of the United States Armed Forces whose last duty station is in Hawaii and who does all other things necessary to establish a bona fide Hawaiian domicile, including discharge from the military in Hawaii, may be classified as a resident. In addition, a person who establishes a Hawaiian domicile but who enters the military service prior to the expiration of twelve months from the date of such establishment may add the period of the person's military service on to the former period to satisfy the twelve-month rule.

(e) Married persons and persons in other legal relationships. A married person or reciprocal beneficiary or civil union partner may establish resident status, either on the basis of indications of residence, or on the basis of the indications of residence of the person's spouse. However, the person must clearly state intent to make Hawaii the person's permanent residence. For purposes of the liveaboard fee, the person holding a principal habitation permit may rely on the residency indications of a [~~personal partner~~] reciprocal beneficiary who lives on board the vessel." [Eff 2/22/94; am and comp 12/7/13; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-4, 200-10) (Imp: HRS §§200-2, 200-4, 200-10)

5. Section 13-231-3, Hawaii Administrative Rules, is amended to read as follows:

"§13-231-3 Use permits; issuance. (a) [~~"Use permit" as used in these rules means the authorization~~

~~by the department to utilize state boating facilities, offshore mooring areas, offshore mooring, state ocean waters, and navigable streams, as evidenced by the fully executed "agreement" described in section 13-231-2.~~—]The department may issue the following types of use permits:

- (1) Mooring permit. A use permit which authorizes the docking, mooring, or anchoring of a vessel at a small boat harbor or offshore mooring area.
  - (A) Regular mooring permit. A use permit which authorizes the permittee to moor a vessel in a state small boat harbor or at an offshore mooring area for a period not to exceed one year from the date of issuance.
  - (B) Temporary mooring permit. A non-renewable use permit which authorizes the permittee to moor a vessel in a state small boat harbor or at an offshore mooring area for a period of thirty days or less from the date of issuance.
  - (C) All applicants for a mooring permit shall provide documentation of the applicant's ownership structure, including the ownership structure of any entity that would own or control, directly or indirectly, the mooring permit.
- (2) Waikiki catamaran registration certificate. A Waikiki catamaran registration certificate is a document, issued by the department, that may authorize its holder to utilize state boating facilities, offshore and onshore mooring, in Waikiki ocean waters and beach. All applicants for a Waikiki catamaran registration certificate shall provide the following information:
  - (A) Vessel Documentation or registration.

- (B) Vessel Certificate of Inspection (if applicable).
  - (C) Certificate of business liability insurance pursuant to the requirements of section 13-231-65 of these rules.
  - (D) Certificate of good standing from the Hawaii Department of Commerce and Consumer Affairs.
  - (E) Tax clearance certificate from the department of taxation.
  - (F) Conservation District Use Permits (if applicable)
  - (G) Affidavit describing any and all sales or transfers of any ownership interest in the business.
  - (H) Documentation of the applicant's ownership structure, including the ownership structure of any entity that would own or control, directly or indirectly, the Waikiki catamaran registration certificate.
- (3) Stay aboard permit. A use permit which authorizes use of a state small boat harbor or offshore mooring by the permittee for the purpose of staying aboard a vessel while moored in a state small boat harbor or at an offshore mooring or at anchor.
- (4) Vacation permit. A use permit which authorizes use of the small boat harbor or an offshore mooring area by the permittee for the purpose of using a vessel as a vacation site while moored in a state small boat harbor or at an offshore mooring or at anchor.
- (5) Principal habitation permit. A use permit which authorizes use of the small boat harbor by the permittee for the purpose of using the vessel as a principal place of habitation while moored in Ala Wai or Keehi small boat harbor or in the Keehi Lagoon mooring area.

- (6) Commercial use permit. A use permit which authorizes the owner of a commercial vessel to engage in commercial activities as specified in the permit. All applicants for a commercial use permit shall provide the following information:
- (A) Vessel Documentation or registration.
  - (B) Vessel Certificate of Inspection (if applicable).
  - (C) Certificate of business liability insurance pursuant to the requirements of section 13-231-65 of these rules.
  - (D) Certificate of good standing from the Hawaii Department of Commerce and Consumer Affairs.
  - (E) Tax clearance certificate from the department of taxation.
  - (F) Conservation District Use Permits (if applicable)
  - (H) Affidavit describing any and all sales or transfers of any ownership interest in the business.
  - (J) Documentation of the applicant's ownership structure, including the ownership structure of any entity that would own or control, directly or indirectly, the commercial use permit.
- (7) Storage permit. A use permit which authorizes use of a small boat harbor storage area for vessels or other items on land at a small boat harbor.
- (8) Miscellaneous permit. A use permit which authorizes use of a small boat harbor, ~~or~~ an offshore mooring area, or State ocean waters for other purposes as may be authorized by the department in its use permit and is consistent with these rules and applicable laws.

(b) Use permits, or where applicable, Waikiki catamaran registration certificates, shall be issued only after the department has determined that all



applicable laws have been complied with and that all fees and charges have been paid.

(c) The issuance of any use permit by the department shall not create a property interest in favor of the permittee to an unrestricted use of [state] State small boat harbors, facilities or [state] State ocean waters." [Eff 2/24/94; am and comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4, 200-6) (Imp: HRS §§200-2, 200-3, 200-4, 200-6)

6. Section 13-231-6, Hawaii Administrative Rules, is amended to read as follows:

"§13-231-6 Revocation of use permit. (a) If after notice and lapse of a reasonable period of time set by the department, the permittee fails to remedy any breach of the duties, covenants or conditions of the use permit or to desist from violating or permitting violation of these rules, the department may revoke the permittee's use permit.

(b) In addition to subsection (a), the department may revoke a use permit for a deliberate misstatement or [~~willful~~] willful failure to disclose any material fact in an application for a vessel number, documentation, registration of a vessel, or any of the use permits specified in section 13-231-3.

(c) A permittee's failure to pay all fees owed to the department within thirty days of the date payment is due shall result in suspension of the right to conduct business under the commercial use permit or catamaran registration certificate until all past due fees are paid in full. Each and every notification of default shall be sent by certified mail, return receipt requested to the last address of record of the permittee on record with the division of boating and ocean recreation. Any delinquency beyond the due date, even within the thirty days, may cause the commercial use permit or catamaran registration certificate to be revoked." [Eff 2/24/94; am and comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-4, 200-10,

200-22, 200-24) (Imp: HRS §§200-2, 200-4, 200-10, 200-22, 200-24)

7. Section 13-231-13, Hawaii Administrative Rules, is amended to read as follows:

"§13-231-13 Joint and several liability; non-transferability of use permits. (a) All individuals and entities who have signed any agreement with respect to a vessel shall be jointly and severally liable for the full performance of such agreement. No use permit shall be transferable, so that whenever a permittee parts with possession or transfers the title to or interest in the vessel identified in the permit to another person by any arrangement, the use permit shall expire except as provided herein. The new possessor, transferee, or owner shall have no right to use the permit.

(b) Upon written application to and approval by the department:

- (1) The original mooring permittee may retain the mooring space under the permittee's mooring permit; provided that within thirty days the permittee moves into the space another vessel owned by the permittee of appropriate characteristics for occupancy of the berth or mooring space and pays the appropriate fees therefor;
- (2) A principal owner of a vessel may retain a berth or mooring space if that owner acquires the interest of one or more co-owners because a co-owner has died or moved out of the State;
- (3) An owner may retain the berth or mooring space if an interest in a vessel is transferred to the owner's spouse or immediate family member or a [~~personal partner~~] reciprocal beneficiary authorized to live on board under a principal habitation permit;
- (4) The spouse or immediate family member, or a [~~personal partner~~] reciprocal beneficiary

authorized to live on board under a principal habitation permit, of a permittee, may retain all use permits upon the death of the permittee, provided that the permittee's will, trust, or a court decree (the department may require a court decree if the department finds it necessary) states that the spouse or immediate family member, or a [~~personal partner~~] reciprocal beneficiary authorized to live on board under a principal habitation permit shall be awarded ownership of the vessel identified in the use permit; or

- (5) The department may extend the deadline for the permittee holder to place a new vessel in the assigned berth or mooring space or in operation if conclusive evidence is presented to the department that the granting of additional time for compliance is reasonable and essential to prevent undue hardship, provided that any extension of time necessary to place a new vessel in the berth or mooring space or in operation shall not exceed one hundred twenty days from the date of sale or transfer of the previously assigned vessel.

(c) Notwithstanding the requirements of subsection (a), the department may permit a one-time change in ownership of the permittee's vessel from personal ownership to corporate or other business ownership, provided that the individual holds a valid commercial use permit, a valid catamaran registration certificate, or is engaged in commercial fishing as a primary means of livelihood, and notifies the department in writing of an intended change in ownership. The transfer of all use permits or registration certificates from the individual to the new corporation or other business entity shall be completed within one year of the date of receipt of the notification of intended change of ownership. The following requirements and conditions shall apply to the foregoing change in ownership:

- (1) The ownership of any corporation or other business entity formed under the provisions of this subsection shall include the original individual owner;
- (2) The permittee or certificate holder shall apply for the reissuance of the commercial permit, mooring permit, catamaran registration certificate, and any other use permits in the name of the corporation or other business entity in accordance with the application procedures established by this chapter. Each application shall be accompanied by a copy of the charter of incorporation or other evidence acceptable to the department that the new corporation or other business entity is properly registered with the department of commerce and consumer affairs and is licensed to do business in the State; and
- (3) Each application for change of ownership shall be reviewed by the department in accordance with the provisions of section 13-231-82.

(d) No corporation or other business entity shall be eligible for the initial issuance of a mooring permit at a state small boat harbor unless the entity is eligible for a then available commercial use permit or catamaran registration certificate.

(e) "Immediate family member" means, for purposes of this section, a natural individual who by blood line or adoption is a child, grandchild, parent, or grandparent of the deceased." [Eff 2/24/94; am and comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-4, 200-9, 200-10) (Imp: HRS §§200-2, 200-4, 200-9, 200-10)

8. Section 13-231-15, Hawaii Administrative Rules, is amended to read as follows:

"§13-231-15 Boat owner required to report change of ownership, address, and other changes. (a) The owner of any vessel moored, stored, or left in a small

boat harbor or offshore mooring area shall notify the department in writing within seven days if:

- (1) The owner no longer has possession of the vessel;
- (2) All or any interest in the vessel is transferred to another person or persons;
- (3) The owner's address or telephone number changes;
- (4) The vessel is chartered, leased, or rented; or
- (5) There is any change of agents or their telephone numbers or addresses.

(b) The new possessor or owner of any interest in any vessel moored in a small boat harbor or offshore mooring area shall within seven days after acquiring the same, inform the department in writing concerning the acquisition. If the vessel is owned by a corporation, the duties and obligations of the "owner" as prescribed in this section devolve upon the person who owns or controls a majority of the stock of the corporation. If there is no such ownership or control, the corporation must perform the duties and obligations. ~~"Transfer" [as used in this section includes transfers of stock in a corporate owner if the transfer affects a change in the majority stockholder. "Interest" as used in this section includes ownership of stock in a corporation that owns a vessel moored in a small boat harbor or offshore mooring area]~~ includes any change in control, by whatever means, of any entity that owns or controls, directly or indirectly, a use permit.

(c) Evidence of any ~~[wilful]~~ willful misstatement or omission of fact regarding the ownership of a vessel moored in a ~~[state]~~ State small boat harbor or offshore mooring area, or regarding transfer of ownership of a corporation or other

business entity to which a mooring permit, commercial use permit, catamaran registration certificate, or other permit has been issued, including failure to notify the department of a change of ownership, shall be cause for immediate termination of all permits and catamaran registration certificates held by the parties involved, and may be a bar against the issuance of any permit or catamaran registration certificates in the future." [Eff 2/24/94; am and comp 9/25/14; am \_\_\_\_\_] [Auth: HRS §§200-2, 200-3, 200-4, 200-10] [Imp: HRS §§200-2, 200-3, 200-4, 200-10]

9. Section 13-231-26, Hawaii Administrative Rules, is amended to read as follows:

"§13-231-26 Use of a vessel as a place of principal habitation. (a) A vessel owner who holds a valid regular mooring permit issued by the department authorizing the owner to moor the owner's vessel in Ala Wai or Keehi small boat harbors may use that vessel as a place of principal habitation if the owner has applied for and secured a principal habitation permit issued by the department in accordance with these rules, provided that the owner and the vessel meet the requirements set forth in these rules.

(b) A permit authorizing the use of a vessel as a place of principal habitation shall not be issued if the vessel is owned by a corporation.

(c) No person shall be issued a permit authorizing the use of any vessel as a place of principal habitation while the vessel is moored at the following locations in Ala Wai small boat harbor:

- (1) Berths 23 through 79;
- (2) The area leased to the Waikiki Yacht Club;
- (3) The area leased as a marine fueling facility; and
- (4) A haul-out facility.

(d) A vessel owner may utilize the owner's vessel as a place of principal habitation while moored

in the area leased to the Hawaii Yacht Club if the owner has applied for and holds a valid principal habitation permit issued by the department in accordance with these rules.

(e) Only the vessel owner, co-owner, the spouse or, in the alternative, one [~~personal partner~~] reciprocal beneficiary of each, and their legal dependents may be issued a principal habitation permit. [~~A "personal partner" is an individual considered to be a "significant other" of the vessel owner principal habitation permittee who is not a relative by biology or adoption of the vessel owner principal habitation permittee.~~] While living together on the vessel, the vessel owner principal habitation permittee and [~~personal partner~~] reciprocal beneficiary shall not have a landlord-tenant relationship. The department shall retain the right to limit the total number of people allowed to live on a particular vessel based on reasonable health, safety, security, or environmental concerns for persons on the vessel, other permittee's at the harbor, public use of the harbor, or the harbor itself, and may deny the issuance of a principal habitation permit if such issuance would exceed the limit determined by the department to be appropriate.

(f) The owners of no more than one hundred twenty-nine vessels moored at Ala Wai small boat harbor shall be issued permits to use their vessels as a place of principal habitation. The owners of no more than thirty-five vessels moored at Keehi small boat harbor may be issued such permits. Any vessel used as a place of principal habitation that is temporarily absent from its mooring shall continue to be considered as one of the vessels being used as a place of principal habitation if the owner retains a principal habitation permit as provided in section 13-231-11." [Eff 2/24/94; am 8/20/12; am and comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-4, 200-10) (Imp: HRS §§200-2, 200-4, 200-9, 200-10)

10. Section 13-231-28, Hawaii Administrative Rules, is amended to read as follows:

"§13-231-28 Staying aboard vessels moored at Ala Wai or Keehi small boat harbor. (a) Staying aboard a vessel moored at Ala Wai or Keehi small boat harbor is prohibited except that:

- (1) Owners holding a valid regular mooring permit, the spouse or [~~personal partner~~] reciprocal beneficiary of each, their legal dependents, and their nonpaying guests, when in the company of the owner, may stay aboard the vessel without a use permit upon written notification to the department on or before the date of stay; provided that the period does not exceed any three nights in a week and a total of any one hundred twenty nights in a calendar year, including vessels used as a vacation site;
- (2) Staying aboard a vessel in excess of any three nights in a week may be permitted when done in accordance with a valid:
  - (A) Stay aboard permit issued pursuant to section 13-231-22 (staying aboard transient or visiting vessels);
  - (B) Stay aboard permit issued pursuant to section 13-231-29 (vessel used as a vacation site);
  - (C) Stay aboard permit issued to a vessel owner holding a valid principal habitation permit authorizing a nonpaying bona fide guest to stay aboard the vessel in the company of the owner for a period not to exceed any thirty days in a calendar year.

(b) When staying aboard in accordance with subsection (a)(1), and the stay is extended past the third day, the entire period of stay will be counted against time used as a vacation site in accordance with section 13-231-29.

(c) Each harbor resident or other person authorized by the department to stay aboard a vessel in a small boat harbor in accordance with this chapter, except for those under the age of six, may



secure one shower facility key. Prior to receiving the shower key, the person shall deposit with the State the amount specified in section 13-234-32. No person shall be permitted to replace a shower facility key more than two times." [Eff 2/24/94; am 8/8/11; comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-4, 200-9, 200-10) (Imp: HRS §§200-2, 200-4, 200-9, 200-10)

11. Section 13-231-29, Hawaii Administrative Rules, is amended to read as follows:

"§13-231-29 Vessel used as a vacation site. (a) Staying aboard a vessel moored in Ala Wai or Keehi small boat harbor during a vacation is authorized but limited to owners holding valid regular mooring permits authorizing them to moor their vessels in the small boat harbor, the spouse or [~~personal partner~~] reciprocal beneficiary of each, their legal dependents, and nonpaying guests when accompanied by the owner, provided that:

- (1) The aggregate period of the stay is not more than thirty days in a calendar year;
- (2) The vessel owner secures a vacation permit and a stay-aboard permit for each individual vacationer;
- (3) The vessel and its occupants comply with the sanitation, vessel equipment, and all other requirements set forth under this chapter; and
- (4) The vessel owner provides evidence that the owner maintains a bona fide shoreside residence.

(b) No vacation permit shall be issued for a vessel registered or documented as being owned by a corporation." [Eff 2/24/94; am 8/8/11; comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-10) (Imp: HRS §§200-2, 200-9, 200-10)

12. Section 13-231-45, Hawaii Administrative Rules, is amended to read as follows:

~~"§13-231-45 Vessel Inspections. (a) ["Approved marine surveyor" as used in this section means a person who has been approved by the chairperson to inspect a vessel for an owner seeking a permit to moor a vessel in a small boat harbor in accordance with subsections (h) and (i). "Approved vessel inspector" as used in this section means an employee of the department who has been designated by the chairperson to inspect a vessel for compliance with criteria necessary to obtain a mooring permit.] An inspection conducted by an approved vessel inspector is deemed to meet the requirements of the marine inspection required by section 200-13, Hawaii Revised Statutes, and may be valid for a period of two years.~~

(b) Before a regular mooring permit is issued or renewed, the vessel owner shall complete a satisfactory vessel inspection conducted by an approved vessel inspector, or present a certificate not more than two years old to the department at the owner's own expense, signed by an approved marine surveyor certifying the surveyor has inspected the vessel and considers it to fulfill the minimum requirements described in Exhibit "B" located at the end of this chapter and incorporated herein entitled "vessel inspection report" and dated July 2012. The department reserves the right to inspect any vessel to ensure that any deficiencies or omissions noted on a marine inspection have been corrected prior to issuing a mooring permit. All vessel owners shall also demonstrate to the department that their vessel is capable of navigating beyond the confines of the harbor and returning under its own power to its assigned mooring/berth prior to the mooring permit being issued.

(c) Commercial vessels carrying more than six passengers for hire are exempted from the provisions of Subsections (a) and (b) when evidence of a current Coast Guard certificate of inspection is presented.

(d) Owners of vessels failing the vessel inspection shall have thirty days to correct deficiencies and complete the inspection. Failure to

do so will preclude re-issuance of the use permit or be cause for rejection of the application for mooring.

(e) The department may extend the deadline for correction of deficiencies prescribed in subsection (d) if the vessel owner presents conclusive evidence to the department that the granting of additional time is reasonable and essential due to the necessity of replacing essential parts and gear and that reasonable and diligent efforts by the owner to secure the items necessary to repair the vessel or replacement of parts is demonstrated, and further provided that any extension of time for compliance shall not exceed sixty days.

(f) Owners of vessels that fail the vessel inspection may contest the decision before an arbitration board as established in section 200-13, Hawaii Revised Statutes. The costs of the arbitration shall be borne by the vessel owner if it is determined that the vessel does not meet the minimum requirements to moor in a small boat harbor in accordance with these rules. No additional time allowance for the correction of deficiencies will be granted following arbitration and the vessel shall be removed from the harbor. The costs of the arbitration shall be borne by the State if it is determined that the vessel does meet minimum requirements.

(g) The fee for a vessel inspection conducted by the department, pursuant to this section shall be as prescribed in section 13-234-29 provided that holders of commercial use permits and registration certificates with proof of certification of inspection from the United States Coast Guard shall be exempt from this requirement or state fees associated therewith.

(h) A person who desires to become an approved marine surveyor shall apply to the department upon a form furnished by the department and pay the application fee prescribed in section 13-234-30.

(i) An application to become an approved marine surveyor shall not be accepted by the department unless the applicant is engaged wholly or partly in the business of performing marine surveys for gain or

compensation and the person's surveys are acceptable to at least one insurance company or surety company authorized to do business in the State, and is a member of a nationally recognized marine surveyor organization as approved by the department.

(j) An approved marine surveyor permit shall be valid for a period of three years from date of issuance. The department reserves the right to revoke any approved marine surveyor permit at any time prior to the expiration of the permit.

(k) A satisfactory vessel inspection shall consist of the following:

- (1) Presentation of the vessel to be inspected at a place designated by the harbor agent;
- (2) A demonstration that the vessel is capable of being regularly navigated beyond the confines of the harbor or mooring area and maneuvering into and out of the assigned berth;
- (3) A finding that the vessel and all systems are in good material and operating condition;
- (4) A finding that the requirements described in the exhibit at the end of this chapter entitled "vessel inspection report" are met; and

Applicable standards published by the U.S. Coast Guard and the American Boat and Yacht Council, Inc. (ABYC) shall be used in conducting the vessel inspection, and are adopted and incorporated herein by reference.

(l) A marine survey shall be required for any vessel which has undergone any substantial reconstruction, alteration or modification of the original vessel design, certifying that such reconstruction, alteration or modification does not materially affect the vessel's stability or maneuverability, and the existing power plant is in good operating condition and meets the minimum power requirement necessary for safe navigation beyond the confines of the small boat harbor or offshore mooring area in which it is moored. Any vessel operating under a commercial use permit or registration certificate

that can produce evidence of a valid United States Coast Guard inspection certification for the above condition shall not be required to obtain a separate marine survey. A certificate of protection and indemnity insurance for the vessel, in an amount of not less than \$100,000, naming the State as an additional insured, shall be required in addition to the marine survey.

(m) No modification or alteration to a houseboat moored in Keehi Lagoon which changes the length, beam or size of silhouette area from that which existed at the time of issuance of the initial mooring permit shall be allowed without prior approval of the department, provided that routine maintenance and repairs for safety, security and structural integrity shall be allowed." [Eff 2/24/94; am and comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-1, 200-2, 200-4, 200-9, 200-10) (Imp: HRS §§200-1, 200-2, 200-4, 200-9, 200-10)

13. Section 13-231-56, Hawaii Administrative Rules, is repealed.

~~"§13-231-56 [Definitions, gross receipts. Gross receipts as used in this subchapter means all moneys paid or payable to the account of the vessel owner, for the rendition of services, or resulting from trade, business, commerce, or sales by the vessel owner when the services, trade, business, commerce, or sales have a direct relationship to the vessel] [Eff 2/24/94; am and comp 9/25/14] (Auth: HRS §§200-2, 200-4, 200-10) (Imp: HRS §§200-2, 200-4, 200-10)] REPEALED." [R \_\_\_\_\_]~~

14. Section 13-231-70, Hawaii Administrative Rules, is amended to read as follows:

"§13-231-70 Water taxi operations. (a) Water taxi operations may be permitted at all small boat harbors provided that the owner of the water taxi operation has been issued a commercial use permit.

~~[For the purpose of this section, "water taxi operations" means the shuttling of persons or cargo to or from the small boat harbor facility or a shoreside location authorized for such use under chapter 13-256, Hawaii Administrative Rules, to a destination or vessel located outside the small boat harbor boundary.]~~

(b) No water taxi operations may be permitted to transport passengers and crew from commercial vessels moored offshore, or the shuttling of passengers to and from a commercial vessel moored elsewhere if that vessel has not been issued a commercial use permit for the small boat harbor or other valid commercial use permit issued by the department. There shall be no restriction on the use of water taxi service by recreational vessels, vessels owned by the United States, or commercial vessels which are exempt from commercial use permit requirements under the provisions of section 13-231-57.

(c) The department may furnish a current list of commercial vessels authorized to receive water taxi service as provided in subsection (b) upon request by the owner of the vessel performing water taxi operations at no charge." [Eff 2/24/94; am and comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4, 200-10) (Imp: HRS §§200-2, 200-3, 200-4, 200-10)

15. Chapter 13-232, Hawaii Administrative Rules, is amended by adding a new section to read as follows:

"§13-232-57.1 Feeding of colonies, strays, wildlife, or feral animals prohibited. (a) While on any property under the jurisdiction of the division, no person shall feed or deliberately introduce any food material, substance, or attractant directly to, or in the vicinity of, any colony, stray, wildlife, or

feral animal except as authorized by the department or the department's authorized representative.

(b) Animals include, but are not limited to birds, cats, chickens, deer, dogs, eels, fish, mongooses, pigs, rodents, seals, sharks, and turtles.

(c) Nothing in this section prohibits the use of bait or chum to attract fish for fishing or harvesting purposes." [Eff \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

16. Chapter 13-232, Hawaii Administrative Rules, is amended by adding a new section to read as follows:

"§13-232-57.2 Animal abandonment and creating or contributing to colonies prohibited. (a) While on any property under the jurisdiction of the division, no person shall abandon an animal nor create or contribute to a colony.

(b) Violators shall be fined not less than \$50 and not more than \$1,000 or sentenced to a term of imprisonment of not more than thirty days, or both, for each violation and shall also be subject to penalties in accordance with chapter 143-2.6, Hawaii Revised Statutes." [Eff \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4, 200-25) (Imp: HRS §§200-2, 200-3, 200-4, 200-25)

17. Section 13-232-8, Hawaii Administrative Rules, is amended to read as follows:

"§13-232-8 Marine toilets - restrictions. (a) No toilet on a vessel or contrivance shall be operated so as to discharge any untreated sewage directly or indirectly into the waters of a small boat harbor.

(b) No person on a vessel or contrivance equipped with a toilet shall use, or permit the use of that toilet on the waters of a small boat harbor unless the toilet is equipped with facilities in good operating condition that will adequately treat, hold, incinerate, or otherwise handle sewage in a manner

that is capable of preventing water pollution. A water pollution control device that is acceptable for the purposes of this section is any device determined by the director of the department of health to be effective in arresting the possibility of pollution from sewage passing into or through a toilet aboard a vessel or contrivance.

(c) No person shall live on board a vessel or contrivance in any small boat harbor unless it contains one or more toilets equipped with water pollution control devices in good operating condition and of a type acceptable to the director of health; provided that, the department may permit the operator or other persons to live on board a vessel not equipped with a toilet and acceptable water pollution control device for a period not to exceed the period described in sections 13-231-21 and 13-231-22 if:

- (1) The vessel is from another state or a country other than the United States and is temporarily using the waters of this State or if the vessel has a home port in the [state] State but is visiting another small boat harbor;
- (2) Adequate on-shore toilet facilities are readily available, meaning within a walking distance of not more than two hundred feet, for [the] use by the persons living on board; and
- (3) A toilet aboard the vessel is not used while in the small boat harbor.

~~["Readily available" as used in this section means within a walking distance of not more than two hundred feet.]~~ [Eff 2/24/94; am \_\_\_\_\_]  
 (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)



§13-232-10

18. Section 13-232-10, Hawaii Administrative Rules, is amended to read as follows:

“§13-232-10 Backflow prevention device required on connections to water line - use of water operated de-watering device prohibited. (a) No person shall connect a vessel's water supply system to a small boat harbor portable water supply system, unless an approved backflow prevention device has been installed at the hose bib or other point of connection. [~~An “approved backflow prevention device” means a backflow prevention device that meets the requirements contained in standard 1001, American Society of Sanitary Engineers or the Uniform Plumbing Code adopted by the International Association of Plumbing and Mechanical Officials (IAPMO).~~]

(b) No person shall use any water-operated siphon or other water operated de-watering device, equipment, or mechanism connected to a small boat harbor water supply system for the purpose of removing water or any liquid from the bilges of a vessel, provided such a device may be temporarily used when necessary during an emergency to prevent a distressed vessel from sinking if an approved backflow prevention device has been installed in accordance with subsection (a).” [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

19. Section 13-232-30, Hawaii Administrative Rules, is amended to read as follows:

“§13-232-30 Fire signal for vessels in small boat harbors. Five prolonged blasts, each from four to six seconds in duration, on a vessel's whistle, horn, or other sound producing device indicates:

- (1) A fire on board a vessel not underway; or
- (2) A fire at any facility to which the vessel may be moored.

~~[The words "prolonged blast" used in this section mean a blast of from four to six seconds duration.]~~  
This fire signal shall not be used for other purposes in any small boat harbor." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4)  
(Imp: HRS §§200-2, 200-3, 200-4)

20. Section 13-232-57, Hawaii Administrative Rules, is amended to read as follows:

"§13-232-57 Dogs, cats or other domestic pets.

(a) ~~[This section is applicable only in Ala Wai and Keeki boat harbors.]~~As used in this section, unless the context otherwise indicates:

~~["At large" means:~~

- ~~(1) On a vessel not the property of the owner of the pet, without consent of the vessel owner; or~~
- ~~(2) In any public place within a small boat harbor, except when under control of the owner by leash, cord, chain, or other similar means of physical restraint, provided that such leash, cord, chain, or other means is not more than eight feet in length.]~~

~~["Owner]~~ Pet owner" means any person owning, harboring or keeping a dog, cat, or other domestic pet, or having custody thereof. "Stray" ~~[or "stray dog"]~~ means [any dog running at large] any dog, cat, or other animal without a microchip or other registered owner-identifier or is living or roaming off its owner's property without permission to be on other public or private property. Strays may also be feral or abandoned.

(b) This section shall not apply to:

- (1) Service animals as defined in the Title II of the Americans with Disabilities Act (ADA)

as adopted by the United States Department of Justice;

- (2) Dogs trained and used by a law enforcement agency in law enforcement activities while the dogs are engaged in the performance of such work; or
- (3) An obedience trial, where tracking and show dogs are accompanied by their owners and are being trained or in competition, provided permission is first obtained from the department for such use.

(c) No person shall introduce or keep a dog aged three months or older in a small boat harbor unless the dog is licensed as prescribed in chapter 143, Hawaii Revised Statutes. Officers and employees of the department, and every other person authorized by law may seize any unlicensed dog found at large within a small boat harbor, and confine and dispose of the dog as provided in chapter 143, Hawaii Revised Statutes. A dog, cat, or other domestic pet is considered at large when:

- (1) On a vessel not the property of the pet owner, without consent of the vessel owner;  
or
- (2) In any public place within a small boat harbor, except when under control of the pet owner by leash, cord, chain, or other similar means of physical restraint, provided that such leash, cord, chain, or other means is not more than eight feet in length.

(d) No ~~dog~~ pet owner shall permit the owner's dog, cat, or other domestic pet to become a stray. Any dog, cat, or other domestic pet, while being a stray within a small boat harbor, may be seized by officers and employees of the department, or by any

other person authorized by law, and shall be disposed of as provided in chapter [443] 183D-65, Hawaii Revised Statutes.

(e) No pet owner shall permit the owner's pet to excrete any solid waste in any public place or on any premises in a small boat harbor not the property of the pet's owner, provided no violation of this subsection shall occur if the owner promptly and voluntarily removes the animal waste.

(f) No person shall introduce or keep any animals except for birds, fish, or other common domestic pets within the confines of a small boat harbor.

(g) In any event no person shall introduce or keep a dog, cat, or other domestic pet at any small boat harbor where dogs, cats, or other domestic pets are prohibited by a sign or other marker posted by the department." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

21. Section 13-232-58, Hawaii Administrative Rules, is amended to read as follows:

"§13-232-58 Sleeping or camping prohibited. Sleeping and/or camping in any State facility or property under the jurisdiction of the division [~~small boat harbor~~] is prohibited except on board a vessel moored in a [the] small boat harbor with the proper authorization of the department." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

22. Section 13-232-60, Hawaii Administrative Rules, is amended to read as follows:

"§13-232-60 Serving, sale, and consumption of liquor in [state] State small boat harbors, and boat launching facilities. (a) It is declared to be the intent of the department to prohibit the open and unrestricted use or consumption of liquor on or within State small boat harbors and boat launching facilities. For the purpose of this section, "liquor" or "intoxicating liquor" shall mean the same [Liquor,] as defined in section 281-1, Hawaii Revised Statutes. [~~shall not be consumed within any state small boat harbor or boat launching facility except on a vessel issued with a valid mooring permit, or unless otherwise permitted by the department.~~

~~(b) No person shall sell any liquor within a state small boat harbor or boat launching facility unless that person is licensed as required by chapter 281, Hawaii Revised Statutes.]~~

(b) No person shall possess, other than in a container in the manufacturer's sealed condition, intoxicating liquor on any street or sidewalk, or in any public off-street parking area or any building located thereon within a state small boat harbor and/or State boat launching facility.

(c) The prohibitions contained in subsection (b) of this section shall not apply to:

- (1) Possession, use or consumption of intoxicating liquor on board a vessel with a valid mooring permit;
- (2) Intoxicating liquor procured from a vendor dispensing intoxicating liquor pursuant to a permit or license issued by the department when the intoxicating liquor is possessed or consumed in a manner and in a place consistent with the terms and conditions of such permit or license;
- (3) The consumption or possession of an intoxicating liquor in a motor vehicle upon any public street, road, or highway; or

(4) The possession of a container of wine authorized to be removed from liquor-licensed premises pursuant to HRS Section 281-31(q), provided that the container has been corked or resealed.

(d) Subject to the provisions of HRS Chapter 281, as amended, and if the sale and consumption of intoxicating liquor is permitted by a disposition or agreement with the department, the prohibitions contained in subsection (b) of this section shall not apply within the licensed premises (as described in a liquor license) of concessionaires or licensees of the department.

(e) The penalties provided in this section are criminal penalties and the article shall be enforced by the Division of Conservation and Resources Enforcement (DOCARE), the county police department, and any other authorized entity as provided by law.

(1) A DOCARE officer or police officer may arrest an alleged violator of any provision of this article or may issue a citation in lieu of arrest as provided in section 803-6, Hawaii Revised Statutes.

(2) Penalty. Any person convicted of a violation of any provision of this article shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 30 days, or both such fine and imprisonment."

[Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

23. Section 13-233-13, Hawaii Administrative Rules, is amended to read as follows:

"§13-233-13 Operation, parking, or storage of bicycles or play vehicles. (a) [~~This section is applicable only in Ala Wai and Kechi boat harbors. As used in this section, "bicycle" means every device propelled by human power upon which any person may ride, having two tandem wheels which are sixteen inches in diameter or greater, and including any~~

~~device generally recognized as a bicycle though equipped with two front or two rear wheels.~~

~~(b)~~ Effect of section.

- (1) The parent of any child or the guardian of any ward shall not authorize or knowingly permit the child or ward to violate this section.
- (2) This section applicable to bicycles and play vehicles shall apply whenever a bicycle or play vehicle is ridden, operated, parked, or stored within the confines of a small boat harbor.

~~(e)~~ (b) Bicycle tax. No bicycle shall be used for conveyance of any person within the confines of a small boat harbor unless the annual tax has been paid and a valid license tag is attached to the bicycle in accordance with section 249-14, Hawai'i Revised Statutes.

~~(d)~~ (c) The department may erect signs on any sidewalk, roadway, pier, wharf, catwalk, or other location prohibiting the riding of bicycles thereon, and when such signs are in place, no person shall disobey the same.

~~(e)~~ (d) Parking or storage of bicycles. No person shall park, store, place, or leave a bicycle on catwalks, piers, sidewalks, roads, parking areas, or any other public area except in bicycle parking racks.

~~(f)~~ (e) Traffic and bicycle equipment laws applicable to persons riding bicycles. Every person riding a bicycle within the confines of a small boat harbor shall be granted all the rights and shall be subject to all the duties applicable to the bicycle operator and to the driver of a vehicle by chapter 291C (Statewide Traffic Code), Hawai'i Revised Statutes, which by reference is hereby incorporated in these rules and made a part hereof as though fully recited herein, except as to those provisions of chapter 291C which by their nature can have no

application to a bicycle operator." [Eff 2/24/94; comp 4/5/08; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

24. Section 13-233-29, Hawaii Administrative Rules, is amended to read as follows:

"§13-233-29 Eligibility for parking permits; fee per vehicle. (a) Persons eligible for the parking permits described in section 13-233-28 and the fees for the permits are as follows:

Eligible persons	Fees Per Vehicle
(1) An owner holding a valid Use permit (permittee) authorizing the mooring of the owner's vessel at the small boat harbor, and any co-owner of the vessel.	\$25 per month
(2) The spouse or [ <del>personal partner</del> ] <u>reciprocal beneficiary</u> of each owner, and their legal dependents 18 years of age or older.	\$25 per month
(3) An owner or co-owner holding a valid use permit authorizing the mooring of the owner's vessel at the small boat harbor may secure a temporary parking permit, for use by bona fide guests accompanying the owner on board the vessel on a voyage outside the confines of the small boat harbor.	\$10 for each 24-hour period or fraction thereof
(4) An owner or employee of a firm, business, or organization operating under a lease or other agreement authorizing the owner, employee, firm, business, or organization to engage in a business or commercial activity at the small boat harbor.	\$90 per month
(5) Other non-boating related	not less



person(s) parking in any paid parking stalls. than \$100 per month

(b) Fees for permits issued after the first month of a calendar quarter shall be prorated on a monthly basis.

(c) Not more than one parking permit shall be issued to a person eligible for a parking permit." [Eff 2/24/94; am and comp 4/5/08; am 8/8/11; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-4) (Imp: HRS §§200-2, 200-4)

25. Section 13-235-5, Hawaii Administrative Rules, is amended to read as follows:

"§13-235-5 Owners required to report change in ownership, address and other changes. (a) It shall be the responsibility of an offshore mooring permittee to notify the department in writing within seven days if:

- (1) The owner no longer has possession of the vessel, houseboat or contrivance;
- (2) All or any interest in the vessel, houseboat, or contrivance is transferred to or assigned to another person or business entity; or
- (3) The owner's address or telephone number changes.

(b) Failure to comply this section will result in automatic termination of the offshore mooring permit.

~~[(c) "Transfer" as used in this section means any sale, agreement of sale, assignment, lease of a vessel or the change in ownership or transfer of stock in a corporate owner which results in a change of the majority stockholder, or the transfer of interest in any other business entity which results in a change of the owner holding the majority interest.~~

~~(d) "Interest" as used in this section includes any claim of right, title, ownership of stock, shares, profit, benefit or gain in a corporation, partnership,~~

~~joint venture or any other business entity that has a mooring permit issued under this subchapter.]” [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-1, 200-2, 200-3, 200-4, 200-6) (Imp: HRS §§200-1, 200-2, 200-3, 200-6)~~

26. Section 13-235-9, Hawaii Administrative Rules, is amended to read as follows:

“§13-235-9 Restrictions on anchoring or mooring outside of a designated offshore mooring area. (a) No person shall anchor [~~or moor~~] a vessel [~~outside of a State offshore mooring area without a permit issued by the department, provided that recreational and commercial fishing vessels shall not be required to obtain an offshore mooring permit to moor or anchor for a period not to exceed seventy-two hours except in areas where anchoring or mooring is prohibited~~] in an Ocean Recreation Management Area (ORMA) or a non-designated area for a cumulative period of time exceeding seventy-two hours within any fourteen day period subject to the following restrictions:

- (1) Calculation of the seventy-two hour time limit shall not restart if a vessel is relocated or temporarily moved and then later returned to the same site or location or in close proximity thereto.
- (2) The department or the department's authorized representative may authorize an extension of the seventy-two hour time limit if, under the particular circumstances, an extension of time is reasonable and warranted.

(b) No person shall anchor or moor a houseboat on the ocean waters or navigable streams of the State outside of a designated mooring area.

(c) No person shall live aboard any vessel or use any vessel as a principal place of habitation on the ocean waters or navigable streams of the [~~state~~] State outside of a designated mooring area, provided that staying aboard or use of a vessel as a vacation site may be permitted in accordance with provisions

set forth in sections 13-231-22, 13-231-28, and 13-231-29.

(d) The owner of a vessel desiring to moor a vessel outside a designated mooring area may be issued a permit by the department, subject to compliance with all other provisions of this chapter, provided that:

- (1) There is no designated mooring area within a reasonable distance of the desired location specified in the permit application;
- (2) A permit for installation of a mooring at that location is approved by the board of land and natural resources; and
- (3) In the case of commercial vessels, a permit is also approved for installation of the mooring by the U. S. Army Corps of Engineers.

(e) Transient or visiting vessels may be issued a temporary permit to anchor outside of a designated mooring area for a period not to exceed ninety days." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-1, 200-2, 200-3, 200-6) (Imp: HRS §§200-1, 200-2, 200-3, 200-6)

27. Section 13-240-5, Hawaii Administrative Rules, is repealed.

~~"§13-240-5 [Definitions. As used in this part: "Approved" means that a fitting, appliance, apparatus, or item of equipment to be fitted or carried in a vessel, or by any particular arrangement, is sanctioned by the commandant of the Coast Guard, unless otherwise stated.~~

~~"Barge" means a vessel with no motive power of its own.~~

~~"Boat dealer" means a person who is engaged in the business of selling, offering for sale, buying or taking in vessels for the purpose of reselling them.]~~

~~"Boat livery" means a person who is engaged in the business of renting, leasing, or chartering vessels.~~

~~"Boat manufacturer" means a person engaged in the business of building or assembling vessels.~~

~~"Boating accident":~~

- ~~(1) Means collision, accident, or other casualty involving:
  - ~~(A) A person's death;~~
  - ~~(B) The injury to a person requiring medical treatment beyond first aid;~~
  - ~~(C) Damage to a vessel amounting to \$200 or more;~~
  - ~~(D) Complete loss of a vessel; or~~
  - ~~(E) The disappearance of a person from a vessel under circumstances indicating death or injury to that person.~~~~
- ~~(2) Includes damage to a vessel or its equipment, loss of life, or injury to any person or object:
  - ~~(A) On board a vessel;~~
  - ~~(B) Caused by a moving vessel's wake, wash, or waves, or by a vessel's capsizing, or collision with another vessel or object;~~
  - ~~(C) Caused by flooding, fire, or explosion; or~~
  - ~~(D) Caused when a person falls overboard.~~~~

~~"Certificate" means certificate of numbers as explained in chapter 13-241.~~

~~"Chairperson" means the chairperson of the department of land and natural resources or the chairpersons' duly authorized representatives or subordinates.~~

~~"Coast guard" means the United States Coast Guard or any of its successor agencies.~~

~~"Commercial fishing motorboat" means a motorboat used for taking fish for profit or gain or as a means of livelihood.~~

~~"Commercial motorboat" means any power-driven vessel used for hire, profit, or gain.~~

~~"Department" means the department of land and natural resources of the State of Hawaii.~~

~~"Diver's flag" means a red flag with a white diagonal running from the upper left hand corner to the lower right hand corner (from masthead to lower outside corner).~~

~~"Documented vessel" means any vessel which has a valid marine document issued by the Coast Guard, in accordance with the Code of Federal Regulations, Subchapter G, Part 67, Documentation of Vessels.~~

~~"Federal laws and requirements" mean all statutes, regulations, and other laws of the United States, which may be applicable to this chapter.~~

~~"Foreign built vessel" means any vessel whose hull was constructed in a country other than the United States.~~

~~"Forward half of the vessel" means any portion of the vessel in front of a point equidistant from the stem and stern of the vessel.~~

~~"Free diver" means a person who is using a mask and snorkel, other than for SCUBA diving, who submerges under water or breaks the surface of the water.~~

~~"High seas" mean the following:~~

- ~~(1) Those waters outside of Mamala Bay whose outer boundary is represented by a straight line drawn from Barber's Point Light to Diamond Head Light; and~~
- ~~(2) At all buoyed entrances from seaward to bays, sounds, rivers, or other estuaries, for which specific lines are not described in this section, the waters outside of a line approximately parallel with the general trend of the shore, drawn through the outermost buoy or other aid to navigation of any system of aids.~~

~~"Humpback whale cow/calf area" are shown on Exhibit "A" dated November 23, 1988, located at the end of this chapter and described as follows:~~

- ~~(1) Adjoining the island of Lanai. All waters within two miles of the shoreline along the north and east coast between lines extending perpendicular to the shoreline from Kaena Point to Kamaiki Point.~~
- ~~(2) Adjoining the island of Maui. All waters inshore of a straight line drawn between Hekili Point and Puu Olai.~~

~~"Inland waters" mean the waters inshore of lines described in the definition of "high seas" in this section.~~

~~"Kaanapali ocean waters" mean the area confined by the boundaries shown and defined in Exhibit C, July 9, 1984, located at the end of this chapter.~~

~~"Length", when applied to vessels covered by this chapter, means the measurement of a vessel from end to end over the deck. It is a straight line measurement of the overall length from the foremost part of the vessel measured parallel to the centerline. Bowsprits, bumpkins, rudders, motor brackets, and similar fittings or attachments or sheer are not to be included in the measurement. "Sheer" is the longitudinal upward curve of the deck, gunwales, and lines of a vessel, when viewed from the side.~~

~~In case of a vessel of an open type or with a cockpit, the measurement is taken between the foremost and aftermost extremities of the hull exclusive of sheer.~~

~~In vessels having more than one deck, it is the length measured from the foremost part of the bow to the aftermost part at the stern exclusive of sheer.~~

~~"Lienholder" means a person holding a security interest in a vessel.~~

~~"Lifeboat" means a boat carried aboard a vessel and used solely for lifesaving purposes, but not including dinghies, tenders, speedboats, or other types of craft carried aboard a vessel and used for other than lifesaving purposes.~~

~~"Livery boat" means a vessel which is rented, leased, or chartered by a person who is engaged in the business of renting, leasing, or chartering vessels.~~

~~"Machinery" means all internal combustion engines located within the vessel and all motor or mechanical devices capable of propelling vessels.~~

~~"Motor vessel" means any vessel more than sixty-five feet in length, which is propelled by machinery other than steam.~~

~~"Motorboat" means any vessel sixty-five feet in length or less which is equipped with propulsion machinery including steam and includes wet bikes,~~

~~motorized surfboards and any other vessel propelled by a motor engaged in towing discs, boards, parasails or any other device which may be towed. This term includes a vessel temporarily or permanently equipped with a motor.~~

~~"Number", "numbering", and "certificate of number" are the equivalents of the terms "register", "registration", and "certificate of registration" respectively.~~

~~"Operate" means to navigate or otherwise use a vessel on or in the waters of the State.~~

~~"Owner" means a person, other than a lienholder, having the property in or title to a vessel. This term includes a person entitled to the use and possession of a vessel subject to a security interest in another person, but excludes a lessee under a lease not intended as security.~~

~~"Passenger" means every person other than the master and members of the crew or other persons employed or engaged in any capacity on board a vessel in the business of that vessel. In the case of a vessel on an international voyage, a child under one year of age is not counted as a passenger.~~

~~"Person" means an individual, partnership, firm, corporation, association, or other legal entity including the servant, employee, agent, or representative of any of the foregoing.~~

~~"Personal flotation device" is a technical term for a life preserver that has been approved and certified by the United States Coast Guard and capable of providing at least ninety per cent of factory-rated flotation capacity.~~

~~"Power-driven vessel" means any vessel propelled by machinery.~~

~~"Principally used" means a measurement of the time when a vessel is on the waters of the United States, a state, territory, province, or country and includes the time when the vessel is not in motion, as for instance when the vessel is moored or at anchor, as well as the time when the vessel is being navigated.~~

~~"Registration stickers" mean a pair of stickers, plates, tabs, or other devices issued by the department with certificates of number and renewals thereof to be affixed to the vessel to indicate that the vessel's certificate of number is current and valid.~~

~~"Rules of the road" mean the federal statutory and regulatory rules governing navigation of vessels. These rules are published by the Coast Guard in pamphlet form and known as Navigation Rules -- International -- Inland COMDTINST M16672.2B.~~

~~"Sailing vessel" means any vessel propelled by sail only. Every power-driven vessel which is under sail and not under power is to be considered a sailing vessel, and every vessel under power, whether under sail or not, is to be considered a power-driven vessel.~~

~~"SCUBA" means self-contained underwater breathing apparatus and includes all forms of self-contained underwater breathing apparatuses, e.g., re-breathers, open-circuit, semi-closed or closed circuit or surface-supplied breathing apparatuses.~~

~~"Security interest" means an interest in a vessel reserved or created by agreement and which secures payment or performance of an obligation. The term includes the interest of a lessor under a lease intended for security. A security interest is "perfected" when it is valid against third parties generally, subject only to specific statutory exceptions contained in article 9, of chapter 490 and section 490:1-201, Hawaii Revised Statutes.~~

~~"Slow no-wake" means as slow as possible without losing steerage way and so as to make the least possible wake. This would almost always mean speeds of less than five miles an hour.~~

~~"State" means the State of Hawaii.~~

~~"Underway" means the vessel is not at anchor, aground, or made fast to shore.~~

~~"Undocumented vessel" means any vessel which does not have a valid marine document issued by the Coast Guard, in accordance with the Code of Federal~~



§13-240-5

~~Regulations, Subchapter C, Part 67, Documentation of Vessels.~~

~~"Vessel" means all description of watercraft used or capable of being used as a means of transportation on or in the water.~~

~~"Vessel carrying passengers for hire" means any vessel which carries any person or persons for a valuable consideration, whether that consideration goes directly or indirectly to the owner, charterer, operator, agent, or any person who has a lien on the vessel.~~

~~"Vessel engaged in fishing" means any vessel fishing with nets, lines, trawls, or other fishing apparatus which restrict maneuverability, but does not include a vessel fishing with trolling lines or other fishing apparatus which do not restrict maneuverability.~~

~~"Waters of the State" mean any waters within the jurisdiction of the State, the marginal seas adjacent to the State, and the high seas when navigated as part of a journey or ride to or from the shores of the State. [Eff 2/24/94; am 7/5/03] (Auth: HRS §§200-21, 200-22, 200-23, 200-24) (Imp: HRS §§200-21, 200-22, 200-23, 200-24)] REPEALED." [R \_\_\_\_\_]~~

28. Section 13-242-1, Hawaii Administrative Rules, is amended to read as follows:

"§13-242-1 Duty to render aid and give information. (a) It shall be the duty of the operator of a vessel involved in a boating accident, as defined in section [~~13-240-5~~] 13-230-8, if and so far as the operator can do so without serious danger to the operator's own vessel or persons aboard to render to the other persons affected by the accident, such assistance as may be practicable and as may be necessary in order to save them from or minimize any danger caused by the accident and also to give the operator's name, address, and identification of the operator's vessel to any person injured and to the owner of any property damaged in the accident.

(b) The duties imposed by chapter 13-242 shall be in addition to any duties otherwise provided by law." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §200-24) (Imp: HRS §§200-24, 200-28)

29. Section 13-242-3, Hawaii Administrative Rules, is amended to read as follows:

"§13-242-3 Immediate notice of accident; when required. (a) The operator of any recreational vessel which is involved in a boating accident as defined in section [~~13-240-5~~] 13-230-8, if the casualty results in death or injury of any person sufficient to cause reasonable belief that the injury will require medical treatment beyond first aid or if a person disappears from on board under circumstances which suggest any possibility of their death or injury shall, as soon as possible after fulfilling the requirements of section 13-242-1, by the quickest means of communication, give notice of the accident to a harbor official, police officer or the nearest police station with the following:

- (1) The date, time, and exact location of the occurrence;
- (2) The name of each person who was a casualty;
- (3) The number and name of the vessel; and
- (4) The names and addresses of the owner and operator.

(b) The above action shall be followed up by a written report as required in section 13-242-4.

(c) Whenever the operator of a vessel is physically incapable of giving an immediate notice of an accident as required in subsection (a) and there was another occupant on the vessel at the time of the accident capable of doing so, the occupant shall make or cause to be given the notice not given by the operator." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §200-24) (Imp: HRS §§200-24, 200-28, 200-29)

30. Section 13-242-4, Hawaii Administrative Rules, is amended to read as follows:

"§13-242-4 Written boating accident report; when required. (a) Whenever a recreational boating accident results in: (1) loss of life or the disappearance of any person; (2) injury causing any person to require medical treatment beyond first aid; or (3) actual damage to any recreational vessel or to any other property in excess of [~~\$200~~] \$2,000, then the operator of the vessel shall submit within forty-eight hours of the happening thereof, and within seven days of every other accident, a written report to the department on forms furnished by the department which report must contain information as prescribed in section 13-242-7.

(b) This section shall apply to the operator of: (1) any recreational vessel involved in a boating accident in the waters of the State; and (2) any recreational vessel required to be numbered or numbered pursuant to these rules and involved in a boating accident in any waters; provided that the report need not be filed with the department where the operator is required by federal laws and requirements to report the accident to the Coast Guard.

(c) A written accident report is not required under this section from any person who is physically incapable of making a report during the period of the incapacity.

(d) Whenever the operator is physically incapable of making a written report of a recreational boating accident as required in this section and the operator is not the owner of the vessel, then the owner of the vessel involved in the accident shall make the report not made by the operator." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §200-24) (Imp: HRS §§200-24, 200-29)

31. Section 13-243-4, Hawaii Administrative Rules, is amended to read as follows:

"§13-243-4 Mufflers. A vessel propelled by an internal combustion engine shall, when in operation, be equipped with an efficient muffler, underwater exhaust or other modern device in good working order

and in constant operation capable of adequately muffling the sound of the exhaust of the engine. An engine is considered adequately muffled when the motor's exhaust at all times is muffled or suppressed so as to not create excessive or unusual noise. The discharge of cooling water through the exhaust of an inboard engine shall be considered an adequate muffling device. The use of cutouts, or open exhaust stacks is prohibited, except: (1) for motorboats competing in a race or regatta approved by the department or a federal agency; (2) while competing in official trials for speed records; or (3) for such vessels while on trial runs as is incidental to the tuning up of the boats and engines. [~~The phrase "adequate muffling" means that the motor's exhaust at all times be so muffled or suppressed as to not create excessive or unusual noise. The discharge of cooling water through the exhaust of an inboard engine shall be considered an adequate muffling device.~~] [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §200-24) (Imp: HRS §200-24)

32. Section 13-243-5, Hawaii Administrative Rules, is repealed.

~~"§13-243-5 [Recognition of marine examination decals. In order to free enforcement personnel for other inspections and duties and in recognition of the exacting requirements of the Courtesy Marine Examination, enforcement personnel shall not stop and board any vessel properly displaying a valid United States Coast Guard Auxiliary Courtesy Marine Examination decal for the purpose of determining compliance with this chapter except upon reasonable belief that the vessel is being operated in violation of these rules or other regulations or laws. [Eff 2/24/94] (Auth: HRS §200-24) (Imp: HRS §§200-22, 200-24)] REPEALED."~~ [R \_\_\_\_\_]

§13-244-15.5

33. Section 13-244-15.5, Hawaii Administrative Rules, is amended to read as follows:

"§13-244-15.5 Operation of power driven vessels.

(a) Any person operating a power driven vessel on the waters of the State shall be required to possess a certificate of completion from a National Association of State Boating Law Administrators (NASBLA) approved course on the safe use and operation of a power driven vessel that contains a component on Hawaii waters approved by the department. Exempt from this requirement are persons who:

- (1) Possess a valid merchant mariner credential to operate a vessel issued by the United States Coast Guard pursuant to 46 [CFR] C.F.R. Part 10;
- (2) Operate a thrill craft in a commercial thrill craft zone as authorized by the State;
- (3) Operate a [~~motor vessel~~] motorboat that is ten horsepower or less, or
- (4) Are on a voyage originating outside of the State and remain in the State less than sixty calendar days.

(b) A person under sixteen (16) years of age shall not operate a power driven vessel on the waters of the State unless the person possesses a certificate of completion and is also accompanied on-board and directly supervised by a person twenty-one (21) years of age or older who holds the required certificate of completion.

(c) A person or the person's responsible managing employee or agent engaged in the business of renting or leasing power driven vessels shall not rent or lease a power driven vessel to any person for operation on the waters of the State unless the person:

- (1) Meets all the requirements of this section by receiving a safety briefing provided by the rental or leasing business that is approved by the department; and

(2) Is identified on the rental or lease agreement for a power driven vessel by name and age. A person or the person's agent or employee renting or leasing power driven vessels who fails to request and inspect certificates or evidence of exemption is in violation of this section.

(d) A person who is operating a power driven vessel on any waters of the State and who is stopped by a law enforcement officer shall present to the officer, upon request, a certificate of completion required by this section or acceptable evidence of exemption from the required certificate. Failure to present a certificate of completion or acceptable evidence of exemption shall constitute a violation of this section, unless the person presents the required certificate or evidence of exemption to a court of law and satisfies the court that this person held a proper certificate or was exempt at the time the person was asked to produce the certificate.

(e) A person who alters, forges, counterfeits, or falsifies a certificate or other document used as evidence, or who possesses a certificate or other document that has been altered, forged, counterfeited, or falsified, or who loans or permits that person's certificate or other document to be used by another person, shall be in violation of this section.

(f) The department shall maintain a list of NASBLA approved courses that provide a department approved component on Hawaii waters, which shall include but not be limited to:

- (1) Local ocean safety principles and practices; and
- (2) Any rules or laws pertaining to protected species and power driven vessel operation in the State.

(g) This section shall be enforced beginning on the second anniversary date of the section's effective date.

(h) Pursuant to section 200-25, Hawaii Revised Statutes, any person violating this section shall be fined not less than \$50 and not more than \$1000 or

sentenced to a term of imprisonment of not more than thirty days, or both, for each violation; provided that in addition to, or as a condition to the suspension of, the fines and penalties, the court may deprive the offender of the privilege of operating any vessel in the waters of the State for a period of not more than thirty days." [Eff 11/10/12; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4, 200-21, 200-22, 200-24, 200-25) (Imp: HRS §§200-2, 200-3, 200-4, 200-21, 200-22, 200-24, 200-25)

34. Section 13-244-19, Hawaii Administrative Rules, is amended to read as follows:

"§13-244-19 Authorization required to hold regatta, marine parade, boat race or exhibition.

~~(a) [Definition of terms used in this chapter. "Regatta" or "marine parade" means an organized water event of limited duration which is conducted according to a prearranged schedule.~~

~~—(b)—~~] Authorization required; submission of application.

- (1) Any person or organization planning to hold a regatta or marine parade which, by its nature, circumstances or location, will introduce extra or unusual hazards to the safety of persons or property on the waters of the State shall submit an application to the chairperson of the board of land and natural resources. No person shall hold such a regatta or marine parade, unless the authorization of the chairperson, has been secured, except that the chairperson's authorization is not required if prior authorization has been secured from the United States Coast Guard. Examples of conditions which are deemed to introduce extra or unusual hazards to the safety of

life include, but are not limited to: an inherently hazardous competition, the customary presence of commercial or pleasure craft in the area, any obstruction of navigable channels which may reasonably be expected to result, and the expected accumulation of spectator craft.

- (2) Where the events are to be held regularly or repeatedly in a single area by an individual or organization, the chairperson may, subject to conditions set from time to time by the department, grant a permit for the series of events for a fixed period of time, not to exceed one year.
- (3) The application shall be submitted no less than thirty days prior to the start of the proposed event.
- (4) The application shall include the following details:
  - (A) Name and address of sponsoring organization.
  - (B) Name, address and telephone number of person or persons in charge of the event.
  - (C) Nature and purpose of the event.
  - (D) Information as to general public interest.
  - (E) Estimated number and type of watercraft participating in the event.
  - (F) Estimated number and type of spectator watercraft.
  - (G) Number of boats being furnished by sponsoring organization to patrol event.
  - (H) Time schedule and description of events.



- (I) A section of a chart or scale drawing showing the boundaries of the event, various water courses or areas to be utilized by participants, officials, and spectator craft.

~~[(e)]~~ (b) An authorization by the chairperson does not exempt a person holding an event from compliance with applicable federal law." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-22, 200-24) (Imp: HRS §§200-22, 200-24)

35. Section 13-244-29, Hawaii Administrative Rules, is amended to read as follows:

"§13-244-29 Makapuu ocean waters. (a) Makapuu ocean waters means the area confined by boundaries as shown on Exhibit F, June 1, 1981, and located at the end of this chapter, and also described as follows:

- (1) Beginning at a point being the mean high water mark which is directly opposite from the northeast corner of the Makapuu Beach Park building;
- (2) In the Makapuu Point direction along the mean high water mark to the tip of Makapuu Point; and
- (3) Along a straight line connecting such point described in paragraph (2) above to, and ending at, the point of beginning.

(b) Restrictions. No person shall operate a vessel in the Makapuu ocean waters as the same are defined in this section. This subsection shall not apply in the case of emergency or to patrol or rescue craft." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §200-24) (Imp: HRS §§200-22, 200-24)

36. Section 13-244-37, Hawaii Administrative Rules, is amended to read as follows:

"§13-244-37 Zone A, Zone B, Ingress/Egress Zones, and Ingress/Egress Corridors. The Kaanapali

ocean waters shall be divided into the following zones:

- (a) Zone A, Kaanapali ocean waters
  - (1) This zone is designated primarily for swimming, bathing, snorkeling, and diving, and means the area confined by the boundaries shown and described in Exhibit G, July 1, 1984, located at the end of this chapter, which boundaries are described as follows:
 

Beginning at a point on the vegetation line six hundred fifty feet north along the vegetation line from the intersection of the extended centerline of Kaniau Road and the vegetation line; thence running by azimuths measured clockwise from True South: 080 degrees for a distance of two hundred feet; 146 degrees 30 minutes for a distance of three thousand seven hundred fifty feet; 206 degrees to a point on the vegetation line; thence southward along the vegetation line to the point of beginning.
  - (2) No person shall navigate or moor a vessel, surfboard, sailboard, or any other water recreational device in or on the waters of Zone A, provided that this restriction shall not apply to:
    - (A) Paipo boards not in excess of four feet in length and without skegs or any other [~~fin-line~~] fin-like projections protruding from the bottom of the boards;
    - (B) Hawaiian design club canoes engaged in crew training;
    - (C) Vessels engaged in fishing during periods of low use of the beach.
- (b) Zone B, Kaanapali ocean waters
  - (1) This zone is an area designed primarily for swimming, bathing, snorkeling, and diving, and means the area confined by the boundaries shown on Exhibit G, July 1, 1984,

located at the end of this chapter and defined as:

Beginning at a point on the vegetation line seven hundred fifty feet south along the vegetation line from the southernmost tip of Keka'a Point shoreline, thence running by azimuths measured clockwise from True South: 068 degrees for a distance of two hundred feet; 156 degrees for a distance of two hundred fifty feet; 078 degrees 30 minutes for a distance of three hundred fifty feet; 156 degrees for a distance of six hundred feet; 221 degrees for a distance of five hundred feet; 287 degrees to a point on the vegetation line; thence southward along the vegetation line to the point of beginning.

- (2) Restrictions: The same restrictions and exceptions thereto applicable to Zone A are applicable to Zone B.
- (c) Ingress/Egress zones.
- (1) These zones shall be established at intervals along the shoreline to provide beach access, through corridors, for all vessels governed by this chapter. Each zone shall be five hundred feet wide at the shoreline and shall extend seaward for a distance of five hundred feet.

Zone number one begins at the point where the north bank of Wahikuli Stream intersects the vegetation line; then northward along the vegetation line for a distance of five hundred feet.

Zone number two begins at a point on the vegetation line which is two thousand three hundred feet north along the vegetation line from a point where the north bank of Wahikuli Stream intersects the vegetation line; then northward along the vegetation line for a distance of five hundred feet.

Zone number three begins at a point on the vegetation line which is two thousand four hundred feet south along the vegetation line from the mean high water mark of the southernmost tip of Keka'a Point shoreline; then southward along the vegetation line for a distance of five hundred feet.

Zone number four begins at a point on the vegetation line which is seven hundred fifty feet south along the vegetation line from the mean high water mark from the southernmost tip of Keka'a Point shoreline; then southward along the vegetation line for a distance of five hundred feet.

Zone number five begins at a point on the vegetation line which is eight hundred twenty-five feet north along the vegetation line from the vegetation line from the southernmost tip of Keka'a Point shoreline, then northward along the vegetation line for a distance of five hundred feet.

- (2) No person shall navigate a vessel within an ingress/egress zone unless operating within an ingress/egress corridor, provided that this restriction shall not apply to Hawaiian design club canoes engaged in crew training.
- (d) Ingress/Egress corridors.
  - (1) These corridors shall be contained within each ingress/egress zone. Each corridor shall be one hundred feet wide and shall be established daily by markers placed by the users of the corridor to determine the best direction for approach to or departure from the shoreline under existing wind and sea conditions.
  - (2) No person shall:
    - (A) Navigate a commercial vessel or non-commercial motor powered vessel to or from the beach area unless using a designated ingress/egress corridor;
    - (B) Navigate a catamaran, registered for carrying passengers for hire, in an

ingress/egress corridor, or approach the shoreline within a distance of five hundred feet, if another catamaran is beached within the boundaries of the intended corridor of use;

- (C) Beach a catamaran, registered for carrying passengers for hire, in an ingress/egress corridor in excess of thirty minutes; and
  - (D) Navigate a vessel within an ingress/egress corridor at a speed exceeding slow-no-wake.
- (3) Exceptions to the restrictions for Ingress/Egress Zones are applicable to Ingress/Egress Corridors.

(e) This section shall not apply in the event of an emergency, to law enforcement or rescue craft, or to vessels operating under a valid ocean waters permit issued by the department." [Eff 2/24/94, am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4)  
(Imp: HRS §§200-2, 200-3, 200-4)

37. Section 13-245-2, Hawaii Administrative Rules, is repealed.

~~§13-245-2 [Definitions.~~

~~"Buoy" means any [device designed to float which is anchored in the water and which is used to convey a message] floating aids to navigation moored to the seabed and used to convey a message.~~

~~"Display area" means the area on a sign or buoy [needed] used for display of a waterway marker symbol.~~

~~"Regulatory marker" means a waterway marker which indicates the existence of regulatory areas, speed zones or restricted areas and which has no equivalent in the United States Coast Guard system of navigational aids.~~

~~"Sign" means any device for carrying a message which is attached to another object such as a piling, buoy, structure or land itself.~~

~~"State aid to navigation" means a waterway marker which is the equivalent of a United States Coast Guard aid to navigation.~~

~~"Symbols" means geometric figures such as a diamond, circle, rectangle, used to convey a basic message.~~

~~"Waterway marker" means any device designed to be placed in, or near, the water to convey an official message to a boat operator on matters which may affect health, safety, or well-being, except that such devices of the United States or an agency of the United States are excluded from the meaning of the definition. [Eff 2/24/94] (Auth: HRS §§200-22, 200-23, 200-24) (Imp: HRS §§200-22, 200-23, 200-24)]~~

~~REPEALED." [R \_\_\_\_\_]~~

38. Section 13-245-9, Hawaii Administrative Rules, is amended to read as follows:

"§13-245-9 Diver's flag. (a) [A "diver's flag" as defined by rule and measuring not less than twelve inches by twelve inches shall be required to be displayed on the surface of the water by any person or group of persons engaged in free diving or SCUBA diving] The following shall apply to snorkelers, free divers, and SCUBA divers who are not accompanied by a host vessel, who surface more than one hundred feet from their host vessel, or who are engaged in snorkeling or diving activities more than one hundred feet from their host vessel:

- (1) Snorkelers, free divers, and SCUBA divers shall tow a dive flag measuring not less than twelve by twelve inches, to be clearly displayed on the surface of the water and attached to an appropriate flotation device.
- (2) Individual snorkelers, free divers, and SCUBA divers shall not display more than one dive flag while engaged in snorkeling or diving activities and shall stay within one hundred feet of their dive flag.

(3) A group of snorkelers, free divers, or SCUBA divers with 2 or more individuals in the group shall display one dive flag for the entire group; each individual need not display their own dive flag. All group members shall stay within one hundred feet of a dive flag while engaged in snorkeling or diving activities.

(b) [~~Notwithstanding subsection (a), a~~] A diver's flag measuring not less than twelve inches by twelve inches[~~7~~] shall be displayed on the highest point of the main structure of a [~~non-motorized~~] vessel that is sixteen feet or less in length overall in order to provide an unobstructed view of the diver's flag from all directions when diving from the vessel.

(c) [~~Notwithstanding subsection (a), in addition to the "Alpha flag," required by the United States Coast Guard, i.e., a blue flag with a white horizontal strip running from the upper left side to the lower left side, a~~] A diver's flag measuring not less than twenty inches by twenty-four inches, shall be displayed on the highest point of the main structure of any [~~motorized or non-motorized~~] vessel that is greater than sixteen feet in length overall in order to provide an unobstructed view of the diver's flag from all directions when diving from the vessel.

(d) [~~No person shall engage in free diving or SCUBA diving, or display a diver's flag, in a manner that shall unreasonably or unnecessarily interfere with vessels or with free and proper navigation of the waterways of the State~~] If snorkeling, free diving, or SCUBA diving is in progress between sunset and sunrise, the diver's flag shall be clearly illuminated. A diver's flag is considered clearly illuminated when it is identifiable from at least one hundred feet away.

(e) [~~Except in cases of emergencies, free diving, swimming, or SCUBA diving within navigation channels shall be prohibited~~] There shall be no restriction on subsurface distance from a diver's flag. However, snorkelers, free divers, and SCUBA

divers are prohibited from surfacing more than one hundred feet away from the diver's flag in the ocean waters of the State and more than fifty feet from the diver's flag in navigable streams, except in cases of emergencies.

(f) All vessels shall be prohibited from approaching within one hundred feet of a displayed diver's flag or within fifty feet of a displayed diver's flag on navigable streams [~~, except within marked navigation channels.~~] with the following exceptions:

(1) Vessels approaching a displayed diver's flag to conduct SCUBA, snorkeling, or free diving activities within the one hundred foot or fifty foot restricted area shall be allowed to do so provided that the vessel approaches at a speed of slow-no-wake.

(2) Vessels approaching a displayed diver's flag navigating through marked navigation channels are exempt from the distance restriction described in subsection (f) but shall proceed at a speed of slow-no-wake through the navigation channel when a diver's flag is displayed adjacent to the navigation channel.

(3) Authorized representatives of the department and life saving personnel are exempt from the distance restrictions of subsection (f) when performing functions related to their duties.

(g) Except in cases of emergencies, snorkeling, free diving, swimming, or SCUBA diving within navigation channels shall be prohibited.

~~[Vessels navigating through marked navigation channels are exempt from the distance restriction described in subsection (f) but shall proceed at a speed of slow-no-wake through the navigation channel when a diver's flag is displayed adjacent to the navigation channel.]~~

~~(h) The diver's flag shall be displayed only when free diving or SCUBA diving is in progress, and its display in a water area when no diving is in~~



~~progress in that area shall constitute a violation of these rules.~~

~~(i) There shall be no subsurface distance restrictions from a dive flag, however, except in cases of emergencies, free divers or SCUBA divers shall be prohibited from surfacing more than one hundred feet away from the diver's flag in the ocean waters of the State and fifty feet in navigable streams.~~

~~(j) Authorized representatives of the department and life saving personnel are exempt from the distance restrictions of subsection (f) when performing functions related to their duties.]~~

(h) No person shall engage in snorkeling, free diving, or SCUBA diving or display a diver's flag in a manner that shall unreasonably or unnecessarily interfere with vessels or with free and proper navigation of the waterways of the State.

(i) A diver's flag shall be displayed only when snorkeling, free diving, or SCUBA diving is in progress, and display of a diver's flag in a water area when no snorkeling or diving is in progress in that area shall constitute a violation of these rules.

~~[(k)] (j) Anyone violating any provision of this section shall be subject to fines and penalties as provided in sections 200-14, 200-14.5, and 200-25, HRS." [Eff 2/24/94; am 7/5/03; am \_\_\_\_\_]~~  
(Auth: HRS §§200-2, 200-3, 200-4, 200-10, 200-14, 200-14.5, 200-24, 200-25) (Imp: HRS §§200-2, 200-3, 200-4, 200-10, 200-14, 200-14.5, 200-24, 200-25)

39. Section 13-250-5, Hawaii Administrative Rules, is repealed.

~~"§13-250-5 [Definitions. As used in this part, unless the context clearly indicates otherwise:~~

~~"Barge" means a non-self-propelled, generally large, flat-bottomed vessel.~~

~~"Boat" means a small vessel propelled by oars or paddles or by sail or power.~~

~~"Business" includes all activities engaged in or caused to be engaged in by any person or legal entity~~

~~with the object of making a profit or obtaining an economic benefit either directly or indirectly.~~

~~"Canoe" means outrigger canoe.~~

~~"Carrying passengers for hire" means the carriage of any person or persons by a vessel for compensation flowing, whether directly or indirectly, to the owner, charterer, operator, agent, or any other person interested in the vessel.~~

~~"Catamaran" means a vessel with two or more hulls side by side.~~

~~"Chairperson" means the chairperson of the board of land and natural resources of the State of Hawaii or the chairperson's duly authorized representative or subordinate.~~

~~"Coast Guard" means the United States Coast Guard.~~

~~"Commercial high speed boating" means the use of an open ocean racing boat to provide high speed rides to passengers who pay compensation for the rides.~~

~~"Commercial high speed boating" does not include:~~

- ~~(1) The use of an open ocean racing boat during an official racing competition; or~~
- ~~(2) The use of an open ocean racing boat while practicing for racing competition; provided that no passenger pays compensation for riding the boat during the practice.~~

~~"Commercial motorboat" means any motorboat used for hire, profit or gain.~~

~~"Commercial ocean recreation activities" means any ocean recreation activity offered for a fee.~~

~~"Compensation" means any valuable consideration.~~

~~"Contrivance" means any man-made object or artificial arrangement not used or intended to be used for transportation which may be floated upon or suspended within the water.~~

~~"Department" means the department of land and natural resources of the State.~~

~~"Global Positioning System (GPS)" means the method of terrestrial navigation using a GPS electronic instrument, receiving data from a network of orbiting satellites to locate one's position by latitude and longitude.~~

~~"Handboard" means any type of surf riding board that is (a) with or without skegs, (b) worn on one or both of the operator's hands, (c) is generally 15 inches in overall length, and (d) is used for the sport of wave riding.~~

~~"Humpback whale cow/calf area" are shown on Exhibit "B" dated November 23, 1988, located at the end of this chapter and described as follows:~~

- ~~(1) Adjoining the island of Lanai. All waters within two miles of the shoreline along the north and east coast between lines extending perpendicular to the shoreline from Kaena Point to Kamaiki Point.~~
- ~~(2) Adjoining the island of Maui. All waters inshore of a straight line drawn between Hekili Point and Puu Olai.~~

~~"Kaanapali ocean waters" means the area confined by the boundaries shown on Exhibit E (1), July 9, 1984, located at the end of chapter 13-251 and defined as:~~

~~—Beginning at the intersection of the extended centerline of Wāhikuli Road at the vegetation line, thence running by azimuths measured clockwise from True South; 088 degrees for a distance of one thousand feet; 177 degrees for a distance of two thousand fifty feet; 145 degrees for a distance of two thousand six hundred twenty-five feet; 117 degrees 30 minutes for a distance of two thousand fifty feet; 150 degrees for a distance of one thousand seven hundred seventy feet; 175 degrees 45 minutes for a distance of four thousand one hundred feet; 197 degrees 15 minutes for a distance of two thousand three hundred twenty-five feet; 177 degrees 30 minutes for a distance of four thousand fifty feet; 201 degrees 30 minutes for a distance of one thousand six hundred twenty-five feet; thence on a straight line to a point on the vegetation line of the south bank of Honokowai Stream; then southward along the vegetation line to the point of beginning.~~

~~"Kayak" means a portable boat styled like an Eskimo canoe and propelled by use of a double-bladed paddle.~~

~~"Motorboat" means any vessel sixty-five feet in length or less which is equipped with propulsion machinery including steam and includes wet bikes, motorized surfboards and any other vessel propelled by a motor engaged in towing discs, boards, parasails or any other devices which may be towed. This term includes a vessel temporarily or permanently equipped with a motor.~~

~~"Navigable streams" means the waters of estuaries and tributaries of the streams of each island of the state, where boating and water related activities, recreational or commercial, may be carried on, whether the mouths of said streams are physically opened or not to ocean waters for intra or interstate commerce or navigation.~~

~~"Ocean recreation management area" means ocean waters of the State that have been designated for specific activities as described in Chapter 13-256, Hawaii Administrative Rules, Ocean Recreation Management Rules and Areas.~~

~~"Ocean Waters" means the waters seaward of the shoreline within the jurisdiction of the State.~~

~~"Open ocean racing boat" means a motorized vessel which:~~

- ~~(1) Is designed, modified, or restored for the primary purpose of high speed boat racing; and~~
- ~~(2) Has the capacity to carry not more than the operator and five passengers.~~

~~"Operate" means to navigate or otherwise use a vessel, surfboard, or paddle board (paipo board).~~

~~"Operator permit" means the permit issued by the department which authorizes either the direct operation or the offering for a fee, surfboards and sailboards or any vessel, watercraft or water sports equipment on the ocean waters and navigable streams of the state.~~

~~"Outrigger canoe" means a boat equipped with a framework terminating in a float, extended outward from the side of the boat to prevent upsetting.~~

~~"Owner" means a person, other than a lienholder, having the property in or title to a vessel. The term includes a person entitled to the use and possession of a vessel subject to a security interest in another person, but excludes a lessee under a lease not intended as security.~~

~~"Paipo boards" means any type of board that is (a) without skegs, (b) does not exceed four feet in length, and (c) is used for the sport of surfriding.~~

~~"Parasailing" means the activity in which an individual is transported or carried aloft by a parachute, sail, or other material attached to a towline which is towed by a vessel.~~

~~"Person" includes every individual, partnership, firm, society, incorporated association, joint venture, group, hui, joint stock company, corporation, trustee, or any other legal entity, including the servant, employee, agent, or representative of any of the foregoing.~~

~~"Power driven catamaran" means a catamaran propelled by machinery whether under sail or not.~~

~~"Recreation" means to create anew, restore, refresh, a diversion such as a hobby or other leisure time activities.~~

~~"Rules" means the rules governing Hawaii Ocean Waters, Navigable Streams and Beaches of the department of land and natural resources, State of Hawaii.~~

~~"Sailboard" means any type of board that exceeds four feet in length and is propelled by a detachable sail apparatus.~~

~~"Sailing catamaran" means a catamaran propelled by sail only, including a catamaran temporarily or permanently equipped with a motor being propelled by sail only.~~

~~"SCUBA" means self-contained underwater breathing apparatus."~~

~~"Shore waters and shores" means any shores or waters between the three nautical mile limit and the~~

~~mean high tide mark on the shores of the islands of the State of Hawaii.~~

~~"Skeg" means any fin-like projection.~~

~~"Slow-no-wake" means as slow as possible without losing steerage way and so as to make the least possible wake. This would almost always mean speeds of less than five miles an hour.~~

~~"State" means the State of Hawaii.~~

~~"Surfboard" means any type of board that exceeds four feet in length and is used for the sport of surf riding.~~

~~"Territorial sea baseline" means the line from which the territorial sea is measured, which is generally the low water line along the coasts including the coasts of islands and special closing lines drawn tangent to the headlands across the mouths of rivers, bays, inlets and other similar indentations.~~

~~"Thrill craft" means any motorized vessel which is generally less than thirteen feet in length as manufactured, is capable of exceeding a speed of twenty miles per hour, and has the capacity to carry not more than the operator and two other persons while in operation. The term includes but is not limited to a jet ski, wet bike, surf jet, miniature speed boat, and hovercraft.~~

~~"Tow-in surfing" means utilizing a surfboard equipped with foot straps to surf waves with the assistance of a thrill craft that is equipped with a rescue sled, bow tow-line and a tow-in-rope.~~

~~"Ultralight float equipped aircraft" means an aircraft of light weight construction and limited range carrying not more than two individuals able to land on water surfaces using floats.~~

~~"Vessel" means any watercraft, used or capable of being used as a means of transportation on or in the water.~~

~~"Vessel length" means the end-to-end measurement of a vessel, taken over the deck, parallel to the waterline from the foremost part at the bow to the aftermost part at the stern; provided, that hull platings, plankings, and extensions aside from the~~

~~hull proper, such as a bowsprit, are not to be included in such measurement; provided further, that an open-type vessel or one with a cockpit shall be measured as if a complete deck existed at the upper level of the hull.~~

~~"Waikiki ocean waters" means the area confined by the boundaries shown on Exhibit A, June 1, 1981, located at the end of this chapter which boundaries are described as follows:~~

- ~~(1) Beginning at the point where the mean high water mark intersects a line perpendicular to the shoreline and extending seaward from the Diamond Head Lighthouse;~~
- ~~(2) In the Ewa direction along the mean high water mark to the point where the mean high water mark meets the revetment on the Waikiki side of the Kewalo Basin entrance channel;~~
- ~~(3) Along a straight line connecting the point described in (2) above to the Kewalo Basin entrance channel buoy ("1" Black);~~
- ~~(4) Along a straight line connecting the buoy described in (3) above to the Ala Wai boat harbor entrance lighted buoy (Red "2");~~
- ~~(5) Along a straight line connecting the buoy described in (4) above to the Diamond Head buoy (Red "2"); and~~
- ~~(6) Along a straight line connecting the buoy described in (5) above to, and ending at, the point of beginning.~~

~~"Water sledding" means the activity in which an individual is transported or carried over the surface of the water on an apparatus that is more than twelve inches wide and is attached to a towline which is towed by a vessel. If the apparatus is round with a hollow center, the width shall be measured as a straight line:~~

- ~~(1) Starting from a point on the outer edge of the apparatus;~~
- ~~(2) Bisecting the hollow center; and~~
- ~~(3) Ending at the farthest point on the opposite outer edge.~~

~~"Water sports equipment" means any equipment, contrivance, frame or other device that one or more persons may lie, sit, or stand upon or in, and which is primarily for use in or on the water for pleasure, recreation or sports, and not necessarily for transportation. [Eff 2/24/94; am 9/10/01; am 4/27/02; am 10/19/02; 10/2/03] (Auth: HRS §§200-2, 200-3, 200-4, 200-22, 200-24, 200-37) (Imp: HRS §§200-2, 200-3, 200-4, 200-22, 200-24, 200-37)] REPEALED." [R~~  
~~\_\_\_\_\_]~~

40. Section 13-251-57, Hawaii Administrative Rules, is amended to read as follows:

"§13-251-57 Waikiki ocean waters. Waikiki ocean waters means the area shown on Exhibit 1, dated May 1, 2012, located at the end of this subchapter and incorporated herein. The boundaries are as follows:

Beginning at the point where the mean high water mark intersects a line perpendicular to the shoreline below the Diamond Head Lighthouse; then in the Ewa direction along the mean high water mark to the makai boundary of the Ala Wai Small Boat Harbor and buoy R"8"; then west across the channel to the seawall on the Diamond Head side of Magic Island; then following along the mean high water mark to the seaward prolongation of the parking lot on the Ewa side of Magic Island; then along the edge of the reef to the revetment on the Waikiki side of the Kewalo Basin entrance channel; then along a straight line to the Kewalo Basin entrance channel buoy R"2"; then southeasterly along a straight line to the Ala Wai boat harbor entrance lighted buoy R"4"; then along a straight line to the Diamond Head buoy R"2"; then along a straight line the point of beginning.

The Waikiki ocean waters are reserved primarily for use by bathers, swimmers, surfers, snorkelers, and other recreational uses and subject to restrictions set forth in this section. No person shall operate a



vessel or watercraft within the Waikiki ocean waters within 500 feet of the shoreline at a speed in excess of slow-no-wake. Vessel operators shall exercise caution while transiting the area due to heavy use by swimmers. This section shall not apply in the event of an emergency, or to law enforcement or rescue craft, or vessels participating under a valid regatta permit issued by the department or the Coast Guard.

(a) Zone A is described as follows:

Beginning at the breakwater makai of the Hilton Hawaiian Village rainbow tower; then following the mean high water mark northwesterly to the Duke Kahanamoku Lagoon; then southerly to  $21^{\circ}16'25.36''N$ ,  $157^{\circ}50'12.15''W$ ; then in a straight line ending at the starting point;

(1) Restrictions: No person shall navigate, moor, or anchor a vessel in or on the waters of Zone A, except that a manually propelled outrigger canoe or a catamaran propelled by sail may be operated in those waters if the vessel has been issued a permit by the department, or that a catamaran propelled by sail capable of carrying six persons or less, with a valid permit to operate within Waikiki ocean waters under the provisions of section 13-251-52, may anchor overnight in the area adjacent to the groin in the vicinity of the Ala Wai Heliport.

Notwithstanding this subsection, vessels operating from the Hilton Hawaiian Village pier are exempt from the restrictions in this paragraph.

(b) Zone B is described as follows:

Beginning at the breakwater makai of the Hawaiian Village Rainbow Tower; then along the mean high water mark in the Diamond Head direction to the mauka Ewa side of the natatorium; then seaward along the Ewa wall of the natatorium to the outer edge of the reef at  $21^{\circ}15'52.26''N$ ,  $157^{\circ}49'31.67''W$ ; then along the reef in the north direction to the seaward end of the wall at Kapahulu; then in a straight line eastward ending at the starting point;

(1) Restrictions:

- (A) No person shall navigate or moor a vessel in or on the Waikiki ocean waters, except that outrigger canoes operated by a duly organized canoe club, or a sailing catamaran, or a manually propelled outrigger canoe may be navigated, moored, or anchored in those waters if the vessel has been issued a permit by the department to navigate in the waters. Notwithstanding this subsection, a sailing catamaran may temporarily operate in [~~Zone D~~] Zone B as a power-driven catamaran when necessary to protect life or property and [~~is~~] if that vessel is registered by the department to operate in Waikiki ocean waters and under the immediate control of an operator who has been issued a valid permit by the department;
  - (B) No person shall navigate or moor a catamaran in or on the waters of Zone B or on the shore below the mean high water mark if four catamarans are navigating or moored in such zone;
  - (C) The minimum distance separating any two catamarans moored in Zone B shall be eighty feet; and
  - (D) For this subchapter, surfboards are not considered to be a vessel.
- (c) Zone C is described as follows:  
Beginning at the end of the Ewa groin at the Duke Kahanamoku statue; then following the groin shoreward and along the Kuhio Beach shoreline to the mauka end of the wall at Kapahulu; then to the end of the wall; then following the seawall in a northward direction to the point of beginning.
- (1) Restrictions: Zone C is designated as a swimming, bathing and wading zone. No person shall engage in fishing by any means or device from the Kuhio seawall to the

shoreline between the wall at Kapahulu and the Ewa groin.

(d) Zone D is described as follows:

Beginning at the makai-Ewa corner of the wall at Kapahulu; then 160 yards in the Diamond Head direction on a straight line perpendicular to the beach to  $21^{\circ}16'11.35''N$ ,  $157^{\circ}49'24.49''W$ ; then 100 yards seaward on a straight line ending at  $21^{\circ}16'10.43''N$ ,  $157^{\circ}49'27.89''W$ ; then 310 yards in the Ewa direction on a straight line ending at  $21^{\circ}16'19.32''N$ ,  $157^{\circ}49'30.27''W$ ; then 100 yards shoreward to  $21^{\circ}16'20.27''N$ ,  $157^{\circ}49'26.90''W$ ; then in a straight line back to the point of beginning.

(1) Restrictions: No person shall navigate or moor a vessel or navigate or otherwise use a surfboard in or on the waters of Zone D, except that paipo boards not in excess of four feet in length and without skegs or any other fin-like projections protruding from the bottom of the boards are permitted to be used on the waters.

(e) Zone E is described as follows:

Beginning at a point where the Diamond Head wall of the Natatorium intersects the mean high water mark at  $21^{\circ}15'50.66''N$ ,  $157^{\circ}49'18.30''W$ ; then following the mean high water mark in a Diamond Head direction to the Colony Surf Hotel at  $21^{\circ}15'44.76''N$ ,  $157^{\circ}49'17.45''W$ ; then in a seaward direction to  $21^{\circ}15'44.16''N$ ,  $157^{\circ}49'19.32''W$ ; then north to the makai-Diamond Head corner of the Natatorium; then in a straight line to the point of beginning.

(1) Restrictions: No person shall navigate or moor a vessel in or on the waters of Zone E, except that a manually propelled outrigger canoe operated by a duly organized canoe club, or a commercially operated manually propelled outrigger canoe may be navigated in these waters if the vessel has been registered in accordance with this chapter and is under immediate control of an

operator who has a valid permit issued by the department in accordance with subchapter 1." [Eff 2/24/94; am and comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-4, 200-9, 200-10, 200-22, 200-24) (Imp: HRS §§200-2, 200-4, 200-9, 200-10, 200-22, 200-24)

41. Section 13-253-1.3, Hawaii Administrative Rules, is amended to read as follows:

"§13-253-1.3 Gross receipts. [~~(a)~~ "~~Gross receipts~~" as used in this chapter means all moneys paid or payable to the account of the commercial use permittee or catamaran registration certificate holder, for services rendered, or resulting from trade, business, commerce, or sales by the vessel or water sports equipment owner when the services, trade, business, commerce, or sales has a direct relationship to the vessel.

~~(b)~~] Each commercial permittee or catamaran registration certificate holder shall be responsible for submitting to the department a monthly statement of its gross receipts." [Eff and comp 9/25/14; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4, 200-22, 200-24) (Imp: HRS §§200-2, 200-3, 200-4, 200-22, 200-24)

42. Section 13-254-1, Hawaii Administrative Rules, is repealed.

"§13-254-1 [Definitions.

~~"Makapuu ocean waters"~~ means the area confined by boundaries as shown on Exhibit F, June 1, 1981, and located at the end of this chapter, and also described as follows:

~~(1)~~ Beginning at a point, being the mean high water mark which is directly opposite from

~~the northeast corner of the Makapuu Beach  
Park Building;~~

~~(2) In the Makapuu Point direction along the  
mean high water mark to the tip of Makapuu  
Point; and~~

~~(3) Along a straight line connecting the point  
described in (2) above to, and ending at the  
point of beginning.~~

~~"Operate" means to navigate or otherwise use a  
vessel, surfboard, or paddle board (paipo board).~~

~~"Outrigger canoe" means a boat equipped with a  
framework terminating in a float, extended outward  
from the side of the boat to prevent upsetting.~~

~~"Paddleboards" (paipo boards) means any type of  
board that is (a) without skegs, (b) does not exceed  
four feet in length, and (c) is used for the sport of  
surfriding. [Eff 2/24/94] (Auth: HRS §§200-2, 200-3,  
200-4) (Imp: HRS §§200-2, 200-3, 200-4)] REPEALED."~~  
[R \_\_\_\_\_]

43. Section 13-255-1, Hawaii Administrative  
Rules, is amended to read as follows:

"§13-255-1 Purpose and scope. The purpose of  
these rules is to further the public interest and  
welfare and to promote safety by keeping Waikiki  
Beach, as defined in section [~~13-255-5~~] 13-255-6, free  
and clear of business activities and obstructions and  
open for the use of the public as a bathing beach and  
for passing over and along by foot." [Eff 2/24/94; am  
\_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4)  
(Imp: HRS §§200-2, 200-3, 200-4)

44. Section 13-255-5, Hawaii Administrative  
Rules, is repealed.

~~"§13-255-5 [Definitions. As used in this part,  
unless the context clearly indicates otherwise:~~

~~"Business" means all activities engaged in or caused to be engaged in by any person or legal entity with the object of making a profit or obtaining an economic benefit either directly or indirectly.~~

~~"Chairperson" means the chairperson of the board of land and natural resources of the State of Hawaii or a duly authorized representative or subordinate.~~

~~"Department" means the department of land and natural resources of the State of Hawaii.~~

~~"Person" means any individual, partnership, firm, society, incorporated association, joint venture, group, hui, joint stock company, corporation, trustee or any other legal entity.~~

~~"Rules" means the Rules Governing Hawaii Ocean Waters, Navigable Streams and Beaches of the department of land and natural resources, State of Hawaii.~~

~~"State" means the State of Hawaii.~~

~~"Waikiki Beach" means any and all lands along the shores of the island of Oahu from the Diamond Head boundary of the Elks Club (Tax Map Key No. 3-1-32-6) to the Diamond Head boundary of Fort DeRussy (Tax Map Key No. 2-6-05), seaward of line "A" as shown on exhibit "A" and described in exhibit "B", dated July 13, 1965, and located at the end of this chapter, over which the State of Hawaii now has or hereafter acquires an easement for the use of the public as a bathing beach and for passing over and along by foot. [Eff 2/24/94] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)] REPEALED." [R  
\_\_\_\_\_]~~

45. Section 13-255-6, Hawaii Administrative Rules, is amended to read as follows:

"§13-255-6 Waikiki Beach uses and activities; restrictions. (a) "Waikiki Beach" as used in these rules means any and all lands along the shores of the island of Oahu from the Diamond Head boundary of the

Elks Club (Tax Map Key No. 3-1-32-6) to the Diamond Head boundary of Fort DeRussy (Tax Map Key No. 2-6-05), seaward of line "A" as shown on exhibit "A" and described in exhibit "B", dated July 13, 1965, and located at the end of this chapter, over which the State of Hawaii now has or hereafter acquires an easement for the use of the public as a bathing beach and for passing over and along by foot.

~~[(a)]~~ (b) Permitted activities. Waikiki Beach is open to public use for sunbathing, foot traffic, swimming, and other activities which, when engaged in, will not unduly disrupt others from enjoying the beach.

~~[(b)]~~ (c) Business operations, soliciting prohibited. No person shall engage in, conduct, transact, or solicit business of any kind on or at Waikiki Beach.

~~[(c)]~~ (d) Storage, parking, and display prohibited. No person shall store, park, moor, place, or display any thing or personal property on or at Waikiki Beach for the purpose of engaging in, conducting, transacting, or soliciting business of any kind; provided that an outrigger canoe or sailing catamaran registered by the department pursuant to Hawaii ocean waters and shores rules may be placed, moored, or anchored below the mean high water mark.

~~[(d)]~~ (e) Structures and obstructions prohibited. No person shall construct, erect, place, deposit, or set up any building, structure, booth, wall, obstruction, or any improvement of any kind, whether temporary, portable, or permanent in nature, on or at Waikiki Beach, except such as may be approved by the department for sporting events, public safety, or for beach construction, repairs, preservation, or cleaning. In addition to any other available remedies, the department may remove, raze, or demolish the same wherever found at Waikiki Beach.

~~[(e)]~~ (f) Ball, etc., playing and kite flying prohibited. No person shall throw, cast, catch, kick, or strike any type of ball, frisbee, or other similar object while on or at Waikiki Beach. No person shall fly a kite of any kind while on or at Waikiki Beach."

[Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4, 200-06)

46. Section 13-256-3, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-3 Commercial use permit or catamaran registration certificate requirements. ~~[(a)]~~ All operators of commercial vessels, water craft or water sports equipment or activities conducting commercial tours or instruction on State ocean waters ~~[shall apply for]~~ must obtain a commercial use permit or where applicable a catamaran registration certificate to be issued by the department, except for those operating out of a ~~[state]~~ State commercial harbor~~[-or Kewalo Basin]~~. The applicant for such permit shall comply with the applicable provisions stated in sections 13-231-50 to 13-231-70.

~~[(b) The department may establish and maintain a Recreation Advisory Committee of not less than three for each recreation management area as defined in this chapter to review and make recommendations for commercial use permits or catamaran registration certificate to be issued by the department. The department shall consider the recommendations of the Advisory Committee, but is not bound by the recommendations. Members of the Recreation Advisory Committee shall have not less than three years of experience in their area of specialty.]"~~ [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-22, 200-24) (Imp: HRS §§200-22, 200-24)

47. Section 13-256-5, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-5 Commercial use permits; public auction. (a) Unless otherwise provided by law, all commercial use permits issued by the department under this chapter for thrill craft or parasail operations may be made at public auction under sealed bid after public notice.



(b) Before any prospective bidder is entitled to submit a bid for a commercial use permit, the prospective bidder shall, not less than six calendar days prior to the day designated for opening bids, give written notice of its intention to bid to the officer charged with issuing the commercial use permits. Each prospective bidder shall submit answers, under oath, to questions contained in a questionnaire, provided by the department, setting forth a complete statement of the experience, competence and financial standing of the prospective bidder. The names and the number of persons who have submitted a notice of intention to bid shall not be divulged. Information contained in the answers to the questionnaire shall remain confidential, and any government officer or employee who knowingly divulges or permits to be divulged any such information to any person not fully entitled thereto shall be fined not more than \$250. A questionnaire so submitted shall be returned to the bidder after having served its purpose.

(c) Advertisement for bids. Publication of a call for tenders shall be made not less than three times on not less than three different days in a newspaper of general circulation printed and published within the State and in a newspaper of general circulation published in the county in which the designated area is located. The first publication shall be not less than three weeks prior to the date designated for the opening of tenders. Notice of the call for tenders shall contain the following:

- (1) Location where the bid questionnaire is available;
- (2) Time and place of the opening of tenders;
- (3) General description of the designated area;
- (4) Specific use for which the commercial use permit is intended; and
- (5) The upset price as established by the department. Unless a higher amount is specified for a specific commercial use permit the annual upset price shall be \$900.00, which is the monthly charge of \$75.00. If the commercial use permit is

located within an area which requires less than twelve months of operation, the upset price shall be adjusted accordingly.

(d) All bids shall be sealed and delivered to the officer advertising therefor and shall be opened by the officer at the time and place to be stated in the call for tenders which time shall not be less than ten days after the last publication, in the presence of all bidders who attend, and may be inspected by any bidder. All bids which do not comply with the requirements of the call for tenders shall be rejected. The officer calling for bids may reject any or all bids and waive any defects when in the officer's opinion such rejection or waiver will be in the best interest of the public.

(e) All bids shall be accompanied by a deposit of legal tender, or a certificate of deposit, cashier's check or certified check on a bank that is insured by the Federal Deposit Insurance Corporation, or on a savings institution insured by the Federal Savings & Loan Insurance Corporation or by a share certificate issued by a credit union insured by the National Credit Union Administration, in a sum of not less than five per cent of the amount bid, payable at sight to the officer advertising for tenders. A bid deposit may also be in the form of a surety bond conforming to the requirements of Section [~~103-31~~] 102-8, Hawaii Revised Statutes.

(f) If the highest bidder to whom the commercial use permit is awarded fails or neglects to fully comply with the terms and conditions for the issuance of the commercial use permit within ten days after the award or within such further time as the officer awarding the permit may allow, the bidder shall forfeit the bid deposit to the State. If the permit is issued, the bid deposit shall be returned to the permittee upon receipt of the first monthly payment. The deposits made by the unsuccessful bidders shall be returned to them after the commercial use permit is issued or if the commercial use permit is not awarded or issued after the officer's determination to publish

another call for tenders or not to issue any commercial use permit.

(g) The commercial use permit shall be awarded to the highest qualified bidder. If there is more than one authorized commercial operating area in a particular designated area, then the permit for each operating area shall be made by a separate call for tenders.

(h) No commercial operator shall be awarded more than one commercial use permit per designated area. Each bidder shall be awarded only one commercial use permit per designated area. Thus, if a bidder is the highest qualified bidder on more than one operating area then that bidder shall choose one operating area and the bidder's other bids shall be deemed withdrawn.

(i) Each commercial use permit shall be valid for one year with an option to renew the commercial use permit no more than four times, which shall be accomplished on or before the anniversary date of its initial issuance. A permittee interested in renewing its commercial use permit, shall however, notify the department sixty days before the expiration of the commercial use permit of its intent to renew. The terms and conditions during the renewal period shall be the same as those applicable to the initial issuance except as to the renewal option which shall in no event cause the commercial use permit to be renewed more than four times. At the end of the fourth renewal period of the permit, the permit may again be offered for public auction, provided that the previous permittee shall be offered the right of first refusal at the new upset price.

(j) Monthly payments for a commercial use permit shall be based upon 1) one-twelfth of the bid price or 2) a percentage of the monthly gross receipts equal to ~~[two]~~ three per cent, whichever is greater. ~~[Gross receipt]~~ "Gross receipts" is defined in ~~§ 13-256-12~~ section 13-230-8.

(k) The commercial use permit does not give the permittee any vested property rights. The department reserves the right not to issue or renew any commercial use permits." [Eff 2/24/94; am

\_\_\_\_\_ ] (Auth: HRS §§200-2, 200-3, 200-4)  
(Imp: HRS §200-2, 200-3, 200-4)

48. Section 13-256-7, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-7 Business transfer fee. (a) Whenever a stockholder or owner of an interest in a corporation or other business which has been issued a commercial use permit sells or transfers stock or interest in the corporation, either as a single transaction or as aggregate of several transactions, to any person or business entity who is not a stockholder or owner of record on the effective date of these rules, the seller or person transferring such stock or interest shall pay to the department a business transfer fee which is the greater of (1) two per cent of the gross receipts which are directly attributable to the use of the [~~co~~commercial] commercial use permit issued by the department for the twelve month period prior to the date of sale, or (2) ten per cent of the net value of the sale of the stock or interest in the business as determined by the difference between the sale price and an equal percentage of the appraised value of the assets of the business.

(b) The value of the stock or interest transferred shall be as mutually agreed to by the seller and the department. In the case of a business which engages in more than one type of business activity, only the value of the business activity which is dependent upon the possession and use of the commercial use permit shall be considered for the purposes of this section. In those cases where the transfer is made for consideration other than legal tender, the appraised or market value of the item of consideration given in exchange for the interest in the business shall be used.

(c) If the seller and the department are unable to agree on the value of the interest transferred, that value shall be determined through arbitration by an independent party acceptable to both the seller and the department. The cost of the arbitration shall be

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borne by the party in whose favor the final value is determined." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

49. Section 13-256-8, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-8 Owner required to report change in ownership, address and other changes. [(a)] In addition to the provisions in section 13-251-44, the holder of any commercial use permit issued under this chapter shall notify the department in writing within seven days if:

- (1) The owner no longer has possession of the permitted vessel or water sports equipment[-] ; or
- (2) All or any interest in the permitted vessels or water sports equipment is transferred to or assigned to another person or business entity[-] as defined in these rules; or
- (3) The owner's address or telephone number changes.

~~[(b)] "Transfer" as used in this section means any sale, assignment or lease of the permitted vessel or water sports equipment; the change in ownership or transfer of stock in a corporate owner which results in a change of the majority stockholder; or the sale or assignment of interest in any other business entity which results in a change of the owner holding the majority interest.~~

~~[(c)] "Interest" as used in this section includes any claim of right, title, ownership of stock, shares, profit, benefit or gain in a corporation, partnership, joint venture or any other business entity that has a commercial permit issued under this Chapter.]~~ [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-

3, 200-4, 200-22, 200-24) (Imp: HRS §§200-2, 200-3, 200-4, 200-22, 200-24)

50. Section 13-256-12, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-12 Gross receipts. [~~(a)~~—Gross receipts as used in this chapter means all moneys paid or payable to the account of the commercial permittee, for services rendered, or resulting from trade, business, commerce, or sales by the vessel or water sports equipment owner when the services, trade, business, commerce, and sales have a direct relationship to the vessel.

~~(b)~~—]Each commercial permittee shall be responsible for submitting to the department a monthly statement of its gross receipts." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

51. Section 13-256-16, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-16 Thrill craft operations; general provisions. (a) No person under fifteen years of age shall operate a thrill craft. No person shall permit, or mislead another person into permitting, a person under fifteen years of age to operate a thrill craft.

(b) No person shall operate thrill craft within a marine life conservation district or marine natural area reserve.

(c) Thrill craft operations shall be curtailed in certain designated areas as described in subchapters two through eleven as necessary, to: 1) avoid possible adverse impacts on humpback whales or other protected marine life; 2) provide for increased public access; 3) reduce user conflicts; and 4) promote overall public safety.

(d) Effective January 2005, all recreational thrill craft operators shall be required to possess, and make available upon demand of enforcement personnel, a certificate of completion from ~~[an accredited institution of higher education]~~ a State approved course on the safe use and operation of a thrill craft. The State may recognize reciprocity with other states, i.e., the National Association of State Boating Law Administrators (NASBLA) approved portion of the personal water craft course; however, all operators shall be required to complete the portions of a certificate course for Hawaii that includes, but is not limited to:

- (1) Local ocean safety principles and practices;
- (2) The historical, cultural, and customary practices of Hawaii's ocean users; and
- (3) Any rules or laws pertaining to protected species and thrill craft operation in the State.

(e) All thrill craft operators and passengers shall be required to wear a personal flotation device in accordance with section 13-243-1.

(f) All persons holding or receiving a certificate of completion under this rule are exempt from section 13-244-15.5 for purposes of operating thrill craft." [Eff 2/24/94; am 7/5/2003; am \_\_\_\_\_] (Auth: HRS §§200-22, 200-24) (Imp: HRS §§200-22, 200-24)

52. Section 13-256-17, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-17 Recreational thrill craft operations. (a) Access to and from designated recreational thrill craft operating areas shall be by the most direct route consistent with safety considerations. Thrill craft operators shall not exceed a speed of slow-no-wake when within three hundred feet of the shoreline.

(b) Thrill craft operation shall be prohibited in State waters surrounding the islands of Kahoolawe, Lanai, Molokai and Niihau. In all other [In] non-designated ocean recreation management areas of State waters, recreational thrill craft may operate [only in state waters between] seaward of five hundred feet from the shoreline or the outer edge of the fringing reef whichever is greater[and two miles off the islands of Kauai, Oahu, Maui and Hawaii. Thrill craft operation shall be prohibited in State waters surrounding the islands of Kahoolawe, Lanai, Molokai and Niihau].

(c) In designated ocean recreation management areas, recreational thrill craft may operate only within locations designated for recreational thrill craft use.

(d) No thrill craft shall be operated for profit or gain in a recreational thrill craft operating area.

(e) Recreational thrill craft may gain access to state waters only from launching or harbor facilities or from private [~~beach front~~] beachfront property.

(f) The State may exempt thrill craft from the requirements of this section, and allow thrill craft to operate outside of designated thrill craft areas, as described in subchapters two through eleven, conditioned upon application for, and receipt of, a miscellaneous use permit pursuant to section 13-231-13 of these rules. [Eff 2/24/94; am \_\_\_\_\_]  
(Auth: HRS §§200-22, 200-24) (Imp: HRS §§200-22, 200-24)

53. Section 13-256-21, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-21 Ultralight float equipped aircraft.

(a) For the purpose of this section, ultralight or experimental float equipped aircraft means an



ultralight or experimental aircraft as defined by ~~[Part 103 of the Federal Aviation Regulations and equipped with floats]~~ section 13-230-8 of these rules.

(b) The takeoff, landing and inflight portions of all ultralight or experimental float equipped aircraft operations on or above any ocean recreation management area shall be governed by Parts 91 and 103 of the Federal Aviation Regulations, which are incorporated by reference. No person shall operate an ultralight or experimental float equipped aircraft in a careless or reckless manner so as to endanger the life or property of another.

(c) The operator of any aircraft designed to maneuver on the water shall abide by all rules governing the operation of motorized vessels during the launching, retrieval and taxi. No person shall operate an ultralight or experimental aircraft registered as an experimental or ultralight aircraft by the Federal Aviation Administration when operating within a designated ocean recreation management area while carrying passengers for hire.

(d) The use of shuttle vessels in support of ultralight or experimental float equipped aircraft operations is prohibited on the ocean waters of the ~~[state]~~ State, except for small watercraft carried aboard the aircraft." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4, 200-22, 200-24) (Imp: HRS §§200-2, 200-3, 200-4, 200-22, 200-24)

54. Section 13-256-22, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-22 Tow-in surfing. (a) The State assumes no responsibility or liability associated with tow-in surfing.

(b) Only thrill craft may be used for tow-in surfing.

(c) All thrill craft being used for tow-in surfing shall be recorded with the department using forms provided by the department.

(d) Tow-in surfing decals shall be provided at the time the vessel is recorded with the department and shall be required to be prominently displayed on the front half of the vessel.

(e) Thrill craft not recorded with the department for tow-in surfing are prohibited from displaying a tow-in surfing decal.

(f) Effective September 1, 2004, both the thrill craft operator and surfer, who engage in, or operate a thrill craft for tow-in surfing, shall be required to possess, and make available upon demand of enforcement personnel, a certificate of completion from an accredited institution of higher education in Hawaii on the safe use and operation of a thrill craft in high surf, that includes but is not limited to:

- (1) Local ocean safety principles and practices;
- (2) Hawaii Administrative Rules as they apply to boating;
- (3) The historical, cultural, and customary practices of Hawaii's ocean users; and
- (4) Any rules or laws pertaining to protected species and thrill craft operation in the State.

(g) When operating a thrill craft for tow-in surfing, all operators shall:

- (1) Carry on board a two-way communicating device;
- (2) Tow-in a maximum of one person at any one time;
- (3) Carry dive fins and a safety knife on their person; and

- (4) Yield right of way to all other boating or ocean recreation activities by leaving the same surfing break area and remaining a minimum of one thousand feet from the other activities.

(h) Notwithstanding section 13-256-17, within designated ocean recreation management areas, thrill craft used for tow-in surfing may enter the ocean recreation management area to gain access to and from a surfing site and for board and personnel recovery, rescue, and emergency purposes only in areas designated specifically for this activity as described in sections 13-256-23, 13-256-24 and 13-256-25.

(i) Unless otherwise provided by rule, towing surfers into waves within a designated ocean recreation management area shall be prohibited.

(j) Tow-in surfing may only be conducted during periods of high surf warning as declared by the National Weather Service in the region or around the island or islands for which the high surf warning has been issued.

(k) Notwithstanding section 13-244-18, surfers engaged in tow-in surfing shall not be required to wear a life-saving device.

(l) Thrill craft used for tow-in surfing may gain access to State waters from boat ramps, harbor facilities or from private beach front property and access the designated tow-in surfing area by the most direct route consistent with safety considerations.

(m) In addition to equipment required by the U.S. Coast Guard for vessels, all thrill craft used for tow-in surfing shall be equipped with the following:

- (1) A rescue sled that is a minimum of three feet wide, four feet long and three inches thick. The sled shall have a minimum of

five hand-grip handles, two of which shall be on the port side, two on the starboard side and one at the bow of the sled. The sled shall not exceed the thrill craft load capacity recommended by the manufacturer;

- (2) A quick-release tow-rope a minimum of thirty-feet long; and
- (3) A bow tow-line a minimum of six feet long.

(n) Notwithstanding section 13-244-9, thrill craft used for tow-in surfing may be in proximity of the shoreline and tow-in surfers and travel at a speed greater than slow-no-wake when accessing the ocean or shoreline or when retrieving a surfboard or surfer in accordance with this subchapter.

(o) The thrill craft shall be operated at all times with due care for the rights and safety of people and property and the operator shall abide by any state or federal laws as they pertain to protected species.

(p) All participants in tow-in surfing special events shall be required to possess a certificate of completion as described in subsection (f).

(q) Notwithstanding section 13-256-17(d), operators of a thrill craft used for filming tow-in surfing shall possess a certificate of completion as required by subsection (f)." [Eff 10/2/03; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4, 200-22, 200-24, 200-37) (Imp: HRS §§200-2, 200-3, 200-4, 200-22, 200-24, 200-37)

55. Section 13-256-35, Hawaii Administrative Rules, is repealed.

~~"§13-256-35 [Owner required to report change in ownership, address and other changes. (a) In addition to the provisions in section 13-251-44, the holder of any commercial vessel permit issued under~~

~~this chapter shall notify the department in writing within seven days if:~~

- ~~(1) The owner no longer has possession of the vessel;~~
- ~~(2) All or any interest in the vessel is transferred to or assigned to another person(s) or business entity; and~~
- ~~(3) The owner's address or telephone number changes.~~

~~(b) "Transfer" as used in this section means any sale, assignment, lease of a vessel or the change in ownership or transfer of stock in a corporate owner which results in a change of the majority stockholder, or the transfer of interest in any other business entity which results in a change of the owner holding the majority interest.~~

~~(c) "Interest" as used in this section includes any claim of right, title, ownership of stock, shares, profit, benefit or gain in a corporation, partnership, joint venture or any other business entity that has a commercial vessel permit issued under this subchapter. [Eff 2/24/94] (Auth: HRS §§200-2, 200-3, 200-4, 200-22, 200-24) (Imp: HRS §§200-2, 200-3, 200-4, 200-22, 200-24)] REPEALED. [R \_\_\_\_\_]~~

56. Section 13-256-56, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-56 Wailua River restricted area. (a) Restrictions described in this section shall not apply to department vessels, department personnel or emergency, patrol or rescue craft while performing official duties.

(b) The Wailua River restricted area means the navigable waters of the Wailua River, Kauai, as defined by the boundaries as shown on Exhibit "L", titled, "Island of Kauai, Wailua River Restricted Area," dated February 27, 1998, and located at the end of this subchapter. The boundaries begin at a point at

the high water mark at the mouth of the Wailua River and include all the navigable waters along the Wailua River in a westerly direction to the base of Kaholalele Falls on the north fork of the river and all of the navigable waters to the base of the Wailua Falls on the south fork of the river.

(c) The Wailua River restricted area shall be divided into four zones:

- (1) Zone 'A' includes all the navigable waters beginning fifty feet into the river from the western side of the Wailua River bridge and from seventy-five feet into the Wailua River from the north shoreline to a point approximately eighteen hundred feet along the shoreline, then extends from the banks of the north shoreline to approximately seven hundred and eighty-three yards upstream as indicated by navigational aids on both sides of the river designating the boundary between Zones 'A' and 'B', as shown on Exhibit "L-1", titled, "Island of Kauai, Wailua River Restricted Area, Zone 'A'," dated February 27, 1998, and located at the end of this subchapter.
- (2) Zone 'B' includes all waters extending approximately two miles upstream from the navigational aids on both sides of the river designating the boundary between Zones 'A' and 'B' to the base of Kaholalele Falls on the north fork of the river and approximately three and a half miles from the navigational aids designating the boundary between Zones 'A' and 'B' to the base of the Wailua Falls on the south fork of the river as shown on Exhibit "L", titled, "Island of Kauai, Wailua River Restricted Area," dated February 27, 1998, and located at the end of this subchapter.
- (3) Zone 'C' includes the waters beginning at the west side of the Wailua River bridge between the north and south banks and extends fifty feet into the river, then

proceeds along the north shoreline extending seventy-five feet into the Wailua River from the north shoreline to a point approximately eighteen hundred feet along the shoreline as shown on Exhibit "L-1", titled, "Island of Kauai, Wailua River Restricted Area, Zone 'A'," dated February 27, 1998, and located at the end of this subchapter.

- (4) Zone 'D' begins at the eastern boundary of Zone 'C' and extends under the Wailua River bridge between the north and south banks, extending to the shoreline.
- (d) General rules for Wailua River.
  - (1) Only commercial and recreational vessels not exceeding twenty-one feet in length shall be allowed to utilize the Wailua River and shall be limited to:
    - (A) Vessels used for waterskiing;
    - (B) Motorized vessels, excluding thrill craft; and
    - (C) Manually-propelled vessels.
  - (2) Commercial barges, or vessels otherwise allowed by the department, shall be exempt from vessel length restrictions described in paragraph (1).
  - (3) Recreational motorized vessels, and recreational and rented manually-propelled vessels may utilize Zones 'A', 'B' and 'C' as provided for in this section.
  - (4) Zone 'C' shall be designated a swimming zone indicated by marker buoys. Motorized vessels launching from launch ramp 'A' shall proceed with caution while within Zone 'C'.
  - (5) All manually-propelled vessels shall be required to operate along side the northern river bank.
  - (6) All vessel operators shall possess a state park permit to embark or disembark along the shores only within the state park in Zone 'B'.
- (e) Commercial vessel activity requirements for Wailua River.

- (1) Unless otherwise provided by law, anyone conducting commercial activities on the Wailua River shall possess a valid commercial activity permit from the department.
- (2) All individuals possessing a commercial activity permit to utilize the Wailua river as of June 11, 1999, may retain the commercial activity permit on the effective date of these rules.
- (3) All available commercial activity permits may be issued in accordance with section 13-231-60.
- (4) Reissuance of commercial activity permits shall be in accordance with section 13-231-61.
- (5) Commercial barges, or vessels otherwise allowed by the department, may only utilize Zones 'A' and 'B'.
- (6) All commercial vessel activity is prohibited from Zones 'C' and 'D'.
- (7) Commercial waterskiing commercial activity permittees shall abide by the requirements described in subsection (g).
- (8) Commercial manually-propelled vessel commercial activity permittees shall abide by the requirements described in subsection (f).
- (f) Commercial manually-propelled vessel requirements for the Wailua River.
  - (1) Not more than fifteen manually-propelled vessel commercial activity permits, with a maximum of twelve vessels per commercial activity permit per day, and with a maximum of four guides per permit, may be issued for guided tours for the Wailua River.
  - (2) Not more than four manually-propelled vessel commercial activity permits, with a maximum of six vessels per commercial activity permit, may be issued for rented manually-propelled vessels for the Wailua River.



- (3) In addition to the provisions in subsection (e)(1), manually-propelled vessel commercial activity permittees utilizing the Wailua River shall abide by the following:
- (A) For guided tours, a minimum of one tour guide shall be required for each group of twelve people;
  - (B) Tour guides shall be required to wear a bright orange shirt with the company name printed on the shirt when guiding tours; and
  - (C) All commercial manually-propelled [~~vessels~~] vessel permittees shall be provided a Wailua River restricted area decal for each commercial manually-propelled vessel and shall be required to display it on the bow of the vessel.
- (g) Waterskiing activity requirements for the Wailua River.
- (1) Waterskiing may be conducted in Zone 'A' in an area designated by the department, as shown in Exhibit "L-1", titled "Island of Kauai, Wailua River Restricted Area, Zone 'A'," dated February 27, 1998, and located at the end of this subchapter, and shall be prohibited in Zone 'C'.
  - (2) Waterskiing may be conducted in Zone 'B' only between sunrise to 9:00 a.m. and from 5:00 p.m. to sunset.
  - (3) A maximum of one commercial activity permit may be issued for waterskiing activities.
  - (4) The vessel towing water skiers may tow not more than one person at any one time.
  - (5) Waterskiing shall be conducted in accordance with section 13-244-18.
  - (6) Waterskiing activities shall be exempt from the speed restrictions of section 13-244-9.
  - (7) Waterskiing vessel traffic patterns shall be in a counter-clockwise direction.
  - (8) Waterskiing tow ropes shall not exceed seventy-five feet in length.

- (9) Vessels engaged in waterskiing activities shall not exceed a speed of thirty-six miles per hour.
- (10) The only water [~~water~~] towing apparatus allowed shall be those equipped with boots, straps, or a leash on the board or ski.
- (h) Launch ramp restrictions.
  - (1) All commercial vessels are prohibited from utilizing Launch ramp 'A', as shown in Exhibit "L-1", titled "Island of Kauai, Wailua River Restricted Area, Zone 'A'," dated February 27, 1998, and located at the end of this subchapter, and shall be required to utilize Launch ramp 'B', as shown in Exhibit "L-1," titled "Island of Kauai, Wailua River Restricted Area, Zone 'A'," dated February 27, 1998, and located at the end of this subchapter.
    - (i) The eastern half of the lower Kaumualii area, as shown in Exhibit "L-1", titled "Island of Kauai, Wailua River Restricted Area, Zone 'A'," dated February 27, 1998, and located at the end of this subchapter, shall be used exclusively for the launching and recovery of Hawaiian outrigger canoes.
    - (j) The western half of the lower Kaumualii area, as shown in Exhibit "L-1", titled "Island of Kauai, Wailua River Restricted Area, Zone 'A'," dated February 27, 1998, and located at the end of this subchapter, may be utilized by recreational vessels, other than Hawaiian outrigger canoes, allowed on Wailua River." [Eff 10/19/02; am \_\_\_\_\_ ]  
(Auth: HRS §§200-2, 200-3, 200-4, 200-22, 200-24)  
(Imp: HRS §§200-2, 200-3, 200-4, 200-22, 200-24)

57. Section 13-256-63, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-63 Sharks Cove, Three Tables and Waimea Bay ocean waters. (a) Sharks Cove, Three Tables and Waimea Bay ocean waters means the area confined by the boundaries shown on Exhibit "Q", titled "Ocean Recreation Management Areas, Sharks Cove, Three Tables

and Waimea Bay ocean waters", dated October 20, 2000, and located at the end of this subchapter.

- (1) Zone 'A' begins at a point in the water at approximately 21°38.296 N, 158°04.092 W, then in a northerly direction along the shoreline to Waimea Point at approximately 21°38.599 N, 158°03.916 W, then in a straight line in a southwesterly direction for approximately one thousand eight hundred thirty-seven feet back to the point of origin.
- (2) Zone 'B' begins at a point in the water Three Tables Point at approximately 21°38.751 N, 158°03.925 W; then along the shoreline in a northeasterly direction to a point in the water at approximately 21°39.010 N, 158°03.842 W, then due west to approximately 21°39.010 N, 158°03.874 W, then in a straight line in a southwesterly direction back to the point of origin.
- (3) Zone 'C' begins at a point in the water at approximately 21°39.010 N, 158°03.842 W, then in a northerly direction along the shoreline to Kulalua Point at approximately 21°39.296 N, 158°03.823 W, then in a straight line in a southwesterly direction to approximately 21°39.010 N, 158°03.874 W, then in a straight line due east back to the point of origin.
- (4) Zone 'D' begins at Kulalua Point at approximately 21°39.296 N, 158°03.823 W, then due west for one hundred yards, then in a straight line in a southwesterly direction to the Wananapaoa Islet at approximately 21°38.340 N, 158°04.198 W, then in a straight line in a southeasterly direction to 21°38.296 N, 158°04.092 W, then in a straight line in the northeasterly direction to Waimea Point at approximately 21°38.599 N, 158°03.916 W, then in a northeasterly direction along the shoreline to approximately 21°38.751 N, 158°03.925 W and

then in a straight line in a northeasterly direction to the point of origin.

(b) Following are restrictions for Zone 'A':

- (1) Except where permitted by law, motorized vessels, except sailing vessels with auxiliary engines, are prohibited in Zone 'A'.
- (2) Sailing vessels with auxiliary engines shall be required to enter and leave Zone 'A' on sail power or by oar only.
- (3) Manually-propelled vessels, i.e., kayaks, may embark and disembark from the shoreline of Zone 'A'.
- (4) Any vessel anchoring within Zone 'A' shall be prohibited from anchoring within two hundred feet of the shoreline and shall anchor only in sandy areas.
- (5) All vessels shall proceed at a speed of slow-no-wake, as defined in section [~~13-250-5~~ 13-230-8, when in Zone 'A'.

(c) Following are restrictions for Zone 'B':

- (1) Manually-propelled vessels, i.e., kayaks, may embark and disembark from the shoreline in Zone 'B'.
- (2) Except where permitted by law, motorized vessels, including sailing vessels with auxiliary engines, are prohibited in Zone 'B'.

(d) [~~Following are restrictions for Zone 'C':~~

~~(1)]~~ Except where permitted by law, all vessels are prohibited from embarking or disembarking from the shoreline into Zone 'C'.

(e) In addition to any federal, state or county law, rule, permit or ordinance requirements, a commercial activity permit shall be required to conduct commercial SCUBA or commercial snorkeling activities in Zone 'C,' issued by the department. This applies to all for-profit and not-for-profit companies or organizations. Allocation of the commercial activity permits shall be in accordance with section 13-231-60 and the applicant shall submit the following with the application:

- (1) A list of all instructors or guides to be named on the commercial activity permit. The onus shall be on the commercial activity permittee to update any additions or deletions of the names of the persons utilized for instruction or guided tours;
- (2) Proof of insurance, as described in section 13-231-65, for each individual listed on the commercial activity permit;
- (3) A copy of the tax clearance certificate or a letter from the state department of taxation that confirms the applicant is paying taxes;
- (4) Vehicle license numbers for vehicles utilized for shuttling customers; and
- (5) Proof of a leadership level professional credential, i.e., dive master or above, from an internationally recognized SCUBA diving training agency, e.g., PADI, for each instructor or guide listed on the commercial activity permit for commercial SCUBA and snorkeling activities.

(f) Commercial activity permits for commercial SCUBA or snorkeling activities shall be valid for a period not to exceed one year.

(g) Renewal of a commercial activity permit shall be in accordance with section 13-231-61, except that subsection (b)(1), (4) and (8) shall not apply. The minimum revenue standard shall be the fees provided in subsection (j).

(h) A yearly non-refundable commercial activity permit application fee of \$50 shall be paid at the time the application is submitted.

(i) In addition to the commercial activity permit described in subsection (e), a use permit, as described in subsection (j) shall be required when using Zone 'C'.

(j) A maximum of six use permits, with a combination of commercial activity permittees and customers not to exceed ten individuals, including instructors and assistants per use permit, shall be issued for any one of three time periods and the permittee shall only be allowed to use Zone 'C' during

the periods reserved by the permittee via a reservation system established by the department.

(k) Use permit fees, that shall be paid in full at the time of the reservation for use periods, shall be as follows:

- (1) A seasonal user fee of \$420 or
- (2) A monthly user fee of \$75; or
- (3) A weekly user fee of \$56; or
- (4) A daily user fee of \$10.

(l) Individuals who possess a commercial activity permit and pay fees in accordance with section 13-234-25, shall be exempt from the fee requirements provided in subsection (k) but shall be required to make reservations as described in subsection (j).

(m) Commercial activities may be allowed from April 1st through October 31st of each year but shall be prohibited between the hours of 9:00 p.m. to 8:00 a.m. and from November 1st through March 31st of each year.

(n) Individuals conducting instruction or guided tours shall be required to make available to representatives of the department a copy of the use permit upon demand.

(o) Any person who violates any of these rules or who violates any lawful command issued pursuant to these rules shall be subject to fines as prescribed in sections 200-14, 200-14.5, and 200-25, [HRS] Hawaii Revised Statutes. Prosecution of offenders shall be as provided by law.

(p) Commercial activity permittees shall make available to customers maps or charts that show the boundaries of the area(s), outlined restricted zones, and dangerous areas and conditions and shall establish an education program acceptable to the department addressing the historical, cultural, ecological significance of the area, and any rules or laws pertaining to protected species and marine resource conservation etiquette.

(q) Unless otherwise allowed by the County, commercial activity permittees shall be required to shuttle their customers to and from the parking area

fronting Zone 'C', when utilizing Shark's Cove for commercial activities.

(r) Following are restrictions for Zone 'D' [-] :

- (1) All vessels shall proceed at a speed of slow-no-wake, as defined in section [~~13-250-5~~] 13-230-8, when in Zone 'D'.
- (2) When installed, all vessels mooring in Zone 'D' shall utilize day-use-moorings or shall anchor in sandy areas.

(s) Individuals conducting special events in Zones 'A', 'B', 'C' or 'D', shall be required to obtain a special events permit in accordance with 13-244-19." [Eff 2/24/94; am 4/27/02; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4, 200-10, 200-22, 200-24) (Imp: HRS §§200-2, 200-3, 200-4, 200-10, 200-22, 200-24)

58. Section 13-256-73.5, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-73.5 Large snorkel tour permit restrictions. (a) No more than one-hundred fifty customers per day or the historical daily average of the months July, August, and September of the calendar years 1996 thru 2000, whichever is lower, not to be less than seventy customers per day per permit shall be permitted.

(b) The passenger carrying capacity of the vessel(s) having a capacity of over six passengers shall be established by a United States Coast Guard Certificate of Inspection.

(c) All associated operational and supporting activities on land must meet all applicable land use laws and zoning ordinances, including, but not limited to the number of passengers allowed and approved for loading from private lands or as approved by the department through a conservation district use permit.

(d) Snorkel tours shall be conducted in Zones "D" and "E" within Kaneohe bay waters, pursuant to section 13-256-73.

(e) All stops for other than snorkeling shall be within the commercial area of the sand flat area

within Kaneohe [~~By~~] Bay waters designated as restricted zone I and shall not exceed two hours. Only non-motorized equipment may be used for water sports recreation.

(f) Any vessel authorized on the effective date of these rules to load passengers from the Heeia Kea small boat harbor pier under a permit issued pursuant to chapter 13-231 is permitted to load to full certified passenger capacity.

(g) Replacement or substitution of any existing vessels or equipment shall require prior written approval by the department and the department shall have discretion to permit vessel substitution with a similar length vessel; provided that the increase shall not be greater than ten per cent of the length of the authorized vessel of record on May 22, 2000. An increase of greater than ten per cent of the length of the authorized vessel of record on May 22, 2000 is prohibited. Additional motorized and non-motorized vessels and equipment not authorized on July 1, 1993 by the department shall not be allowed.

(h) Educational and not-for-profit tours shall not be counted against daily customer limits, but the permittee's total number of passengers shall not exceed the maximum number of customers allowed per day. Not-for-profit tours and passengers shall not be mixed with commercial customers on the vessel at the same time.

(i) All vessels shall be registered in accordance with section 13-256-4(a), notwithstanding section 13-256-4(b), and display a current Ocean Recreation Management Area decal.

(j) Permittees or owners or shareholders of record of business entities holding permits may transfer any interest in the business. Any transfer of interest in the business shall result in assessment of a business transfer fee in accordance with section 13-256-7.

(k) When the Kualoa full service permit or a large full service permit turns into a large snorkel tour permit because of a transfer of ownership to a non-family member, no additional motorized or non-



motorized vessels or equipment shall be allowed to be added to the existing authorized inventory.

(1) When a large snorkel tour permit transfers ownership to a non-family member no more than seventy customers per day shall be permitted." [Eff 11/7/11; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4, 200-22, 200-23, 200-24, 200-39) (Imp: HRS §§200-2, 200-3, 200-4, 200-22, 200-23, 200-24, 200-39)

59. Section 13-256-74, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-74 Kailua Ocean Waters Restricted Zones. (a) Zone A Kailua ocean waters restricted zone is the area encompassed by the boundaries of the zone shown on Exhibit "Y", dated June 7, 1989, located at the end of this subchapter. The boundaries are as follows:

Beginning at a point on the low water mark of the shoreline at the extension of the western boundary of Kailua Beach Park; then along the low water mark of the shoreline in a eastern direction for a distance of three hundred feet; then by azimuth measured clockwise from True South, 180 degrees for a distance of one thousand one hundred fifty feet; 090 degrees for a distance of three hundred feet; then by a straight line to the point of beginning.

Zone A Kailua ocean waters restricted zone is designated for windsurfing. No person shall operate a [~~motor vessel~~] motorboat and no person shall swim in the zone when used by windsurfers.

[~~(e)~~] (b) Zone B Kailua ocean waters restricted zone is the area encompassed by the boundaries of the zone shown on Exhibit "Y", dated June 7, 1989, located at the end of this subchapter. The boundaries are as follows:

Beginning at a point at the center of the bridge of Kawailoa Road at the entrance to Kaelepulei Pond; then for fifty feet either side of a line by azimuth measured clockwise from True

South, 240 degrees for a distance of one thousand feet.

Zone B Kailua ocean waters restricted zone is designated an ingress/egress zone for manually propelled vessels. Swimming in the zone is prohibited when in use by vessels." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRSS§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

60. Section 13-256-88, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-88 Maunalua Bay waters. (a) Maunalua Bay waters means the area encompassed by the boundaries shown on Exhibit "FF", dated May 15, 1990, and located at the end of this subchapter. The boundaries are described as follows:

Beginning at the southern point on the shoreline of Kawaihoa Point, then by azimuth measured clockwise from True South, 107 degrees for a distance of seventeen thousand and eighty-five feet to the southwestern tip of Wailupe Peninsula, then along the shoreline of Maunalua Bay to the point of beginning.

(b) Commercial ocean recreation activities shall be restricted within Maunalua Bay waters as follows:

(1) No commercial operator shall operate a thrill craft, engage in parasailing, water sledding or commercial high speed boating, operate a motorized vessel towing a person engaged in parasailing, or operate a [~~motor vessel~~] motorboat towing a person engaged in water sledding during all weekends, and state or federal holidays.

(2) All commercial ocean recreation activities in Maunalua Bay waters are prohibited on Sunday, effective January 1, 1991.

(c) Zone A Restricted Zone is the area encompassed by the boundaries shown of the zone on Exhibit "EE", dated February 7, 1990, and located at the end of this subchapter. The boundaries of Zone A are as follows:

Beginning at a point in the water, by azimuth measured clockwise from True South, which is 325 degrees for a distance of two thousand three hundred twenty-five feet from a point on the low water mark on the east side of Maunalua Bay boat ramp; then on a radius of two hundred feet around that point.

(d) Zone B Restricted Zone is the area encompassed by the boundaries shown of the zone on Exhibit "EE", dated February 7, 1990, and located at the end of this subchapter. The boundaries of Zone B are as follows:

Beginning at a point in the water, by azimuth measured clockwise from True South, which is 330 degrees for a distance of one thousand six hundred eighty feet from a point on the low water mark on the east side of Maunalua Bay boat ramp; then on a radius of two hundred feet around that point.

(e) Zone C Restricted Zone is the area encompassed by the boundaries shown of the zone on Exhibit "EE", dated February 7, 1990, and located at the end of this subchapter. The boundaries of Zone C are as follows:

Beginning at a point in the water, by azimuth measured clockwise from True South, which is 340 degrees for a distance of two thousand five hundred fifty feet from a point on the low water mark on the east side of Maunalua Bay boat ramp; then on a radius of two hundred feet around that point.

Zones A, B and C are designated commercial thrill craft operating zones. No commercial operator permittee shall operate more than six rental thrill craft within each designated area at any one time. No commercial thrill craft shall be operated within Zones A, B and C except between the hours of 9:00 a.m. and 5:00 p.m., Mondays through Fridays. No commercial thrill craft shall be operated within Zones A, B and C on Saturdays, Sundays and state or federal holidays.

(f) Zone D Restricted Zone is the area encompassed by the boundaries shown of the zone on

Exhibit "EE", dated February 7, 1990, and located at the end of this subchapter. The boundaries of Zone D are as follows:

Beginning at a point in the water, by azimuth measured clockwise from True South, which is 012 degrees for a distance of seven hundred fifty feet from a point on the low water mark on the east side of Maunalua Bay boat ramp; then on a radius of two hundred feet around that point.

Zone D is designated a recreational thrill craft operating zone for use by inexperienced operators only. Commercial thrill craft operations are prohibited.

(g) Zone E Restricted Zone is the area encompassed by the boundaries shown of the zone on Exhibit "EE", dated February 7, 1990, and located at the end of this subchapter. The boundaries of Zone E are as follows:

Beginning at a point in the water, by azimuth measured clockwise from True South 076 degrees for a distance of four thousand one hundred feet from Buoy "1", then 076 degrees for a distance of eight thousand four hundred feet; 168 degrees for a distance of one thousand four hundred fifty-five feet; 259 degrees for a distance of eight thousand five hundred eighty feet; then in a straight line to the point of beginning.

Zone E is designated a recreational thrill craft zone. No person shall operate a commercial thrill craft within this area. Other vessels shall exercise caution when transiting this area. This zone shall be closed to all thrill craft operations during the whale season, from December 15 to May 15 of the following year.

(h) Zone F Restricted Zone is the area encompassed by the boundaries shown of the zone on Exhibit "EE", dated February 7, 1990, and located at the end of this subchapter. The boundaries of Zone F are as follows:

Beginning at a point in the water at Buoy "1", by azimuth measured clockwise from True

South, then 157 degrees for a distance of one thousand nine hundred thirty-five feet; 092 degrees for a distance of one thousand nine hundred five feet; 085 degrees for a distance of three thousand three hundred feet; 075 degrees for a distance of four thousand two hundred eighteen feet; 347 degrees for a distance of two thousand four hundred feet; 259 degrees for a distance of eight thousand eight hundred eighty feet; 000 degrees for a distance of eight hundred eighty-five feet; then by a straight line to a point of beginning.

No person shall operate a vessel within this area at a speed in excess of slow-no-wake. This is a green sea turtle resting and foraging area.

(i) Zone G Maunalua Bay Parasail Zone is the area encompassed by the boundaries shown of the zone on Exhibit "FF", dated May 15, 1990, and located at the end of this subchapter. The boundaries of Zone G are as follows:

Beginning at entrance buoy "1" to the Hawaii-Kai Marina and Maunalua Bay boat launching ramp, establishing the eastern boundary along the extended centerline of the Ku'i channel entrance; then by straight line to buoy R-2 off Diamond Head, establishing the western boundary.

Zone G Maunalua Bay Parasail Zone is designated for parasail operations. All operating parasail vessels shall remain seaward of the boundary line. No more than two commercial operating area use permits for parasailing operations shall be authorized for this zone. No permittee shall operate more than one vessel with a parasail aloft at any one time. No person shall operate within one thousand feet of any buoy when the parasail is aloft. All other vessels using this area shall exercise extreme caution. This zone, except for that portion which is encompassed by alternate parasail zone G1, shall be closed to parasail operations from January 6 to May 15 of each year.

(j) Zone G1 Maunalua Bay Alternate Parasail Zone is the area encompassed by the boundaries shown on

Exhibit "FF", dated May 15, 1990, and located at the end of this subchapter. The boundaries of Zone G1 are as follows:

Beginning at a point on the [~~the~~] eastern boundary of Zone G at the intersection of the straight line following a line from Kawaihoa Point at Koko Head to buoy R-2 off Diamond Head, establishing the shoreward boundary; then at a point on the shoreward boundary intersected by a line on a bearing of 000 degrees to the Kahala Hilton Hotel establishing the western boundary. Zone G1 Maunalua Bay Alternate Parasail Zone is that portion of parasail Zone G which is designated for parasail operations from January 6 to May 15 of each year. No permittee shall operate more than one parasail vessel within this zone during this period. No parasail vessel shall exceed the speed of 18 knots within this zone. All other vessels using this area shall exercise caution.

(k) Zone H Ingress-egress corridor means the area encompassed by the boundaries shown on Exhibit "HH", dated August 19, 1988, and located at the end of this subchapter. The boundaries of Zone H are as follows:

Beginning at a point at the shoreward western boundary of Maunalua Beach Park boat ramp; then by azimuth measured clockwise from True South, 120 degrees for a distance of seventy-five feet, 030 degrees for a distance of one hundred feet to a point in the water; 120 degrees for a distance of one hundred feet to a point in the water; 218 degrees for distance of one hundred feet to a point on land; then in a straight line to the point of beginning.

Zone H is designated for recreational thrill craft ingress-egress to the ocean waters of Maunalua Bay. No person shall operate or moor a vessel, surfboard, or sailboard within this area.

(l) Zone I means the area encompassed by the boundaries shown on Exhibit "HH", dated August 19, 1988, and located at the end of this subchapter. The boundaries of Zone I are as follows:

Beginning at a point in the water 270 degrees by azimuth measured clockwise from True South, at a distance of twenty-five feet from daybeacon R"2" of Ku'i channel; then 270 degrees for a distance of three hundred feet, 025 degrees for a distance of one thousand one hundred twenty-five feet; 090 degrees for a distance of three hundred feet; then in a straight line to the point of beginning.

Zone I is designated for recreational water skiing and commercial water sledding. Only one commercial operating area use permit shall be issued for this zone for safety purposes.

(m) Maunalua Bay, Ku'i Channel speed restrictions.

- (1) The speed of any watercraft shall not exceed 10 knots when within the confines of the Ku'i channel as shown on Exhibit "GG" dated May 15, 1990, and described as follows:

Beginning at a line drawn between buoys R "2" and G"1A", then through each and every daybeacon in ascending order to daybeacons R"8" and G"9".

- (2) The speed of any watercraft shall not exceed 5 knots when within the confines of the Ku'i channel as shown on Exhibit "GG", dated May 15, 1990, and located at the end of this subchapter. The boundaries are described as follows:

Beginning at a line drawn between buoys R"8" and G"9", then through each and every daybeacon and buoy in ascending order to the boundaries of Hawaii Kai Marina Bridge, May Way Bridge and Kuli'ou'ou stream." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-22, 200-23, 200-24, 200-37) (Imp: HRS §§200-22, 200-23, 200-24, 200-37)

61. Section 13-256-91, Hawaii Administrative Rules, is amended to read as follows:

“§13-256-91 Waikiki Ocean Waters Restricted Zones. (a) Waikiki Speed Zone.

- (1) Waikiki speed zone means the area confined by the boundaries shown for said zone on Exhibit “KK”, dated June 30, 1988, located at the end of this subchapter. The boundaries are as follows:

Beginning at a point on the low water of the shoreline at the southern tip of Magic Island on a straight line to the Ala Wai Entrance Buoy G “1”, then on a straight line to Diamond Head Buoy R “2”, then on a straight line toward Diamond Head Lighthouse to intersect the Diamond Head windsurfing zone boundary, then along the boundary to the low water mark at Diamond Head Beach Park, then along the low water mark following the shoreline to the point of beginning.

(2) Restriction. No person shall operate a vessel or watercraft within the Waikiki speed zone at a speed in excess of slow-no-wake. Vessel operators shall exercise caution while transiting the area due to heavy use by swimmers.

- (b) Waikiki Commercial Thrill Craft Zone A.  
(1) Waikiki Thrill Craft Zone A means the area confined by the boundaries shown on Exhibit “KK”, dated June 30, 1988, located at the end of this subchapter. The boundaries are as follows:

Beginning at a point in the water by azimuth measured clockwise from True South, 045 degrees for a distance of three thousand six hundred feet from the low water mark of the tip of the groin at the southern boundary of Fort DeRussy Beach Park; then on a radius of two hundred feet around that point.

- (c) Waikiki Commercial Thrill Craft Zone B.  
(1) Waikiki Commercial Thrill Craft Zone B means the area confined by the boundaries shown



for said zone on Exhibit "KK", dated June 30, 1988, located at the end of this subchapter, which boundaries are described as follows:

Beginning at a point in the water by azimuth measured clockwise from True South, 025 degrees for a distance of three thousand eight hundred feet from the low water mark of the tip of the groin at the southern boundary of Fort DeRussy Beach Park; then on a radius of two hundred feet around that point.

(d) Restrictions. Waikiki Commercial Thrill Craft Zone A and Zone B are designated commercial thrill craft areas. No commercial operator permittee shall operate more than six rented thrill craft within [it] its assigned area at any one time." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-23, 200-24, 200-37) (Imp: HRS §§200-23, 200-24, 200-37)

62. Section 13-256-112, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-112 Maui Humpback whale protected waters. The Maui Humpback whale protected waters means the area encompassed by the boundaries shown on Exhibit "00-1", dated May 15, 1990, and located at the end of this subchapter. The boundaries are described as follows:

Beginning at the shoreline of the southwestern tip of Puu Olai Point, then by azimuths measured clockwise from True South, 082 degrees for a distance of two nautical miles; 141 degrees for a distance of nineteen nautical miles; 164 degrees for a distance of three nautical miles; 184 degrees for a distance of two and five-tenths nautical miles; 200 degrees for a distance of four and three-tenths nautical miles; 295 degrees to Hawea Point; then along the shoreline of west and south Maui to the point of beginning.

Between December 15 and May 15 of the following year during the whale season, no person shall operate a thrill craft, or engage in parasailing, water sledding or commercial high speed boating, or operate a [~~motor vessel~~] motorboat towing a person engaged in water sledding or parasailing within this area." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-22, 200-23, 200-24, 200-37) (Imp: HRS §§200-22, 200-23, 200-24, 200-37)

63. Section 13-256-128, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-128 Baldwin Park-Paia Bay Restricted Area. (a) The Baldwin Park-Paia Bay restricted area means the area confined by the boundaries shown for said zone on Exhibit "XX/YY", dated August 23, 1988, located at the end of this subchapter. The boundaries are as follows:

Beginning at a point at the low water mark at the northern tip of Fly Water Point, then by azimuth measured clockwise from True South, 157 degrees for a distance of five hundred feet; 070 degrees for a distance of six thousand two hundred feet; 344 degrees to the low water mark of the shoreline; then along the low water mark of the shoreline in an easterly direction to the point of beginning.

(b) Restrictions. The Baldwin Park-Paia Bay restricted area is designated for swimming, diving and fishing. No person shall operate a [~~motor vessel~~] motorboat at a speed in excess of slow-no-wake, or operate a sailboard within this area." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: HRS §§200-2, 200-3, 200-4)

64. Section 13-256-162, Hawaii Administrative Rules, is amended to read as follows:

"§13-256-162 Makaiwa Bay Swimming Zones. (a) Zone A.

- (1) Zone A means the area confined by the boundaries shown on Exhibit "MMM", dated July 10, 1988, located at the end of this subchapter. The boundaries are as follows:

Beginning at the low water mark of the shoreline on the northwestern tip to the entrance of the boat ramp; then by azimuth measured clockwise from True South, 110 degrees for a distance of seven hundred ten feet to a point of low water of the shoreline; then along the shoreline in a south and easterly direction to the point of beginning.

- (b) Zone B.

- (1) Zone B means the area confined by the boundaries shown on Exhibit "MMM", dated July 10, 1988, located at the end of this subchapter. The boundaries are as follows:

Beginning at the low water mark of the shoreline on the northeastern tip to the entrance of the boat ramp; then by azimuth measured clockwise from True South, 226 degrees for a distance of five hundred forty feet to a point of low water of the shoreline; then along the shoreline in a south and westerly direction to the point of beginning.

- (c) Restrictions. The Makaiwa Bay swimming zones A and B are designated for swimming and diving. No person shall operate or moor a [~~motor vessel~~] motorboat within this zone." [Eff 2/24/94; am \_\_\_\_\_] (Auth: HRS §§200-2, 200-3, 200-4) (Imp: §§200-2, 200-3, 200-4)

65. Material, except source notes, to be repealed is bracketed and stricken. New material is underscored.

66. Additions to update source notes to reflect this amendment is not underscored.

67. The amendments to chapters 13-230, 13-231, 13-232, 13-233, 13-235, 13-240, 13-242, 13-243, 13-244, 13-245, 13-250, 13-251, 13-253, 13-254, 13-255, 13-256, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

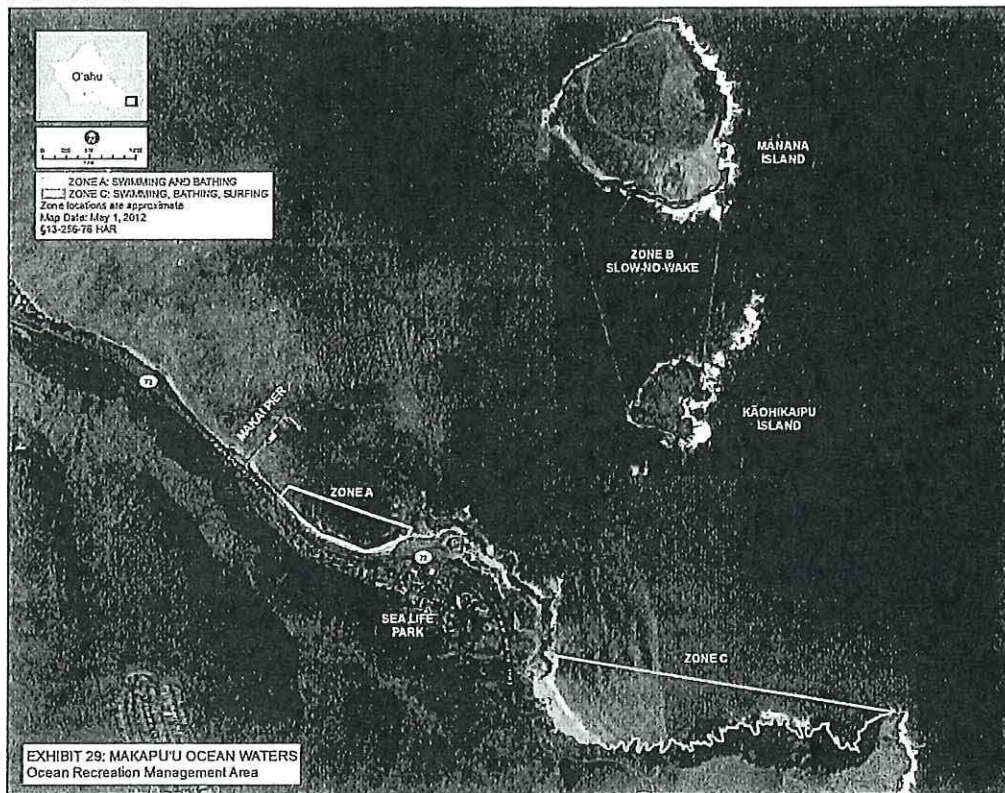
I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on \_\_\_\_\_ by the Board of Land and Natural Resources, and filed with the Office of the Lieutenant Governor.

\_\_\_\_\_  
SUZANNE D. CASE  
Chairperson  
Board of Land and Natural Resources

APPROVED FOR PUBLIC HEARING:

\_\_\_\_\_  
Deputy Attorney General

Exhibit F:



## **V. Administrative Matters**

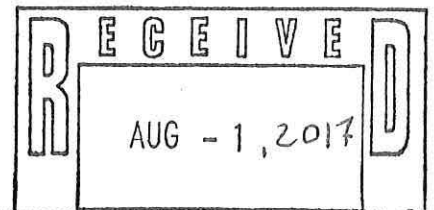
A. Discussion and Action on the Board's Nominations of Proposed Board Members for Submission to the Governor, under Section 201M-5(b)(3), HRS, including Ms. Mary Albitz

Mary Albitz

## Experience

### **FocalPoint Business Coach** July 2016 – Present, VP of Business Development

Responsible for keeping sales funnel full and promoting FocalPoint Business Coaching in the community. Responsible for scheduling workshops and trainings. Also, responsible for 1-on-1 coaching of clients.



### **Kainos Home and Training Center** August 2011 – July 2016

On-call staff August 2011 – August 2012

Production, Sales and Marketing Coordinator August 2012-July 2016

Was responsible for bringing in contract assembly, mailings, production, small parts cleaning and shrink-wrapping jobs for our clients with developmental disabilities. Within 3 months we had 100% time on paid work through my departure in July of 2016. Also, responsible for general marketing of the agency in coordination with the development office. Results included many monetary and in-kind donations for various events put on by the agency.

### **Jigsaw Java, Inc.** Jan 2008 – December 2012

Founder and CEO; Created and built the concept of a shop that combines the ambience of Starbucks with the fun and enjoyment of a tranquil amusement park. The shop's focus was Jigsaw Puzzles and other puzzles and games that stimulated the brain; hosted events such as birthday and celebration parties; social, professional, and corporate meetings; team and skills building; and educational and developmental activities. Customers paid a subscription fee which included coffee, tea and hot chocolate.

### **Global Tax Network, LLP** 2006 – 2008, Tax Paraprofessional

Responsible for office administration supporting completion of Expatriate Tax Returns and Consulting Projects. Responsible for Community Involvement Activities.

### **Ernst & Young, LLP** 2001 – 2006, Administrative Assistant

Administrative support, Expatriate Tax department.

Responsible for E&Y's Community Involvement and Fund-Raising Program

### **Community Association for Rehabilitation (CAR, Non-Profit)** 1998 – 2000, Manager of Supported Employment Program

Rehab Manager, Employment Program for Adults with Developmental Disabilities.

Responsible for locating employment, training, and support for Adults with Developmental Disabilities. Managed support staff, scheduling, billing and reports to the Department of Rehabilitation.

## Education

Santa Clara University, BS; Sociology 1980 – 1984

*Activities and Societies:* Santa Clara Community Action Program (coordinator of Tutor Exchange Program 1983-84), Women's Rugby Club

## Associations

Rotary Club of Upcountry (2016-present),

Rotary Club of Peninsula Sunrise (President 2011-12, Treasurer 2012-2016)

Rotary District 5150 (Asst. Governor 2013-2015, Secretary 2015-2016, Youth Services Chair 2015-2016, RYLA Director 2015-2016)

Redwood City Downtown Business Group (Board Member 2010 through 2016)

BNI (Bus. Networking Int'l) (Treasurer 2008-09, President 2009-10, Membership Chair 2010-11)

Redwood City Chamber Member 2008-2011

San Carlos Chamber Member 2014-2016

PTA President and School Site Chair for many years prior to the above

## **V. Administrative Matters**

B. Discussion and Action on Proposed Amendments  
to Chapter 201M, HRS, for the 2018 Hawaii  
Legislative Session



REVISED:  
1ST DRAFT DATE:

\_\_\_ .B. NO. \_\_\_

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# A BILL FOR AN ACT - DRAFT

RELATING TO THE SMALL BUSINESS REGULATORY REVIEW BOARD.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1       SECTION 1. Section 201M-5, Hawaii Revised Statutes, is  
2 amended by amending subsections (a) to read as follows:  
3       "(a) There shall be established within the department of  
4 business, economic development, and tourism, for administrative  
5 purposes, a small business regulatory review board to review any  
6 proposed new or amended rule. If the board determines that a  
7 proposed rule will not have a significant economic impact on a  
8 substantial number of small businesses, the board shall submit a  
9 statement to that effect to the agency that sets forth the  
10 reason for the board's decision. If the board determines that  
11 the proposed rule will have a significant economic impact on a  
12 substantial number of small businesses, the board may submit to  
13 the agency suggested changes in the proposed rule to minimize  
14 the economic impact of the proposed rule, or may recommend the  
15 withdrawal of the proposed rule. The board may also consider  
16 any request from small business owners for review of any rule  
17 adopted by a state agency and to make recommendations to the

\_\_\_\_.B. NO.\_\_\_\_

1 agency or the legislature regarding the need for a rule change  
2 or legislation. For requests regarding county [ordinances]  
3 rules, the board may make recommendations to the county council  
4 or the mayor for appropriate action.

5 SECTION 2. Statutory material to be repealed is bracketed  
6 and stricken. New statutory material is underscored.

7 SECTION 3. This Act shall take effect upon its approval.

8

9

INTRODUCED BY: \_\_\_\_\_

10

BY REQUEST

11

\_\_\_\_.B. NO.\_\_\_\_

**Report Title:**

Small Business Regulatory Review Board

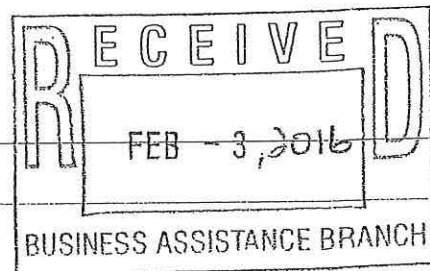
**Description:**

Clarifies that the Small Business Regulatory Review Board may make recommendations to the county council or mayor on county rules based on request from small business owners for review of any rule adopted by the county.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

William S. Richardson School of Law

THE NEED FOR MODERNIZING HAWAII'S INFORMAL RULEMAKING  
PROCEDURE



Denver S. Coon

Spring 2014

THE NEED FOR MODERNIZING HAWAI‘I’S INFORMAL RULEMAKING  
PROCEDURE

Denver S. Coon<sup>al</sup>

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<sup>al</sup> J.D. Candidate 2015, University of Hawai‘i, William S. Richardson  
School of Law.

## Introduction

“No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues.”<sup>1</sup>

Hawai‘i’s Administrative Procedure Act (“HAPA”) was adopted a little more than fifty years ago based on the 1959 draft of the 1961 Model State Administrative Procedure Act (“MSAPA”).<sup>2</sup> HAPA promised better efficiency, greater agency accountability and legitimacy, enhanced fairness, and increased public awareness and input through notice-and-comment rulemaking.<sup>3</sup> While the goals of HAPA remain the same today, research over the last several decades suggests that the early Administrative Procedure Acts (“APAs”) upon which HAPA is founded may be unable to ensure the public’s meaningful participation<sup>4</sup> in the rulemaking process. As a result, Hawai‘i’s public is often unable to provide the information necessary to create regulations that are effective and minimally burdensome on the people and small businesses of the islands.

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<sup>1</sup> E. Donald Elliot, *Re-Inventing Rulemaking*, 41 Duke L.J. 1490, 1492 (1992) (discussing the federal notice-and-comment procedure’s shift from ensuring public input to simply creating a record for judicial review).

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<sup>2</sup> See H.R. Rep. NO. 8, 1st. Sess. (1961) (Standing Comm.), *reprinted in* 1961 HAW. HOUSE J. 653.

<sup>3</sup> See Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

<sup>4</sup> For the purposes of this Article, “meaningful participation” will refer to the public’s ability to change the substance of agency rules as opposed to minor changes that do little to affect how rules impact the public’s rights.

Research and experience over the decades has led legal scholars to argue several reasons why these problems may plague administrative procedure. First, there is a large consensus that the rulemaking process has ossified<sup>5</sup> as a result of various burdens placed on agencies during the rulemaking process. While the additional requirements to the rulemaking process were meant to protect those being regulated and give them greater access to the process, such burdens have had two unexpected consequences: 1) public hearings are no longer an effective tool for the public or small businesses to submit comments and suggestions that will have a meaningful impact on proposed rules, and 2) agencies are “reluctant to revisit rules when the factual or policy predicates underlying them have changed.”<sup>6</sup>

Second, legal scholars suggest that because the public does not get involved in the rulemaking process until agencies have expended considerable resources in pursuing a specific course of action, it is unlikely that public comments will cause agencies to make substantive changes to the rules. As a result, the public and agencies may view the comment period as simply a way to vent frustrations rather than to help shape proposed regulations. Consequently, agency legitimacy is at risk of declining while the frequency that regulations place

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<sup>5</sup> See Dorit Rubenstein Reiss, *Tailored Participation: Modernizing the APA Rulemaking Procedures*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 325 (stating ossification as the degree to which additional requirements placed on agencies by the judicial, legislative, and executive branches has made the rulemaking process “cumbersome and inefficient”); see generally Elliott, *supra* note 1; Thomas O. McGarity, *Some Thoughts on ‘Deossifying’ the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Pierce, *supra* note 3; Paul R. Verkuil, *Comment: Rulemaking Ossification-- A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995).

<sup>6</sup> Pierce Jr., *supra* note 3, at 60.

undue burdens on the public may be increasing.

This Article will examine several aspects of HAPA and the administrative rulemaking procedure to argue that the time is ripe to reinvigorate the rulemaking process in Hawai'i through the adoption of several modern administrative rulemaking procedures found in the 2010 MSAPA, including expedited rulemaking, advanced notice procedures, negotiated rulemaking, and guidance documents. Modern rulemaking methods would not only increase agency efficiency and effectiveness, but also help put HAPA back on track to achieve its goal of ensuring the public's meaningful participation in the rulemaking process.

Part I of this Article will look at the rise of APAs during the mid-twentieth century, the purpose of early administrative rulemaking procedure, and the goals that early APAs were meant to achieve. This Part will suggest that APAs like HAPA were enacted during a period when administrative procedure was a new area of law and that our understanding of the most effective and efficient procedures still had great room to grow. Similarly, Part II of this article will examine the history and purpose of HAPA, including the various legislative acts that have been adopted over the years in the hopes of bolstering the effectiveness of agency rulemaking in the State. Part III will rely on the research and analysis of legal scholars from around the country to highlight several reasons why the traditional notice-and-comment process adopted by HAPA may be unable to fulfill its promises of efficiency and fairness. Next, Part IV of this article looks at the current dynamics at the Department of Land and Natural Resources ("DLNR"), with a particular focus on the Division of Boating and Ocean



Recreation (“DOBOR”). This Part will give a real world situation showing several of HAPA’s current faults and the often futile actions the public and small businesses have to influence proposed rules or motivate the agencies to change rules that are outdated and no longer serve a legitimate purpose. Finally, Part VI will suggest that various modern rulemaking procedures contained in the 2010 MSAPA and used throughout the country would help to increase public participation in the rulemaking process and lead to the creation of rules that better reflect the symbiotic relationship between agencies and small businesses.

### **I. The History and Purpose of Administrative Procedure Acts**

Before examining Hawaii’s Administrative Procedure Act, it helps to take a look at the history of APAs and why they were initially created. As will be discussed below, administrative procedure is still a relatively new area of law.<sup>7</sup> Thus, the need for modernization is not simply due to the technological and societal changes over the last half century, but rather that APAs like HAPA were a new innovation, and like all good inventions, redesigns and refinements are essential in order to reach a final product that meets all expectations and purposes.

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#### ***A. The Rise of Administrative Procedure Acts***

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<sup>7</sup> See John Gedid, *Administrative Procedure For The Twenty-First Century: An Introduction To The 2010 Model State Administrative Procedures Act*, 44 ST. MARY’S L.J. 241, 243 (2012).

APAs' beginnings can be traced back to 1933 when the American Bar Association created the Special Committee on Administrative Law.<sup>8</sup> During this time the American government hoped the New Deal would help solve the many economic problems brought on by the great depression.<sup>9</sup> As a result of this legislation, numerous state and federal agencies were created that were given vast rulemaking and adjudicative powers to allow efficient and effective agency action to solve the economic crisis facing the nation.<sup>10</sup> The problem with this however, was that agencies were given little guidance on the procedures that should be followed in carrying out their duties and responsibilities.<sup>11</sup>

As a result, strong criticisms began to mount against the lack of fairness in agencies' administrative procedures. One major criticism involved the exercise of judicial power by agencies in adjudication procedures<sup>12</sup> and that because an agency "acted as rule maker, prosecutor, judge, and jury, proceedings before the agency were nothing more than a meaningless formality whose purpose 'from end to end is...to give effect to a complaint.'"<sup>13</sup> A second criticism was that there were

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<sup>8</sup> *See id.*; see also Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362 (2010) (tracing administrative law's beginnings throughout the last three decades of the nineteenth century).

<sup>9</sup> *See Gedid, supra* note 7, at 245.

<sup>10</sup> *See id.*

<sup>11</sup> *See id.*

<sup>12</sup> *See* 59 A.B.A. Rep. 539 (1934); see also Gedid, *supra* note 7, at 243.

<sup>13</sup> Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 423 (2007)

significant adverse effects from agencies' failure to provide the public with notice of proposed rules and the inability for the public to obtain the proposed rules during the rulemaking process.<sup>14</sup> While the Federal Register Act of 1935 was a step toward lessening the adverse impacts from federal agency procedures by requiring proposed regulations to be officially published<sup>15</sup>, it wasn't until 1939 that specific action was taken to address the growing opposition to administrative law.

In 1939 President Roosevelt directed the attorney general to appoint a committee ("AG Committee") to study the need for procedural reform of federal agency practices.<sup>16</sup> The product of this research was a comprehensive report containing criticisms and recommendations based on the analysis of approximately forty different agencies and departments, public hearings where interested persons could submit oral and written testimony, and thousands of individual invitations to interested parties to discuss administrative procedure.<sup>17</sup> While the final report was published in 1941, it would not be until 1946 and the

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(citing Special Committee on Administrative Law, 1938 Annual Report of the Special Committee on Administrative Law, at 347).

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<sup>14</sup> See Gedid, *supra* note 7, at 243; See also Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204-08 (1934).

<sup>15</sup> See Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

<sup>16</sup> See *id.* at 224.

<sup>17</sup> See *id.*; FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 1, 3-4 (1941).

end of World War II that the federal APA would be passed addressing the concerns voiced in the report.<sup>18</sup>

At the same time, the American Bar Association (“ABA”) Committee on Administrative Agencies and Tribunals worked to reform state agency administrative procedures.<sup>19</sup> Based on extensive research and the federal reports issued by the AG Committee, the ABA produced the 1946 MSAPA, which the National Conference of Commissioners on Union State Laws (“NCCUSL”) approved shortly after the enactment of the federal APA.<sup>20</sup> Multiple states then quickly used the 1946 MSAPA in full or in part in the creation of their own APAs.<sup>21</sup>

### ***B. Fairness through Notice-and-Comment Rulemaking***

As discussed above, there were serious criticisms with regards to the public’s inability to attain information and participate in the rulemaking process prior to the enactments of APAs. Accordingly, the federal APA and 1946 MSAPA centered on the fundamental principles of fairness and justice.<sup>22</sup> As one

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<sup>18</sup> See Arthur Earl Bonfield, *The Federal APA And State Administrative Law*, 72 VA. L. REV. 297, 298 (1986).

<sup>19</sup> See *id.*

<sup>20</sup> See Gedid, *supra* note 7, at 247.

<sup>21</sup> See *id.*; see also K. Davis, *Administrative Law Treatise* § 1.04-5, at 14 (1970 Supp.) (finding that 12 states adopted APA’s based on 1946 MSAPA).

<sup>22</sup> See Gedid, *supra* note 7, at 251.

commenter stated, “ procedures imposed on state agencies in the 1946 MSAPA were nearly all directed toward ensuring fairness.”<sup>23</sup> One of the most significant of these procedures imposed was notice-and-comment rulemaking, a product of APAs purpose of ensuring that the public is informed and that the public is able to participate in the rulemaking process.<sup>24</sup>

Under the notice-and-comment rubric, rules are first developed “based on the expertise of the agency staff”.<sup>25</sup> It was noted early on that agency knowledge was unlikely to protect private interests without the public’s ability to participate in the process.<sup>26</sup> To address this problem the drafters of the APAs hoped that after an agency provided the public with notice of proposed rules, a period for public review and comment would allow, “adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses.”<sup>27</sup> The result of this framework was the

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<sup>23</sup> *Id.*

<sup>24</sup> See ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, 9 (1947).

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<sup>25</sup> Danielle Holley-Walker, *The Importance of Negotiated Rulemaking To The No Child Left Behind Act*, 85 NEB. L. REV. 1015, 1036 (2007); see also Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) (stating that the APA “was clearly built on the notion of agency expertise”).

<sup>26</sup> See Bonfield, *supra* note 18, at 316; see also ATTORNEY GENERAL, *supra* note 24, at 101-102.

<sup>27</sup> FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. Doc. No. 9, 77<sup>th</sup> Cong., 1<sup>st</sup> Sess. 102 (1941).

beginning of what one commenter referred to as one of the “greatest inventions of modern government.”<sup>28</sup>

Over the next fifteen years, research and experience would lead to a “substantial maturing of ideas with respect to administrative procedures which must be fair to the parties and at the same time effective from the standpoint of government.”<sup>29</sup> The outcome of which was the revision of the MSAPA in 1961. Again fairness, efficiency, effectiveness, and the use of notice-and-comment procedure would be a major focal point for the drafters of the 1961 MSAPA.<sup>30</sup> Subsequently, Hawaii and many other states incorporated the 1961 MSAPA in the creation of their own APAs<sup>31</sup> and in the pursuit of the early APAs’ fundamental principles.

## II. Hawai‘i’s Administrative Procedure Act

### A. *The History of HAPA’s Informal Rulemaking Procedures*

Hawai‘i’s informal rulemaking procedure is a traditional notice-and-comment process like that of the early APAs described in Section II except for

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<sup>28</sup> 1 K. Davis, *Administrative Law Treatise* § 1:7, at 448 (2d ed. 1978).

<sup>29</sup> Model State Administrative Procedure Act, Prefatory Note, 15 U.L.A. 178 (2000).

<sup>30</sup> See Gedid, *supra* note 7, at 255.

<sup>31</sup> See Bonfield, *supra* note 18, at 299; See 14 U.L.A. 171 (Supp. 1985) (listing twenty-nine states which had adopted the 1961 MSAPA in full or in part); see e.g., Oregon (Or. Rev. Stat. §§ 183.025-.725) (West, Westlaw through 2013 Reg. Sess.); Washington (Wash. Rev. Code Ann. §§ 34-05.001-.903) (West, Westlaw through 2013).

HAPA's mandatory requirement that agencies take all proposed rules out to oral public hearings.<sup>32</sup> HAPA was enacted in 1962 after the careful study of the Federal Administrative Procedure Act, Chapter 7 of the Revised Laws of Hawai'i, and the 1959 tentative draft for the 1961 Model State Administrative Procedure Act.<sup>33</sup> HAPA provided a uniform administrative procedure for all state and county boards, commissions, departments or offices, with the intent to increase efficiency, speed and fairness, while decreasing the costs to the public and the government agencies.<sup>34</sup> The notice-and-comment process was meant to ensure public participation in the rulemaking process by allowing any interested person to petition an agency for the adoption, amendment or repeal of a rule and the ability to voice concerns over proposed rules at a public hearing.<sup>35</sup>

One of the great benefits to the 1961 MSAPA was that it was designed so that states could pick and choose which parts of the act were preferable, could copy the MSAPA wording verbatim or change text to fit the existing statutory law of the state, or could adopt the entire act in full.<sup>36</sup> The act left much of the actual

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<sup>32</sup> See Darrin M. Skousen, *Analyzing Hawai'i's Rulemaking Procedures: The Need For A Consensus-Seeking Rulemaking Model*, 53 ADMIN. L. REV. 1043, 1045 (2001).

<sup>33</sup> See *supra* note 2, at 653.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.* at 655.

<sup>36</sup> See Gedid, *supra* note 7, at 249.

... , ... according to six major principles as  
“essential safeguards of fairness in the administrative process.”<sup>37</sup>

Since 1962, MSAPA has been revised twice, once in 1981 and again in 2010. HAPA on the other hand has remained very much the same, allowing the public to participate in only limited ways. First, under HRS § 91-6 of Hawai‘i’s Revised Statutes, the public can petition an agency for the adoption, amendment, or repeal of a rule.<sup>38</sup> Upon submission, the agency has thirty days to deny the request by responding in writing, stating the reasons for the agency’s denial or the agency initiates proceeding in accordance with HRS § 91-3.<sup>39</sup> Second, under HRS § 91-3, the public is afforded the opportunity to participate in the rulemaking through a mandatory public hearing stage that allows the public to submit data, arguments, and views, orally or in writing once the agency has given notice of

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<sup>37</sup> *Id.* at 255; 15 U.L.A. 178 (2000) (Listing the following principles “(1) Requirement that each agency shall adopt essential procedural rules, and, except in emergencies, that all rule-making, both procedural and substantive, be accompanied by notice to interested persons, and opportunity to submit views or information; (2) Assurance of proper publicity for all administrative rules; (3) Provision for advance determination of the validity of administrative rules, and for “declaratory rulings,” affording advance determination of the applicability of administrative rules to particular cases; (4) Assurance of fundamental fairness in administrative adjudicative hearings, particularly in regard to such matters as notice, rules of evidence, the taking of official notice, the exclusion of factual material not properly presented and made a part of the record, and proper separation of functions; (5) Assurance of personal familiarity with the evidence on the part of the responsible deciding officers and agency heads in quasi-judicial cases; (6) Provision for proper proceedings for and scope of judicial review of administrative orders, thus assuring correction of administrative errors”).

<sup>38</sup> *See* HAW. REV. STAT. § 91-6 (West, Westlaw through 2013 Act 4).

<sup>39</sup> *See id.*



proposed legislation.<sup>40</sup> To help ensure that the public's views are not ignored, the agency is required to "fully consider all such oral or written submissions" by the public during the public hearing stage prior to making a final decision.<sup>41</sup>

However, as will be discussed in Part III, an agency's full consideration of public input may not be enough to force a modification of proposed rules and restart the drafting process.

### *B. Additions and Supplements to HAPA's Informal Rulemaking Process*

While HAPA has remained static over the years, there has been extensive legislation passed to supplement the notice-and-comment process in an attempt to ensure the legitimacy of agency actions and rulemaking. However, this legislation has also increased the burdens placed on agencies when seeking to change rules.

#### *1. Hawai'i's Sunshine Law* - 1975

In 1975, Hawai'i adopted an open meetings law known as the Sunshine Law, which regulates the way state and county boards conduct official business.<sup>42</sup>

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<sup>40</sup> See HAW. REV. STAT. § 91-3 (West, Westlaw through 2013 Act 4).

<sup>41</sup> HAW. REV. STAT. § 91-3(a)(2) (West, Westlaw through 2013 Act 4); See also *Vega v. National Union Fire Ins. Co. of Pittsburgh, PA., Inc.*, 682 P.2d 73 (Haw. 1984) (stating "Where an administrative agency seeks to promulgate a 'rule,' it must consider the views of interested persons, for the powers ... of government should not be used in a manner giving an appearance of being arbitrary" (citing *Aguiar v. Hawai'i Housing Authority*, 522 P.2d, 1261, 1262 (Haw. 1974))).

<sup>42</sup> See HAW. REV. STAT. § 92-1 (West, Westlaw through 2013 Act 4). For more information on open meetings laws in general, see Teresa Dale Pupillo, *The*

The purpose of the Sunshine Law was and still remains to protect the people's right to know by making sure that governmental agency actions are conducted as openly as possible.<sup>43</sup> The Hawai'i Supreme Court recently stated that, "The Sunshine Law is essentially a procedural guarantee to protect the public's interest in government decision-making."<sup>44</sup> The Court stated that the legislative history of the law was driven by the need to protect the people of Hawai'i from decisions made behind closed doors by a powerful few, which affect the whole.<sup>45</sup>

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*Changing Weather Forecast: Government In The Sunshine In The 1990's-An Analysis Of State Sunshine Laws*, 71 WASH. U. L.Q. 1165 (1993) (giving an overview of state sunshine laws, the problems they faced in the 1990's, and possible avenues for states to improve open meeting laws effectiveness); Daxton R. "Chip" Stewart, *Let the Sunshine In, Or Else: An Examination Of The "Teeth" Of State And Federal Open Meetings And Open Records Laws*, 15 COMM. L. & POL'Y 265 (2010) (discussing the purpose of open meeting laws, their potential flaws, and various ways in which they can be improved); Stephen Schaeffer, *Sunshine In Cyberspace? Electronic Deliberation And The Reach Of Open Meeting Laws*, 48 ST. LOUIS U. L.J. 755 (2004) (analyzing the impact technology has had on open meeting laws and how legislation could better address the problems that technology raises).

<sup>43</sup> See HAW. REV. STAT. § 92-1 (West, Westlaw through 2013 Act 4) (providing that "In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy.").

<sup>44</sup> *Kanahele v. Maui Cnty. Council*, 307 P.3d. 1174, 1196 (Haw. 2013) (discussing whether the Maui County Council violated the State open meetings law when it conducted thirteen public meetings prior to the passage of two bills. The court found that written memorandums distributed to council members outside duly noticed meeting which sought voting commitments violated the Sunshine Law, while oral announcements for continuances at the end of each meeting did not violate the Sunshine Law).

<sup>45</sup> See *id.* (citing Rep. Poepoe in the 1975 House Journal, at 778-9) ("On many occasions in the past, government decision-making has always been a closed-door process, in which a relative small number of people have been able to exert inordinate influence on issues affecting all of Hawai'i's people. We cannot and must not allow this to go on. Democracy cannot survive for very long in

Accordingly, hearings for proposed rules are open to the public and the board must allow all interested persons the opportunity to submit testimony on any agenda item.<sup>46</sup>

## 2. *Hawai'i Administrative Rule Formatting*

In 1981, twenty years after HAPA's adoption, Hawai'i changed how rules were formatted in two ways. First, agencies are required to prepare a copy of rule changes in Ramseyer format and maintain such copy for the public's inspection.<sup>47</sup> This technique requires the rule changes to be marked by bracketing the material to be deleted and underscoring the material to be added, thus fulfilling the requirements of HRS § 91-4.1.<sup>48</sup>

Second, a uniform method of formatting and indexing was established in order to provide the public with greater access to agency rules.<sup>49</sup> The format was developed in 1979 with three objectives in mind, one of which was making

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darkness. There is no room for secrecy in our form of government. The people have the right to know what their public servants are doing behind the closed doors...[The Sunshine Law] will accomplish several of our goals in the area of government reform. It requires that government meetings with few exceptions be open to the public, that adequate notice be given, and that the minutes be made readily available to the public.").

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<sup>46</sup> See H.B. NO. 126, 8th Leg., Reg. Sess. (1975).

<sup>47</sup> See HAW. REV. STAT. § 91-4.1 (West, Westlaw through 2013 2nd Spec. Sess.).

<sup>48</sup> See Ken H. Takayama, *Hawai'i Administrative Rules Drafting Manual, Second Edition*, 9 (1984), available at [http://lrhHawai'i.info/lrbrpts/10/admindraft\\_10.pdf](http://lrhHawai'i.info/lrbrpts/10/admindraft_10.pdf).

<sup>49</sup> See HAW. REV. STAT. § 91-4.1 (West, Westlaw through 2013 2nd Spec. Sess.).

current and historical information regarding administrative rules available to the public.<sup>50</sup> The format consisted of three main features for organizing, with the result being the entire rules system organized on a numerical basis, something that prior to implementation was impossible as each agency used its own numbering system or did not use any numbering system.<sup>51</sup> This allowed the State to codify rules without much greater effort once an agency is finished with the notice-and-comment process.<sup>52</sup>

### *3. Posting of Rules on the Internet*

In 1999, Hawai'i's legislature passed S.B. No. 1016, currently codified as HRS § 91-2.6, which requires agencies to post notices of proposed rulemaking actions and the full text of proposed rules on the lieutenant governor's website to provide the public with an easier and more efficient way to access proposed rule changes.<sup>53</sup> This was especially important due to the fact that fees interested parties needed to pay to receive copies of proposed rules had become mandatory and had been raised to a rate of fifty cents per page in 1998.<sup>54</sup> The legislature found this to be a barrier to the public's access to the agency rulemaking process

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<sup>50</sup> See Takayama, *supra* note 48, at 15.

<sup>51</sup> See *id.* at 8-9.

<sup>52</sup> See *id.*

<sup>53</sup> See S.B. No. 1016, 20th Leg., Reg. Sess. (Haw. 1999). The statute did not take effect until January 1, 2000.

<sup>54</sup> See *id.*

as an entire rules package could cost the public or a small business hundreds of dollars to attain.<sup>55</sup>

#### 4. *The Small Business Regulatory Flexibility Act*

In 1998 Hawai‘i enacted the Small Business Regulatory Flexibility Act (“SBRFA”), codified as HRS § 201M. This legislation followed in the wake of the 1980 federal Regulatory Flexibility Act (“RFA”), which was “a concerted effort to reduce administrative burden by compelling federal agencies to take small firms into account as part of the rulemaking process.”<sup>56</sup> Under similar reasoning that led to the RFA<sup>57</sup>, the Hawaii legislature found that “administrative rules adopted by state agencies can have an unduly burdensome impact on the growth and vitality of small business” and “a general feeling of mistrust of, and frustration with, these regulating agencies.”<sup>58</sup> This was also true with regards to an agency’s interpretation or application of a rule, “especially when the small business lacks the resources to contest an agency’s interpretation or application of a rule imposing a fine, citation, or penalty.”<sup>59</sup> Accordingly, the SBRFA

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<sup>55</sup> *See id.*

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<sup>56</sup> Robert C. Bird and Elizabeth Brown, *Interactive Regulation*, 13 U. PA. J. BUS. L. 837, 838 (2011).

<sup>57</sup> *See id.* at 838 (stating that the goal of the RFA was meant to be “nothing less than a culture shift in federal bureaucracy towards an appreciation of the value of small business” and “instill a desire...to accommodate their unique interests”).

<sup>58</sup> *See* S.B. No. 2803, 19th Leg., Reg. Sess. (Haw. 1998).

<sup>59</sup> *Id.*

established a board within the Department of Business, Economic Development, and Tourism consisting of eleven members appointed by the Governor to review agency rules and their impact on small businesses.<sup>60</sup>

Under the SBRFA, agencies are required to determine if a proposed rule will have an impact on small business, and if so the agency is required to submit a small business impact statement to the board prior to submitting the proposed rules for adoption, amendment, or repeal.<sup>61</sup> Similar to the federal RFA, the impact statement needs to provide a reasonable determination of seven factors relating to the impact the proposed rules will have on small businesses for the board's review.<sup>62</sup> These factors include a separate impact statement after the public hearing is held detailing how opinions from small businesses were solicited, a summary of the public and small business comments, and a summary of the agency's response to those comments.<sup>63</sup> In addition to the review of proposed

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<sup>60</sup> *See id.*

<sup>61</sup> *See* HAW. REV. STAT. § 201M-2(a), (b) (West, Westlaw through 2013 Act 4).

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<sup>62</sup> *Compare* 5 U.S.C.A. § 604(a)(1)-(6) (West, Westlaw through P.L. 113-92 (excluding P.L. 113-76, 113-79, and 113-89) 2014) (listing seven criteria an agency must determine when submitting small business impact statements, including the issues raised by the public through comments and how agencies responded to such comments) *with* HAW. REV. STAT. § 201M-2(b)(1)-(7) (West, Westlaw through 2013 Act 4) (listing seven criteria an agency must determine when submitting small business impact statements including how the agency involved small businesses in the development of the rule).

<sup>63</sup> *See* HAW. REV. STAT. § 201M-2(b)(1)-(7) (West, Westlaw through 2013 Act 4).

rules by an agency, the board also accepts petitions from small businesses requesting for agency's adopted rules to be reviewed.<sup>64</sup>

The SBRFA was further amended in 2012 to ensure both the stability of the board by expanding the board's power to request a written response from an agency explaining the rationale used to deny the public's concerns along with an affirmative statement that the agency considered all written and oral testimony received at the public hearing.<sup>65</sup> The purpose of this was to further guarantee that agencies take small businesses' input into consideration when drafting regulations.

Recently, a bill was introduced to amend and possibly repeal the SBRFA in 2019.<sup>66</sup> The legislature hopes that by "Requiring members of the small business regulatory review board to receive training by the appropriate division of the department of the attorney general" will "better ensure that the small business regulatory review board functions as originally envisioned..."<sup>67</sup> Yet, the SBRFA is only one part of the rulemaking system that may not be functioning as previously envisioned. The next Section of this Article examines the various criticisms of traditional notice-and-comment rulemaking and the various arguments on why the process is unable to create effective rules in an efficient manner nor provide the public with meaningful participation.

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<sup>64</sup> See HAW. REV. STAT. § 201M-2 (West, Westlaw through 2013 Act 4).

<sup>65</sup> See S.B. No. 2739, 26th Leg., Reg. Sess. (Haw. 2012).

<sup>66</sup> See S.B. 2487, 27th Leg., Reg. Sess. (Haw. 2014) (setting a sunset date for the SBRFA).

<sup>67</sup> *Id.*

### III. Criticisms of Traditional Notice-and-Comment Rulemaking

“It is not uncommon for rule drafting to take between 2 to 6 years. Whether it is a lack of priority or staffing issues, the rule may stay at the Attorney General’s office for an extended amount of time. Because of this, legislators will put a rule change in a bill in order to go around the rulemaking process...It is faster to change a rule through the legislature than go through the agency and it should be just the opposite.”<sup>68</sup>

Traditional notice-and-comment rulemaking procedures established by the early APAs attempted to give the public an avenue for meaningful participation in the rulemaking process but instead are now largely used to simply create a detailed record for judicial review.<sup>69</sup> Legal scholars have detailed the reasons for the ineffectiveness of this process over the past several decades with the most prominent arguments being the ossification theory and the lack of public involvement early in the rulemaking process. The result of this is the lack of public participation in the formation of regulations.

#### A. *The Causes of Ossification on Agency Rulemaking*

Legal scholars maintain that burdens placed on agencies by the legislative, judicial, and the executive branches over the years has hindered the rulemaking process to the point where agencies can no longer carry out the duties they are asked to fulfill in an efficient or expedient manner, and in some cases rulemaking

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<sup>68</sup> INTERVIEW WITH TIM LYONS, OCEAN TOURISM COALITION, in Honolulu, HI (Feb. 4, 2014).

<sup>69</sup> See Elliott, *supra* note 1, at 1493; William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 50-51 (1975); see also Clean Air Act § 307(d), 42 U.S.C. § 7607(d) (1988) (requiring compilation of a “docket” (consisting primarily of the agency proposal, comments received, and agency responses) to use as the basis for judicial review).



comes to complete halt.<sup>70</sup> On the legislative side, these burdens include items such as Environmental Impact Statements (“EIS”) and Small Business Impact Statements (“SBIS”).<sup>71</sup> Both requirements attempt to minimize adverse effects from agency decisions, but they can also slow the rulemaking process due to the added burdens they place on agencies.<sup>72</sup>

The EIS imposed on agency decisionmaking was a product of the National Environmental Policy Act (“NEPA”) passed in 1970.<sup>73</sup> This legislation forced agencies to consider the consequences their actions would have on the environment while hoping to establish “new channels of communication and information-flow within an agency.”<sup>74</sup> An agency’s failure to prepare an EIS could result in the invalidation of major decisions.<sup>75</sup> As a result, the EIS

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<sup>70</sup> See Pierce, Jr., *supra* note 3, at 60; see, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 1992 DUKE L.J. 1385; Jerry Mashaw & David Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987); Richard J. Pierce, Jr. *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300; Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231 (1974).

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<sup>71</sup> See Reiss, *supra* note 5, at 327 (2009).

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<sup>72</sup> *Id.*

<sup>73</sup> See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1284-1285 (1986).

<sup>74</sup> *Id.* at 1287.

<sup>75</sup> *Id.* at 1288; see e.g., *Wilderness Soc’y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973).

requirement cannot be overlooked despite the additional delay in rulemaking and the increase in information-gathering costs.<sup>76</sup>

At the same time, agencies must also determine the effect their actions will have on small businesses through an SBIS. This requirement was a response to the increased regulations by agencies like the Environmental Protection Agency and the Occupational Health and Safety Administration, and the increased costs these regulations were having on small businesses throughout the country.<sup>77</sup> Thus, the RFA required federal agencies to prepare a SBIS that showed that less burdensome alternatives were sought prior to regulations being enacted through notice-and-comment procedure.<sup>78</sup>

The burdens of EISs and SBISs however, are not confined to the federal level and are prevalent throughout Hawai‘i’s rulemaking procedure.<sup>79</sup> Like the federal requirements, both EISs and SBISs contain numerous requirements and failure for an agency in Hawai‘i to follow these statutory guidelines can result in

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<sup>76</sup> See Rabin, *supra* note 73, at 1288.

<sup>77</sup> See Verkuil, *supra* note 5, at 221-222.

<sup>78</sup> See *id.* at 229 (noting also that the SBIS requirement does not apply to agency actions that are not considered rulemaking, such as adjudication proceedings).

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<sup>79</sup> See *e.g.*, *Sierra Club v. Department of Transp.*, 167 P.3d 292 (Haw. 2007) (“EIS preparation begins with a notice and comment period to define the scope of the draft EIS. Following this, the EIS is prepared in draft form by the proposing agency or applicant and becomes finalized after review by public and government agencies and a period for public comment and response. The final EIS must then be accepted, by the Governor or Mayor for agency actions, and by the approving agency for applicant actions. Once the EIS is accepted, the action may be implemented”).

the invalidation of the agency's decisions and the wasting of valuable State resources.<sup>80</sup> As a result, agencies in the islands may be reluctant to take action, whether it is the promulgation of new rules or the repealing of old, knowing that these requirements will take substantial effort to fulfill and will inevitably take time away from other agency duties.

In addition to legislative burdens, the judicial branch is also argued to be responsible for ossification.<sup>81</sup> Over the years courts have added to the basic requirements of the APA through various judicial tools like the "hard look" doctrine as a means of ensuring agency rules are not arbitrary or capricious.<sup>82</sup> This means that agencies must "examine the relevant data and articulate a satisfactory explanation for its actions"<sup>83</sup>, provide the relevant data on which it relied,<sup>84</sup> and consider all the major aspects of the problem the agency is attempting to solve.<sup>85</sup> Thus, agencies may need to spend significant resources prior to the notice-and-comment period and may be hesitant to enter into the rulemaking process at all.<sup>86</sup>

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<sup>80</sup> *See id.* (Holding that the failure to analyze the secondary effects of the Superferry project rendered the DOT's action invalid).

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<sup>81</sup> *See Pierce Jr., supra note 3, at 65.*

<sup>82</sup> *See Reiss, supra note 5 at 327.*

<sup>83</sup> *Id.* at 328.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See Pierce Jr., supra note 3, at 61.*

Similarly, agencies in Hawai‘i have not escaped judicial requirements and must go through a rigorous drafting process to ensure that a proposed rule will pass judicial scrutiny in the event that the rule is challenged.<sup>87</sup> This means that the agency and Attorney General’s office must ensure that the rule change does not violate Hawai‘i’s Constitution or its statutes, such as reaching beyond the scope of authority delegated to the agency. The Supreme Court of Hawai‘i has stated that “A public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the statute under which it is conferred. Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid and must be struck down.”<sup>88</sup> Accordingly, depending on the priority of the rule, the staffing available at the agency and the attorney general’s office, and the complexity of the issues involved, initial rule drafting may take a substantial amount of time to complete and it is not uncommon for two to six years to pass before rules leave the Attorney General’s office for public hearing.<sup>89</sup>

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<sup>87</sup> See *Unite Here! Local 5 v. City & Cnty. of Honolulu*, 231 P.3d 423, 444 (2010) (applying “hard look” doctrine in determining an agency action with regards to an EIS); see also *Price v. Obayashi Hawaii Corp.*, 914 P.2d 1364, 1375 (1996) (applying federal administrative law in determining whether “the EIS as prepared permitted informed decision making by the agency”).

<sup>88</sup> *Kaleikini v. Thielen*, 237 P.3d 1067, 1086 (Haw. 2010) (citing *Capua v. Weyerhaeuser*, 184 P.3d 191, 198 (2008) (citing *Haole v. State*, 140 P.3d 377, 389 (2006)).

<sup>89</sup> Interview with Tim Lyons, Ocean Tourism Coalition, in Honolulu, HI (Feb. 4, 2014).

Furthermore, even with the substantial resources implemented in the drafting process to pass judicial scrutiny, the success of proposed rules is not guaranteed. First, there is always the possibility that during the several years that passed in the drafting stage, new science or changes in the environment or industry have made the rule obsolete before it reaches the public hearing stage. Second, if an agency does not take into account public reaction or the public's reaction is greater than anticipated, opposition may force the agency to redraft the rule and take it out for a second round of public hearing.<sup>90</sup> Third, if a proposed rule makes it to the governor's desk, the governor has the power to veto it.<sup>91</sup> It is not surprising then that agencies may be reluctant to enter into the rulemaking process when the effort exerted may not result in the progression anticipated. As a result, rules stay in force long after they have served their purpose or become outdated due to changes in technology or policy.

#### ***B. Public Participation in the Traditional Notice-and-Comment Procedure***

Legal scholars maintain that the traditional notice-and-comment procedure may be ineffective in providing meaningful public participation due to the fact

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<sup>90</sup> See Stephanie Stern, *Cognitive Consistency: Maintenance and Administrative Rulemaking*, U. PITT. L. REV. 589, 602 (2002); *see also* *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978) (finding that the final version of the agency rule was not a logical outgrowth of the proposed rule and thus a second round of public hearing was required to allow the public to provide meaningful comment). However, it may be difficult for the public to determine whether a second round of public hearing is required since the interested parties "have no rights to insist that a rule remain frozen in its vestige form." *Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1<sup>st</sup> Cir. 1974).

<sup>91</sup> See HAW. REV. STAT. § 91-3(c) (West, Westlaw through 2013 Act 4).

that the public does not get involved in the process soon enough. By the time rules reach the public, an agency has spent significant effort in complying with numerous statutory requirements and thus is often committed to its decision and is unlikely to make substantial changes.<sup>92</sup> This resistance to changing proposed rules is what one commenter refers to as “agency lock-in.”<sup>93</sup> When agency lock-in occurs, the purpose and intent of the notice-and-comment process is lost and instead becomes simply an “expensive procedural artifice.”<sup>94</sup>

Studies done at the federal level have shown agencies to be resistant to change after the post notice stage. In a study on the Department of the Interior, Professor Strauss found that because the department’s administrative procedures prior to the public comment were so extensive, the agency lacked incentive to tackle the problems voiced by the public.<sup>95</sup> This finding is also in line with a 1998 study that showed that substantial rule changes after comment did not occur in the majority of agency rules studied.<sup>96</sup> If the public believes that public

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<sup>92</sup> See Pierce, Jr., *supra* note 3, at 60; see Reiss, *supra* note 4, at 334.

<sup>93</sup> See Stern, *supra* note 90, at 595 (arguing that “Because the agency has developed such a strong commitment to its proposal that it resists public input during the comment period”).

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<sup>94</sup> *Id.*; Elliott, *supra* note 1, at 1490 (stating that rulemaking is now a judicial recording device); James L. Creightin, *The Public Participation Handbook: Making Better decisions Through Citizen Involvement* 7, at 41 (2005) (stating “If the agency has already made a decision, public participation is a sham”).

<sup>95</sup> See Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1245-52 (1974).

hearings are simply a place to vent frustrations and not a means of helping shape rules, then the process loses legitimacy and valuable participation in the future is lost.<sup>97</sup> Additionally, without meaningful participation the public is at the mercy of the knowledge and expertise of the agency to create effective rules despite the fact that those affected by the rules are often in the best position to provide the necessary information to form effective rules.<sup>98</sup>

This problem may be further exacerbated with regards to small businesses in Hawai'i with the possible repeal of the SBRFA in 2019. While repeal would certainly help to deossify the rulemaking process, as agencies would no longer be burdened by the rigors of the SBRFA, it may come at the cost of small businesses' ability to prevent unnecessarily burdensome regulations from being passed. As stated in Section III(b)(4) of this Article, the SBRFA's original purpose was to lessen the adverse effects on small businesses by regulations and foster communication between agencies and interested parties.<sup>99</sup> The fact that the

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<sup>96</sup> See Reiss, *supra* note 5, at 333; Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 259-60 (1998) (finding that the agency studied 'rarely altered the heart of the proposal'); William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 70-71 (2004) (noting that sixteen out of forty-two rules studied were amended 'in a meaningful but not fundamental' way).

<sup>97</sup> See Reiss, *supra* note 5, at 333.

<sup>98</sup> See Bonfield, *supra* note 18, at 316-317.

<sup>99</sup> While the mandatory training proposed in S.B No. 2487 may help to refocus the efforts of SBRFA review board's members, this may not increase the efficiency of the rulemaking process since agencies will still be burdened during the drafting process and by SBISs. Thus, without legislation that addresses the

SBRFA was amended in 2012 to require greater accountability by agencies to take small businesses' input into consideration highlights the current lack of collaboration between agencies and those they regulate.<sup>100</sup> Accordingly, without legislation that addresses agency lock-in and fosters early collaboration, the effect from repealing the SBRFA could be further degradation of meaningful participation by small businesses in the islands.

In addition to low levels of participation, the traditional notice-and-comment process creates antagonism from the adversarial process where agencies must publicly defend themselves against criticism.<sup>101</sup> As a result, future cooperation between an agency and the public will be hindered. One analogy that comes to this commenter's mind is to imagine hiring a contractor to build you a home. According to the laws of the state you are not allowed to work with the contractor until the contractor has decided on the specifications of your home, attained all permits and inspections, and in fact completed a majority of the construction. After years of waiting you are allowed to inspect your new home but to your disbelief it is nothing like what you expected and is in fact well beyond the price you can afford. At this point you are allowed to publicly

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~~confront the contractor and criticize his work in the hopes that he will tear the~~

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rulemaking process at its earliest stages, those outside the small business community might see the SBRFA as a roadblock and creator of inefficiency rather than the mediator it was intended to be.

<sup>100</sup> See S.B. No. 2739, 26th Leg., Reg. Sess. (Haw. 2012) (requiring an agency to explain "the rationale used to deny the public concerns within ten working days of receipt of the small business statement after public hearing").

<sup>101</sup> See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1560 (1992).



house down and build you a new one. With little incentive otherwise, the contractor decides to keep the house as it is and you are left with only one option, sue. Not surprisingly, your relationship with the contractor quickly disintegrates.

The end result over the last fifty years is a system where agencies are burdened so heavily at the beginning of the rulemaking process that by the time the public becomes involved the agency is committed to its decision and is unlikely to make substantial changes to the rule. This does not necessarily occur in every agency or every case, as a large outcry from the public may persuade an agency to change course. However, where a proposed rule may harm only a handful of businesses or a small segment of the public, the agency might not receive enough negative feedback to persuade them to modify years of drafting. The inability for small portions of the public to reduce the adverse effects a proposed rule will have is a significant source of animosity and of the public's belief that the rulemaking process does not provide meaningful participation. As will be discussed in part IV, these problems do exist in Hawai'i and there is a real need to change current rulemaking procedures to solve such problems.

#### IV. Case Study

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##### *A. DLNR, DOBOR, and the Ocean Industry*

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When HAPA was enacted in 1962, Hawai'i hosted 361,812 visitors.<sup>102</sup>

Fifty years later Hawai'i hosts almost eight million visitors annually and tourism

comprises twenty-one percent of State's GDP.<sup>103</sup> While part of this growth is due to the Aloha spirit and island hospitality, one of the major driving forces is Hawai'i's unique ocean environment and the various activities that it affords.

Whether it is fishing, diving, sailing, or various other ecotourism adventures, Hawai'i's ocean waters are the source of many island residents' livelihoods and a sustainable ocean environment is the cornerstone of any business in the ocean activity industry. Relatedly, DLNR and its Division of Boating and Ocean Recreation are tasked with protecting the ocean environment<sup>104</sup> while at the same time benefitting from the revenues that the boating community and industry generates.<sup>105</sup> While this would seem to make for a great working relationship, as both the agency and the ocean community are dependent on one another, under the current informal rulemaking procedures these groups are often adversaries rather than allies.

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<sup>102</sup> DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM, HISTORICAL DATA SHOWING NUMBER OF VISITORS TO HAWAII ANNUALLY (2012), <http://dbedt.Hawaii.gov/visitor/> (last visited Jan. 28, 2014).

<sup>103</sup> HAWAII TOURISM AUTHORITY, DATA SHOWING VISITOR NUMBERS AND SPENDING (2012), *available at* <http://www.HawaiiTourismAuthority.org/research/research/visitor-highlights/>.

<sup>104</sup> See HAW. CODE R. § 13-250-1 (West, Westlaw through 2014).

<sup>105</sup> DEPARTMENT OF BUDGET AND FINANCE, PERFORMANCE MEASURES AND PROGRAM REVENUES (2013), <http://budget.Hawaii.gov/wp-content/uploads/2012/12/22.-Department-of-Land-and-Natural-Resources-FB13-15-PFP.pdf> (last visited Apr. 23, 2014). In 2013 DOBOR generated \$14,258,000 in revenues through its boating programs. This figure does not include the amount that the ocean tourism industry generated in tax revenue for the State.

Whether it is the loss of a surf spot,<sup>106</sup> the inability to run a business cost-effectively,<sup>107</sup> or an inadvertent violation with substantial fines, those regulated are in a constant struggle to cope with the burdens agency rules create. HAPA's notice-and-comment procedures were meant to create a balance between agencies and those regulated. However, by looking at a real experience in the ocean tourism industry, the larger criticisms expressed in Part III and the need for modernization of HAPA's informal rulemaking process are evidenced.<sup>108</sup>

### ***B. The Ocean Industry's Recent Experience with Agency Rulemaking***

Sailing charter businesses have been operating on Maui's Westside for over forty years. The majority of these companies use 50ft to 65ft catamarans to conduct whale watches, snorkeling tours, and sunset sails out of either Kaanapali Beach or Lahaina Harbor under a valid use permit issued by DOBOR.<sup>109</sup>

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<sup>106</sup> See generally Damon Schmidt, *Wiping Out The Ban On Surfboards At Point Panic*, 27 U. HAW. L. REV. 303 (2004) (arguing that a rule by DLNR banning the use of surfboards at the "Point Panic" on Oahu is arbitrary and capricious).

<sup>107</sup> See Bird & Brown, *supra* note 27, at 838 (stating small businesses "faced an annual regulatory cost of \$10,585 per employee, thirty-six percent more than the regulatory cost facing large businesses (defined as firms with five hundred or more employees)." (citing Nicole V. Crain & Mark Crain, *The Impact of Regulatory Costs on Small Firms*, (Sept. 2010) (available at <http://archive.sba.gov/advo/research/rs371.pdf>)).

<sup>108</sup> This specific example is used to highlight a problem that may not exist in every State agency's rulemaking process. A more intense study of the Hawai'i's notice-and-comment procedure is needed to truly understand how many agencies are afflicted and to what amount meaningful participation is harmed.

<sup>109</sup> There are a limited number of use permits to operate off Kaanapali, which makes these permits a scarce but valuable commodity. DOBOR generates

Catamarans with use permits for Kaanapali Beach load passengers by driving the vessels directly onto the shoreline, as there are no loading facilities in this area. When weather conditions make it unsafe to load passengers from the beach, the tour operators direct passengers to meet at Lahaina harbor just down the coast. The harbor provides protection from the elements and is the only other loading point on the Westside of the island capable of accommodating vessels of this size. This arrangement has always been understood under the maritime tradition of allowing boats to seek refuge in protected harbors when unsafe weather conditions exist.

However, in 2011 this arrangement came to an abrupt end when DOBOR began enforcing a rule enacted in 1994 that prevents vessels from loading or offloading passengers from any state facility other than the one designated in their use permit unless the vessel is granted a special permit from the department at least seven days in advance and which will not be granted more than eight times per year.<sup>110</sup> No agency documentation exists that would answer why after sixteen years DOBOR began to enforce the rule. However, as long as the rule is enforceable, the tour operators' options are limited.

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revenue from a mandatory fee when they are transferred to another company or person under HAW. CODE. R § 13-256-7 (West, Westlaw through 2014).

<sup>110</sup> See HAW. CODE. R. §§ 13-231-57(c), (c)(3) (West, Westlaw through 2014) (providing that DOBOR “may authorize the owner of a transient or visiting commercial vessel engaged in a trade or business elsewhere to...Embark and disembark passengers occasionally and infrequently, not exceeding eight times in a calendar year on a special charter when approved not less than seven days in advance of the voyage”).

Since DOBOR began enforcing the rule in 2011, vessels operating out of Kaanapali have taken several actions to survive. First, the companies simply do the best they can under the current rule and hope that there are a limited amount of south swells, unfavorable winds, and Kona storms each year. If they use all eight permits before the end of the year then they must either cancel trips during unfavorable weather, losing all revenues on the day, or try to load and offload passengers in dangerous shore break thereby risking passenger safety and the safety of the vessel. In an industry that is already heavily dependent on weather, the inability to operate without added risk, or operate all together limits growth, increases liability, and decreases the amount of days that employees can work.

Second, given the urgency of the situation the vessel operators sought help from their local representatives and senators to pass a law that would accommodate the situation presented at Kaanapali and Lahaina. In July of 2012, the legislature enacted S.B. No. 2933 which among other items required DOBOR to “adopt rules to allow vessels holding a valid ocean recreation management area commercial use permit to use a state small boat harbor or boat launching ramp when unsafe wind and sea conditions would prevent safe access to the shoreline through a designated ingress or egress zone.”<sup>111</sup> ~~At first glance this would appear to have solved the boat operators’ problem, however this only required DOBOR to initiate rulemaking procedures and thus the current rule will remain in force until the proposed rule navigates all the requirements of HAPA.~~

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<sup>111</sup> S.B. No. 2933, 26th Leg., Reg. Sess. (Haw. 2012).

Since the bill did not specify a time requirement, it was not until September 5, 2013 that DOBOR submitted the proposed rule change to the Board of Land and Natural Resources (“BLNR”) for a vote on whether to send the rule out for public hearing.<sup>112</sup> The board voted to send it to public hearing and the official notice period began on September 15, 2013, thirty days prior to the public hearing date set by the board.<sup>113</sup> At this stage, DOBOR published a notice of the proposed rule change “in a newspaper of general circulation in the State and in each county affected by the proposed rule.”<sup>114</sup> This notice was required to state: 1) the topic of the proposed rule, or a general description of the subjects involved, 2) when, where and during what time the proposed rule may be reviewed in person, and 3) the date, time, and place where the public hearing will be held and where interested parties may be heard.<sup>115</sup> Also, the proposed rule was required to be posted on the agency’s website.<sup>116</sup>

Because the notice and public hearings require substantial resources, DOBOR combined the proposed rule change with numerous other rule changes to

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<sup>112</sup> See HAW. CODE R. § 13-1-21 (West, Westlaw through 2014) (“When the board proposes to adopt, amend, or repeal a rule, whether acting upon a petition or its own motion, a public hearing shall be held as provided by law”).

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<sup>113</sup> DEPARTMENT OF LAND AND NATURAL RESOURCES, NOTICE FOR PUBLIC HEARING (2013), available at <http://dlnr.Hawaii.gov/dobor/files/2013/09/Hearing-Notice-Draft-Rules-HAR-231-251-253-256.pdf> (last visited Apr. 23, 2014).

<sup>114</sup> HAW. REV. STAT. § 91-6 (West, Westlaw through 2013 Act 4).

<sup>115</sup> *Id.* A copy of the public notice is available at, <http://HawaiiTribune-herald.com/sections/news/community/hearings-about-catamarans-set.html>.

<sup>116</sup> See HAW. REV. STAT. § 91-2.4 (West, Westlaw through 2013 Act 4).

form a single rules package.<sup>117</sup> This means that boat operators statewide had thirty days in which to read hundreds of pages of amended, proposed, and repealed rules, understand how the proposed rules might affect them, and generate arguments and testimony against the rules.<sup>118</sup> However, the rules package was not posted to the agency's website until forty-eight hours before the public hearing began and copies were not made available to the public beforehand.<sup>119</sup> As a result, both the Maui operators and the boating community throughout the state had a very limited window to sort through the rules package and devise suggestions on how DOBOR should change the proposed rules and arguments that such changes were necessary. Additionally, since many of the proposed rules were written broadly, it was difficult to determine how administrators would interpret the rules when enforcing them and how the proposed rules might affect recreational and commercial ocean activities.<sup>120</sup>

The actual rule change for loading vessels during adverse weather conditions stated,

“Vessels holding a valid ocean recreation management area commercial use permit may use a state small boat harbor or boat launching ramp when winds are in excess of 25 miles per hour and/or during periods of high surf warnings as indicated by the

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<sup>117</sup> All rules are posted on the agency website for public inspection. The rules package including proposed rule changes for HAW. CODE R. § 13-231, 251, 253, and 256 is available at <http://dlnr.Hawaii.gov/dobor/draft-rules/>.

<sup>118</sup> E-mail from Rick Gaffney, President, Hawai'i Fishing and Boating Association, to author (Jan. 22, 2014, 21:31 HST) (on file with author).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

National Weather Service would prevent safe access to the shoreline through a designated ingress or egress zone.”<sup>121</sup>

While this rule addresses the issue facing the companies on Maui, the vessel operators quickly realized that 30 miles per hour offshore wind might have no adverse affects at Kaanapali Beach while 10 miles per hour onshore wind may pose substantial dangers. Consequently, without wind direction the rule would not be as effective in the solving the problem as it could have been and the operators may still suffer some unnecessary burdens.

At one of the two-hour public hearings on the rules package those attending were informed that the hearing would be cut fifteen minutes short so that the staff had time to put everything away and close the windows.<sup>122</sup> Additionally, the hearing administrator stated that there would likely be misperceptions about the proposed rules since there were additional changes being made in the Attorney General’s office that had not been made public.<sup>123</sup> This means that those affected by hundreds of pages of proposed rules had less than two hours to participate in the rulemaking process and might not have an opportunity to testify on changes to the rules that take place after the hearing. As a result the operators believe that the agency was not seeking meaningful participation from those affected by the proposed rules.

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<sup>121</sup> DIVISION OF BOATING AND OCEAN RECREATION, RULES AMENDING TITLE 13 HAWAII ADMINISTRATIVE RULES, *available at* <http://files.Hawaii.gov/dlnr/dobor/draft-rules/Draft-13-251a.pdf>.

<sup>122</sup> E-mail from Rick Gaffney, President, Hawai‘i Fishing and Boating Association, to author (Jan. 22, 2014, 21:31 HST) (on file with author).

<sup>123</sup> *Id.*



It is now March of 2014 and the final version of the rules package has not been submitted to BLNR for approval. If those affected wish to change the final versions of the rules, they will need to publicly criticize DOBOR's drafting and failure to follow the proper notice-and-comment process in order to have the agency redraft the rules and take them out for another round of public hearing. If successful in this petition, the entire rules package, including the loading rule will be delayed for an indefinite amount of time. At the same time, DOBOR is unlikely to take the criticisms well when it must be done publicly in front of the division's bosses. This course would likely deteriorate this tenuous relationship and make it less likely for the division to seek public input on future rule changes or be willing to grant their petitions to adopt, amend, or repeal rules. As it stands, three years and one legislative act later, the boat operators on Maui must continue to survive without the system that worked well for forty years. Furthermore, many in the boating community have lost faith in the rulemaking system and fear that proposed agency rules will only make life more difficult.

*C. The Larger Effects of HAPA on Hawai'i's Residents*

While the events described above are unique in terms of the facts and those involved, it helps to highlight several of the larger problems facing the current version of HAPA. First, there are currently no means for agencies to quickly modify non-controversial rules. The ability to load passengers out of Lahaina when there were unsafe weather conditions worked for forty years without incident and changing the rule would not affect the rights of those outside the boating community and thus it would be unlikely to face opposition. However,

this rule still proceeds through the notice-and-comment process as part of an entire rules package in order for agencies to conserve resources and avoid the rigors of HAPA for a single rule change. As a result, this minor rule change with significant benefits may not reach those in need until it is too late. This is an unnecessary burden that could be alleviated by a streamlined rulemaking process.

Second, it is often faster to go through the legislature and put a rule change into a bill than it is to go through agency rulemaking procedures.<sup>124</sup> It took only a few months for the legislature to pass the law requiring DOBOR to change the loading rule.<sup>125</sup> Since then it has been over a year and half and it is still unclear when the loading rule will be changed. Accordingly, a system must be put in place that will enable HAPA to return to the efficiency and expediency agency rulemaking once promised.

Third, it is clear that when the public receives an entire rules package two days or even thirty days before public hearings, the public may not be able to formulate arguments and testimony that will convince an agency to change the rules and possibly require the rules to be sent back out to public hearing.

Agencies and departments like DOBOR may spend years drafting numerous rules and it is understandable that they would be reticent to restart this process in order

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<sup>124</sup> Compare S.B. 2933, 26th Leg., Reg. Sess. (Haw. 2012) with DIVISION OF BOATING AND OCEAN RECREATION, RULES AMENDING TITLE 13 HAWAII ADMINISTRATIVE RULES, available at <http://files.Hawaii.gov/dlnr/dobor/draft-rules/Draft-13-251a.pdf> (Sept. 5, 2013) (to be codified at HAW. CODE R. § 13-251-58(b)(7)).

<sup>125</sup> See S.B. 2933, 26th Leg., Reg. Sess. (Haw. 2012). The loading rule was written into S.B. 2933 on March 20, 2012 and then passed on June 29, 2012.

to incorporate the public's input. However, if the public's input is not taken into consideration, then the system no longer allows for meaningful participation.

Fourth, in terms of efficiency it is understandable for agencies to draft rules that are broadly worded to be effective in a variety of situations, but without further clarification those affected by the rules do not know how to avoid unintentionally violating these rules or how to formulate their testimony against proposed rules. Therefore, it is important that a system is in place that allows agencies to keep the public informed on their intents and purposes, while also explaining the reasons for their decisions.

Finally, because the public does not get involved in the rulemaking process until agencies have already committed significant resources to how a proposed rule is drafted it is less likely that they will want to restart the drafting process to accommodate public input. If the agency does redraft the rule then the process is inefficient, as early public input would have helped shape the rule so it did not need to be drafted twice. Had DOBOR involved the vessel operators early in the process, the operators could have helped shape the loading rule using their expertise on weather conditions and develop the most effective language to achieve the goal stated by the senate bill. Instead, the only recourse to change the language of proposed rules is to publicly criticize the agency. This adversarial process does not foster the collaboration needed to create effective rules and lasting relationships between agencies and those they regulate.

## V. The 2010 Model State Administrative Procedure Act

As examined in Part III of this Article, the problems facing HAPA are not unique to Hawai‘i. Fifty years of experimentation with the traditional notice-and-comment procedures has led to the creation of the 2010 Model State Administrative Procedure Act. Several modern features incorporated into the Act deal specifically with the problems described above and seek to reinvigorate public participation in rulemaking while reducing the burdens placed on agencies.

The 2010 MSAPA is specifically designed for states like Hawai‘i that “currently have the 1961 Act, but would like to replace that act with a more modern up to date administrative procedure act.”<sup>126</sup> It is the culmination of seven years of research and development by experts in the administrative rulemaking field all working with fairness, and public access to agency information in mind.<sup>127</sup> While the new MSAPA contains many features that states can adopt, several focus specifically on upgrading the traditional notice-and-comment procedures to improve participation while streamlining the process.<sup>128</sup>

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<sup>126</sup> See REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, Prefatory Note, at 3 (2010) [hereinafter 2010 MSAPA], available at [http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf).

<sup>127</sup> See Gedid, *supra* note 7, at 278.

<sup>128</sup> See *id.* (detailing the new 2010 MSAPA features at greater length).

*A. Section 303: Advanced Notice of Proposed Rulemaking; Negotiated Rulemaking*

Section 303 of the new 2010 MSAPA incorporates an advanced notice procedure and negotiated rulemaking as a means of bolstering the effectiveness of rules by allowing the public to participate in the early stages of the rulemaking process. Section 303(a) provides that “An agency may gather information relevant to the subject matter of a potential rulemaking proceeding and may solicit comments and recommendations from the public by publishing an advance notice of proposed rulemaking in the [administrative bulletin] and indicating where, when, and how persons may comment.”<sup>129</sup> The key advantage to advanced notice of proposed rulemaking is that the public is able to provide agencies with input before the agency has committed substantial resources to a decision and this increases the likelihood of meaningful public participation.

Several studies have examined the advanced notice procedure at the federal level and have found it an effective tool in combating agency lock-in. In one study, Washington-based interest groups rated informal contacts with federal agencies prior to the public comment stage as “the most effective way to influence a rulemaking, as compared to written comments, attendance at hearings, formation of coalitions, mobilization of grassroots support, and informal contact with the agency after notice.”<sup>130</sup> In another a study, Professor Magat examined

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<sup>129</sup> 2010 MSAPA § 303.

the effects from the EPA's use of informal pre-notice procedures when creating "best technology available" guidelines for the Clean Water Act. In response to early feedback from industry participants, the standards originally proposed were significantly lowered, and following the formal comment period few changes were made.<sup>131</sup> This suggests that the EPA took early comments into consideration and as a result did not face public opposition to the guidelines during the notice-and-comment period and thus did not need to make substantive changes.

Advanced notice procedures have already been adopted in several states including, Idaho, Minnesota, Montana, and Wisconsin.<sup>132</sup> Section 67-5220 of Idaho's administrative procedure act has been in effect since 1992 with the intent of improving "the substance of proposed rules by drawing upon shared information, knowledge, expertise and technical abilities possessed by interested persons and to expedite formal rulemaking."<sup>133</sup> Accordingly, adopting advanced notice procedures in Hawai'i would allow agencies to seek out important information at the outset of the rule drafting process and use the expertise of those who are often in the best position to help create effective rules. As seen in the

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<sup>130</sup> See Stern at 600; Cornelius M. Kerwin, *Rulemaking* 116, at 184, 195 (2d ed. 1999).

<sup>131</sup> *Id.*

<sup>132</sup> 2010 MSAPA § 303, Comment; IDAHO CODE ANN. § 67-5220 (West, Westlaw through 2014 Reg. Sess.); MINN. STAT. ANN. § 14.101 (West, Westlaw through 2014 Reg. Sess.); MONT. CODE ANN. § 2-4-304 (West, Westlaw through 2013 Sess.); and WIS. STAT. ANN. § 227.13 (West, Westlaw through 2013 Act 146).

<sup>133</sup> IDAHO CODE ANN. § 67-5220 (West, Westlaw through 2014 Reg. Sess.).

case of DOBOR, those in the regulated industry are working in and with the environment everyday and can provide valuable information to ensure that rules accomplish their purpose without being overly burdensome.

Next, Section 303(b) allows an agency to “engage in negotiated rulemaking by appointing a committee to comment or make recommendations on the subject matter of a proposed rulemaking under active consideration within the agency.”<sup>134</sup> Section 303(b)’s utilization of committees rather than mass public input prevents agencies from being overwhelmed by comments while still receiving the information necessary to create effective rules. Similar to Hawai‘i’s legislative branch, where representatives are elected by the people to ensure that the laws passed represent the wishes of the people, 303(b) holds that “In making appointments to the committee, the agency shall make reasonable efforts to establish a balance in representation among members of the public known to have an interest in the subject matter of the proposed rulemaking.”<sup>135</sup> This allows agencies to work with interested parties who represent the public or regulated industry without being overwhelmed with comments and the need to respond to every comment. This should increase efficiency once the rule goes out for public hearing since it will be less likely to face opposition and should also reduce the

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<sup>134</sup> *Id.*

<sup>135</sup> 2010 MSAPA § 303(b).

threat of litigation from parties who feel that the agency did not take their comments into consideration.<sup>136</sup>

This form of rulemaking has been used at the federal level since the 1970's.<sup>137</sup> The numerous benefits of this process include "avoiding simplistic thinking about complicated issues, difficulty in enforcing compliance, unintended consequences, lengthy rulemaking, lack of mutual accommodation among conflicting parties, keeping of rules even though their purposes have been served, unnecessary legal battles, misconceptions that one rule can effectively apply to all affected parties, and overlaps among agencies."<sup>138</sup> While negotiated rulemaking is not without criticism<sup>139</sup>, legal scholars have found that federal agencies including the Federal Aviation Administration, the Department of Transportation,

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<sup>136</sup> See Order Denying Plaintiffs' Motion for Award of Attorney's Fees and Costs, *Greenpeace Found. v. Dep't of Transp., State of Hawai'i*, Civ. No. 88-00907-ACK, 1990 WL 192480, at \*1 (D. Haw. 1990) (finding on certain rule changes the Hawai'i Department of Transportation violated HAPA because the agency failed to fully consider public testimony given in hearings).

<sup>137</sup> See William Funk, *Public Participation and Transparency in Administrative Law--Three Examples and an Object Lesson*, 61 ADMIN. L. REV. 171, 191-197 (2009).

<sup>138</sup> See Skousen, *supra* note 32, at 1048 (citing John T. Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67, 68-72 (1976)).

<sup>139</sup> See, e.g., Cary Coglianese, *Assessing Consensus: The Promise And Performance Of Negotiated Rulemaking*, 6 DUKE L.J. 1255 (1997) (arguing that negotiated rulemaking has failed to live up to expectations and has not made the rulemaking process more efficient) *but see* Phillip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000) (arguing that Professor Coglianese's research was flawed and misleading with regards to actual experience with negotiated rulemaking).



the Occupational Safety and Health Administration, and various others have all seen success through this procedure especially where the issues involved were highly contentious and difficult to solve through traditional methods.<sup>140</sup>

For example, one study found that the Coast Guard's use of negotiated rulemaking in 1992 was particularly effective in developing standards for oil spill response plans after the Exxon Valdez accident.<sup>141</sup> In a mere two and half months, a negotiated rulemaking committee "developed a consensus on a proposed rule and signed an agreement..."<sup>142</sup> This was a remarkable feat considering the level of controversy surrounding this issue at the time.<sup>143</sup> Additionally, the Environmental Protection Agency was able to use negotiated rulemaking to develop complex regulations that would reduce smog pollution in only six months.<sup>144</sup>

Negotiated rulemaking is also argued to have already shown itself as a viable method in solving difficult problems here in Hawai'i.<sup>145</sup> In 1998, Hawai'i's Department of Education and Department of Health were at risk of losing their federal funding because they were not providing adequate health and human

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<sup>140</sup> See Harter, *supra* note 139, at 37-38 (2000).

<sup>141</sup> *Id.* at 43.

<sup>142</sup> *Id.*

<sup>143</sup> *See id.*

<sup>144</sup> *See id.* at 47-48.

<sup>145</sup> *See* Skousen, *supra* note 32, at 1053-1058.

services to disabled persons in the state.<sup>146</sup> To solve this problem quickly, the State Procurement Office (“SPO”) sought and received a waiver of the HAPA requirements from the Governor to allow for the use of negotiated rulemaking.<sup>147</sup> As a result of the waiver, the agencies were able use several consensus seeking methods to create the rules in fourteen months while at the same time garnering support for the proposed rules prior to the notice-and-comment period.<sup>148</sup> In the following two years after the rules went into effect, no suits were filed challenging the rules and no legislation was sought to amend them.<sup>149</sup> Thus, negotiated rulemaking had solved a difficult problem in a relatively short period of time and with the full support of those involved.<sup>150</sup>

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<sup>146</sup> *See id.*

<sup>147</sup> *Id.*; *see also* HAW. REV. STAT. § 91-3(d) (West, Westlaw through 2014 Act 5).

<sup>148</sup> *See Skousen, supra* note 32, at 1056-1057 (finding the methods the SPO used included, “(1) numerous meetings with private providers of health and human services on each of the Hawaiian Islands; (2) six meetings with the PPB; (3) various meetings with government and agency officers who were involved with and had an interest in the procurement and administration of these services; (4) several solicitations of comments from the public and public information meetings to explain the new procurement rules and what their implications would be for state agencies, providers, and the community; (5) two requests for comments from recipients of the health and human services; and (6) reviews with legal experts, such as the Attorney General’s Office, to assure compliance with the consent decree and other laws”).

<sup>149</sup> *See Id.* at 1057-1058.

<sup>150</sup> *Id.* at 1058.

Section 303(b) does not make negotiated rulemaking a requirement but instead suggests that an agency utilize it when they wish to garner the knowledge of interested parties to create a rule that balances multiple views.<sup>151</sup> This means that agencies in Hawai‘i would need to rely on their expertise in the rulemaking process to decide when to implement this method. A potential problem with this “opt-in” approach this is that agencies may choose not to use negotiated rulemaking. The reasons for this include the extra effort negotiated rulemaking may require of an agency, an agency’s perceived loss of control over regulations, and an agency may already have informal contacts with interested parties that the agency finds to be more effective and efficient.<sup>152</sup> This problem was recently addressed in Idaho, where interested parties found that state agencies were inconsistent in “their willingness to use negotiated rulemaking and their agency-specific procedures for doing so.”<sup>153</sup> In order to make agencies use of negotiated rulemaking more consistent, Idaho’s APA was amended in 2012 to include three requirements: 1) an agency must decide whether negotiated rulemaking is feasible for every contemplated rule, 2) if the agency finds that the rule is not feasible then the agency must publish a written explanation for its decision, and 3) if the agency finds negotiated rulemaking is feasible then the agency is required to use

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<sup>151</sup> 2010 MSAPA § 303, Comment.

<sup>152</sup> Richard Seamon and Joan Callahan, *Achieving Regulatory Reform By Encouraging Consensus*, 56-FEB ADVOCATE (IDAHO) 27, 27-28 (2013).

<sup>153</sup> *Id.* at 28.

it.<sup>154</sup> As a result, agency discretion is limited in order to ensure that interested parties are able to participate at the outset of the rulemaking process.<sup>155</sup>

It is unclear if and how often agencies in Hawai‘i would choose to avoid negotiated rulemaking, however it is important in a state like Hawai‘i, where the population is small and resources are limited, that collaboration between agencies and interested parties be utilized to reduce waste and inefficiency while promoting healthy relationships. If agency rulemaking is truly going to ensure public participation in the rulemaking process then it may make sense to implement a system that not only allows for meaningful participation through negotiated rulemaking, but also makes it a priority.

***B. Section 310: Direct Final Rule.***

Another useful feature of the 2010 MSAPA is Section 310, which allows an agency to bypass the notice-and-comment period for rules that the agency believes are noncontroversial.<sup>156</sup> The purpose of this process is “to streamline the rulemaking process in situations in which a rule is considered so noncontroversial that the most minimal procedures should be adequate.”<sup>157</sup> HAPA currently requires a mandatory oral hearing for all rules promulgated by an agency in every

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<sup>154</sup> *See id.*

<sup>155</sup> *See id.* at 29.

<sup>156</sup> *See* 2010 MSAPA § 310.

<sup>157</sup> Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 2 (1995).

county that will be affected.<sup>158</sup> As discussed in Part IV, this often leads to rules being packaged together, forcing the public to filter through hundreds of pages of rules in a short period of time and discern which rule changes will affect them. By allowing agencies to bypass the mandatory public hearing for noncontroversial and minor rule changes, agencies and the public can focus on the rules that will have a meaningful impact.

This form of rulemaking has been used at the federal level since the early 1980's<sup>159</sup> and Washington State has been using a process known as "expedited rule making" for over a decade.<sup>160</sup> Section 34.05.353 of Washington's Administrative Procedure Act, allows an agency to bypass public comment proceedings for rules that meet certain criteria and have gone through a forty-five day notice period where no objections are received.<sup>161</sup> One criterion that allows for expedited rulemaking is if an agency formulates a rule using negotiated rulemaking or other processes where there has been substantial participation by

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<sup>158</sup> HAW. REV. STAT. § 91-3 (West, Westlaw through 2014 Act 5).

<sup>159</sup> See 46 FED. REG. 44, 476 (1981) (stating how the EPA used direct final rulemaking to increase efficiency in the creation of rules under the Clean Water Act). See also Levin, *supra* note 159, 4-11 (detailing numerous examples of the successful implementation of direct final rulemaking by federal agencies such as the Environmental Protection Agency, the Department of Agriculture, and the Department of Transportation).

<sup>160</sup> See S.H.B. 1375, 2001 Leg., 57th Reg. Sess. (Wa. 2001) (reauthorizing and amending the use of expedited rulemaking).

<sup>161</sup> See Wash. Rev. CODE § 34.05.353(6) (West, Westlaw through 2013).

interested parties.<sup>162</sup> This results in greater agency efficiency with well-reasoned rules going into effect much sooner. While not specifically provided for in the 2010 MSAPA, Hawai'i lawmakers might consider incorporating this type of provision.

Virginia is another state that uses direct final rulemaking and it is this process that served as the model for Section 310 of the 2010 MSAPA. Adopted in 2003, Section 2.2-4012.1 of Virginia's Administrative Process Act allows agencies to submit proposed rules for fast-tracking.<sup>163</sup> After authorization by the Governor, a proposed rule is published for public comment and if after thirty days the agency receives less than ten objections from the public, the rule becomes effective fifteen days after the close of the comment period.<sup>164</sup> If ten or more objections are received then the rule must go through the normal rulemaking process.<sup>165</sup>

One of the main differences between the 2010 MSAPA and Virginia's fast-tracking process is that the 2010 MSAPA suggests proposed rules go through the normal promulgation process if "any" objections are received. This is meant to ensure that an agency does not abuse the direct final rule option. An important concern here is that agencies may attempt to pass controversial rules rather than

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<sup>162</sup> *Id.*

<sup>163</sup> *See* S.B. NO. 1001, Reg. Sess., (VA. 2003).

<sup>164</sup> VA Code Ann. § 2.2-4012.1 (West, Westlaw through 2013 Reg. Sess.).

<sup>165</sup> *Id.*

only noncontroversial rules. For example, in a study on the Food and Drug Administration, it was found that the agency was forced to withdraw a significant amount of rules sent for direct final rulemaking after receiving adverse public feedback.<sup>166</sup> It was argued that this might have occurred because the agency attempted to pass controversial rules hoping that the public would not notice.<sup>167</sup> The consequence of this type of agency action is that the process loses credibility.<sup>168</sup>

Accordingly, the 2010 MSAPA protects against this problem by calling for a 30-day period where the rule is opened to the public for inspection and if any objections are received, then the rule will be required to follow the standard notice-and-comment process.<sup>169</sup> However, if during that time the agency does not

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<sup>166</sup> Michael Kolber, *Rulemaking Without Rules: An Empirical Study of Direct Final Rulemaking*, 72 Alb. L. Rev. 79, 82 (2009) (finding only a forty percent success rate for rules sent out by FDA for direct final rulemaking).

<sup>167</sup> See *id.* at 106 (stating three possible reasons for the agency's high rule withdrawal rate: "Scenario One: Because it believes any rule that is approved by direct final rulemaking represents an efficiency gain at essentially no cost, the FDA is not attempting to determine which rules are controversial. Instead, it is putting as many rules into DFR as possible and letting the public at large decide which rules are controversial.168 Scenario Two: the agency is actively proposing direct final rulemaking for regulations it knows will be controversial and hopes no one notices, in order to circumvent hostile public comment. Scenario Three: the agency is making a good-faith effort to use direct final rulemaking only for rules it believes to be noncontroversial, but is unsuccessful at predicting which rules will be controversial).

<sup>168</sup> See *id.*

<sup>169</sup> See 2010 MSAPA § 310.

receive objections then the rule will take effect at the end of the notice period.<sup>170</sup> A single objection standard in Hawai‘i would help prevent agencies from abusing this process while still allowing minor rule changes to bypass the rigors and expenses of the mandatory oral hearing requirement. Furthermore, since the 2010 MSAPA can be modified, Hawai‘i lawmakers may want to consider a hybrid, such as a 10-objection standard if a rule has been formulated using negotiated rulemaking versus a single objection standard for rules made without public collaboration.

In addition, HAPA currently requires the Governor to sign off on all proposed rules before they have the effect of law.<sup>171</sup> In one sense this provides a last line of defense in case an agency attempts to misuse the direct final rule process. At the same time, this can also be seen as a bottleneck where noncontroversial rules may sit idle for an indiscriminate amount of time at the Governor’s office waiting to be signed. Accordingly, if a single objection standard were to be chosen, then a waiver of this requirement may go along way in streamlining the rulemaking process while still protecting against potential misuse.

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<sup>170</sup> *Id.*

<sup>171</sup> *See* HAW. REV. STAT. § 91-3(c) (West, Westlaw through 2013 Act 4) (holding “The adoption, amendment, or repeal of any rule by any state agency shall be subject to the approval of the governor”).



While it is difficult to determine whether agencies would abuse this form of rulemaking, the adoption of Section 310 should help alleviate some of the burdens facing agencies in Hawai‘i. Any rule that is passed through direct final rulemaking is one less rule that needs to go through oral public hearings. This reduces the amount of proposed rule changes the public must sort through before public hearings and puts focus on rules that have a substantive impact on the public and small businesses of the islands. Also, the possible modification of the Section 310 by adding a minimum objection standard might facilitate the expediency of enacting proposed rules where agencies have used negotiated rulemaking and thus have obtained support and expertise from interested parties.

### ***C. Section 311: Guidance Document.***

A third feature of the 2010 MSAPA that could greatly benefit HAPA is the implementation of guidance documents. The use of guidance documents is particularly important for the public due to the fact that the judiciary has long held that an agency’s interpretation of a regulation is controlling unless “it is plainly erroneous or inconsistent with the regulation.”<sup>172</sup> Legal scholars have debated

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<sup>172</sup> Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). Since *Seminole Rock*, the U.S. Supreme Court has continued to apply the ‘plainly erroneous’ standard with confidence. See, e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965); PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2575-76 (2011); Talk America, Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2260-61 (2011); Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880-81 (2011).

The ‘plainly erroneous’ standard has also been applied in Hawai‘i. See, e.g., Int’l Bhd. of Elec. Workers v. Hawaiian Tel. Co., 713 P.2d 943, 950 (Haw. 1986) (stating an “agency’s interpretation of its rules receives deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose”).

whether this creates a separation of power problem and whether this conflicts with the role of the judiciary to interpret laws.<sup>173</sup> While this Article does not focus on the constitutionality of deference to agency interpretation of its own regulations, this subject has led legal scholars to argue that this view creates incentive for agencies to draft rules that are vague “since the agency can say what its own regulations mean (unless the agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision.”<sup>174</sup>

This does not mean that agencies do not have good reasons for drafting broad rules, as this type of rule is applicable to a wide variety of problems, especially those that are unforeseen during the drafting process.<sup>175</sup> Also, a greater amount of resources and effort are needed to draft rules that are detailed and yet if a rule is too precise it may not cover an unforeseen situation and thus the agency would be forced to go through the expenses of rulemaking to address a problem that a broad rule might have been able to solve.<sup>176</sup> However, the issuance of

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<sup>173</sup> For more information on deference to agency interpretation of agency created rules see, Aneil Kovvali, *Seminole Rock And The Separation Of Powers*, 36 HARV. J.L. & PUB. POL'Y 849 (2013); John F. Manning, *Constitutional Structure And Judicial Deference To Agency Interpretations Of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109 (1991); Russell L. Weaver, *Judicial Interpretation Of Administrative Regulations: The Deference Rule*, 45 U. PITT. L. REV. 587 (1984).

<sup>174</sup> Manning, *supra* note 173, at 655.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

vague rules creates problems for those in the public that may be affected. First, unclear regulations make it difficult for interested parties to determine the actions they must take or refrain from to avoid violations and penalties.<sup>177</sup> Second, there is the fear that agencies will pass vague rules through notice-and-comment “with the plan of issuing ‘interpretations’ to create the intended new law without observance of notice and comment procedures.”<sup>178</sup> Both of these potential problems reduce agency legitimacy, while generating hostility from the public.

The drafters of the 2010 MSAPA have written Section 311 using the laws of Arizona, Michigan, Virginia, and Washington<sup>179</sup> to address the problems that may arise from deference to agency interpretation and “eliminate agencies’ ad hoc reliance upon policies and procedures.”<sup>180</sup> Section 102(14) of the 2010 MSAPA defines a guidance document as “a record of general applicability developed by an agency which lacks the force of law but states the agency’s current approach to, or interpretation of, law, or describes how and when the agency will exercise

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<sup>177</sup> See *id.* at 668 (arguing that due process requires agency rules to give persons a reasonable notice of what is prohibited).

<sup>178</sup> Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN L. J. AM U 1, 12 (1996).

<sup>179</sup> See 2010 MSAPA § 311, Comment.

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<sup>180</sup> Christopher D. Roy, Esq., *A Need to Modernize: Transparency and Regulatory Reform Through Adoption of the 2010 Model State Administrative Procedure Act*, 37-SPG VT. B.J. 36 (2011); see e.g., *Application of Hawaiian Elec., Co., Inc.*, 918 P.2d 561, 569 (Haw. 1996) (holding that agencies have discretion in choosing between proceeding by “general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”) (citing *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

discretionary functions.”<sup>181</sup> As described, guidance documents are advisory in nature without the force of law and thus the 2010 MSAPA does not require them to go through the rigors of public hearing.<sup>182</sup> This is inline with Hawai‘i’s current holding that rules that only affect the internal management of an agency or merely interpret a rule do not need to go through HAPA’s notice-and-comment procedures.<sup>183</sup>

Section 311 would modernize Hawai‘i’s view on interpretative rules with its emphasis on how such rules may be used by agencies and the public’s ability to challenge these rules although they are nonbinding. Section 311(b) states,

“An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.”<sup>184</sup>

The purpose of this is to prevent agencies from using guidance documents as binding rules, and if an affected party disagrees with the agency’s position, the

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<sup>181</sup> 2010 MSAPA § 102(14).

<sup>182</sup> *See* 2010 MSAPA § 311(a).

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<sup>183</sup> *See State v. Claunch*, 137 P.3d 373 (Haw. 2006) (holding that procedures for police run sobriety checks are internal procedures not subject to the requirements of HRS §§ 91-1 et. seq.); *see also* *Sharma v. State Dept. of Land and Natural Resources*, 673 P.2d 1030 (Haw. 1983) (holding that agency decisions that only deal with the internal management of the agency and do not affect the private rights of the public do not fall under the requirements of HRS §§ 91-1 et. seq.).

<sup>184</sup> 2010 MSAPA § 311(b).

agency should afford the party an opportunity to challenge the agency's position.<sup>185</sup>

Additionally, Section 311 will prevent agencies enforcing rules based on a new interpretation that is inconsistent with their previous interpretation unless the agency can explain the reason for the variance.<sup>186</sup> Section 311(d) states,

“If an agency proposes to act in an adjudication at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the variance. If an affected person in an adjudication may have relied reasonably on the agency's position, the explanation must include a reasonable justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interest.”<sup>187</sup>

This bolsters agency accountability by ensuring that agency actions that affect the rights of interested parties will not change without reasonable explanation.<sup>188</sup> In turn, agency legitimacy increases because the public will know that agency actions are not arbitrary or capricious, and that the agency will respond to their concerns. Furthermore, this will provide small businesses in Hawai'i with the

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<sup>185</sup> See 2010 MSAPA § 311, Comment; *see also* Recommendation 120C of the American Bar Association, 118-2 A.B.A. REP. 57, 380 (August 1993).

<sup>186</sup> See 2010 MSAPA § 311.

<sup>187</sup> 2010 MSAPA § 311(d).

<sup>188</sup> See 2010 MSAPA § 311, Comment (citing *Heckler v. Community Health Servs.*, 467 U.S. 51, 61 (1984) (stating “an administrative agency may not apply a new [case law] rule retroactively when to do so would unduly intrude upon reasonable reliance interests”); *see also* *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007); *Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001); *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998).

necessary stability to succeed by avoiding unintentional violations or agency actions that may have substantial consequences with little recourse.

Section 311(e) further maximizes guidance documents' effect by requiring agencies to post them online.<sup>189</sup> Similar to the current requirements of HRS § 91-2.6, agencies in Hawai'i would post guidance documents on their website as an effective and efficient way to inform the public. Additionally, section 311(e) holds that "The agency may not rely on a guidance document, or cite it as precedent against any party to a proceeding, unless the guidance document is published on its Internet website."<sup>190</sup> This reinforces agency accountability and the intended use of guidance documents as a way of keeping the public informed rather than a way for agencies to avoid notice-and-comment procedures.

### Conclusion

When Hawai'i adopted HAPA in 1962, gasoline was cheap, beachfront property was still affordable, and sugarcane and pineapple plantations stretched across the islands. Today, HAPA is one of the few things that have not changed. While various legislative acts have been passed over the last five decades to reinforce HAPA's intent and purpose, much of it has burdened agencies to the point where the notice-and-comment stage is no longer effective in getting the public involved in the creation of regulations. As a result, animosity between agencies and those they regulate is increasing, undue burdens placed on the public

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<sup>189</sup> See 2010 MSAPA § 311(e).

<sup>190</sup> *Id.*

by regulations are common, the time it takes to enact, amend, and repeal rules is discouraging, and meaningful participation by the public is all but lost.

Therefore, the moment is ripe for Hawai'i to modernize HAPA through the adoption of several modern rulemaking procedures from the 2010 MSAPA. First, negotiated rulemaking would help to ensure that the public's interest and expertise is incorporated into new regulations while preventing the agency from being overwhelmed by comments and opinions. Second, advanced notice procedures could allow agencies to receive public input early in the rulemaking process as a means of lessening the effects of agency lock-in and also as a means of gaining insight into how the public will react to various proposed rules. Third, expedited rulemaking will allow minor rule changes to pass through the rulemaking process quickly without needing to go out for public hearings in every county affected by such rules. This will help to limit the size of rules packages and allow agencies and the public to focus on the major rule changes without getting lost in the minutia. Finally, guidance documents would allow agencies to inform agency employees on how rules will be interpreted and how to enforce such rules, which in turn will increase agency legitimacy by reducing the likelihood that the public will view agency actions as arbitrary. Furthermore, guidance documents will provide the public with vital information necessary to avoid unintentional violations and penalties through a clearer understanding of agencies' expectations.

In a place where resources are limited, relationships are crucial, and small rules can have major impacts, Hawai'i is ideally suited for modern rulemaking methods that will reflect the symbiotic relationship between regulators and those they regulate. Research and experience over the last several decades has shown that APAs like HAPA are not always able nor equipped to meet the great expectations that they set out to achieve. Accordingly, the adoption of modern administrative procedures found in the 2010 MSAPA, which focus on collaboration and agency transparency, would ensure that agency rules in Hawai'i are effective and in the best interests of all the islands' residents.



## **V. Administrative Matters**

### C. Discussion and Action on the Board's "2008 Chapter 201M-7, HRS Report"



**HAWAII  
SMALL BUSINESS  
REGULATORY REVIEW  
BOARD**

**Review of Agency Submitted  
Administrative Rules**

**In Compliance with  
Regulatory Flexibility Act  
Section 201M -7,  
Hawaii Revised Statutes**

**December 2008**

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## MESSAGE FROM THE DIRECTOR



As the Director of the Department of Business, Economic Development & Tourism, I continue to extend my sincere appreciation to the members of the Small Business Regulatory Review Board for their hard work, dedication and commitment to the small businesses in Hawaii.

Theodore E. Liu  
Director



## MESSAGE FROM THE CHAIRPERSON

Linda Lingle  
Governor

Theodore E. Liu  
Director, DBEDT

Mark K. Anderson  
Deputy Director, DBEDT



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Richard Schnitzler  
Hawaii

Bruce E. Bucky  
Oahu

Peter Yukimura  
Kauai

David S. DeLuz, Jr.  
Hawaii

The Small Business Regulatory Review Board began the rule review process in 2003 with fourteen State agencies providing this Board with 345 rules that impact small business. After a 2005 modification of the rule submittals, eleven agencies provided our Board with 237 rules. Upon review of each of the 237 rules submitted, the Board recommended that Agencies perform full analyses on 49 of the total submitted. Only the Public Utilities Commission refused to conduct a review after receiving our request.

This report entails the final review of the original 345 rules outlining the Agencies' justifications, actions, if any, and the Review Board's final commentary. The members are deeply appreciative of the hours spent by so many Directors and their staff reviewing this Board's recommendations. Their cooperation is making a difference to businesses buried in regulations.

To say that our Board members are dedicated to the cause of reducing business impacts is to state the obvious. Over this past year our members designed and implemented a Regulatory Alert program in order to avail members of business and industry specific organizations to the rule-making process during the drafting and reviewing phase, a further step towards the goal of making Hawaii a business friendly State.

It is truly an honor for me to work with all of our dedicated Board members, and with Dori Palcovich the State Business Advocate. Their hard work and dedication have made our efforts so very successful. I would also like extend a special Mahalo to DBEDT Director Ted Liu for his unwavering support of our Board's work over the years.

Chairperson  
December 2008

## OVERVIEW

Members of the Small Business Regulatory Review Board (Review Board) are pleased to provide a review and commentary on specific administrative rules, pursuant to the Regulatory Flexibility Act (RFA), Chapter 201M-7, HRS, 2002, for the year 2008.

### **[201M-7] Periodic review; evaluation.**

- (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.

## **ADMINISTRATIVE RULE REVIEW**

This Administrative Rule Review Report consists of 49 existing rules reviewed by the Review Board with final commentary. The analysis began with the Review Board's first report in 2003, where fourteen State agencies provided a total of 345 rules that affect small business. Agencies provided the specific purpose for adopting the rule and justification for the rule's continued implementation. Additionally, four agencies submitted a total of 67 rules that received the most complaints or resulted in the most citations.

In its 2005 report, the Review Board requested a modified version of the 2003 rule submittals. In accordance with the law and within its discretion, the Review Board requested a re-analysis of the rules that it determined had significant business impact. In particular, the Review Board required the specific purpose and reasons for justifying the rules' continued implementation. Subsequently, 11 agencies provided 237 rules that effect small business.

In its 2006 report, upon reassessing the agencies justifications, the Review Board recommended full analyses of 49 of the 237 administrative rules. This report, as a result, outlines the Agencies' justifications, actions and responses along with the Review Board's final commentary.

To date, the Review Board has not found it necessary to solicit testimony from the public regarding any report submitted by the Agency at public hearing.



## RULES REVIEWED MATRIX

<b>Agency</b>	<b># of Rules Reviewed</b>	<b># of Rules Recommended for Full Analysis</b>
1. DEPARTMENT OF AGRICULTURE	29	6
2. DEPARTMENT. OF BUDGET AND FINANCE		
FINANCIAL ADMINISTRATION DIVISION	7	0
PUBLIC UTILITIES COMMISSION	10	3
3. DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM	3	0
4. DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS	45	13
5. DEPARTMENT OF EDUCATION	1	0
6. DEPARTMENT OF HEALTH		
MEDICAL DIVISON	7	6
ENVIRONMENTAL DIVISION	30	3
7. DEPARTMENT OF HUMAN SERVICES	9	5
8. DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS	20	3
9. DEPARTMENT OF LAND AND NATURAL RESOURCES	54	4
10. DEPARTMENT OF TRANSPORTATION	21	6
11. UNIVERSITY OF HAWAII	1	0
<b>Total</b>	<b>237</b>	<b>49</b>

## **SUMMARY OF ADMINISTRATIVE RULES REVIEWED**

Listed below are 49 administrative rules reviewed by the Review Board for the period of December 2006 through December 2008.

### **Department of Agriculture**

#### **Rules Recommended by Review Board for Full Analysis**

1. Chapter 4-86, "Brake Fluids, Coolants, Petroleum Products, and After-Market Additives"
2. Chapter 4-93, "Packaging and Labeling"
3. Chapter 4-101, "Weighing and Measuring Devices"

#### **Rules under Current Review by Agency which Review Board is in Agreement**

1. Chapter 4-72, "Plant and Non-Domestic Animal Quarantine Plant Intrastate Rules"
2. Chapter 4-73, "Plant and Non-domestic Animal Quarantine Plant Export Rules"
3. Chapter 4-96, "Schedule and Fees for Licensing Devices Susceptible of Commercial Usage, and Measuring Devices and Measurement Standards for Testing or Certification"

#### **Additional rules not part of the Initial 201M-7 Rule Review submitted by the Department of Agriculture**

1. Chapter 4-16, "Cattle, Sheep and Goats"
2. Chapter 4-29, "Dogs, Cats and Other Carnivores"
3. Chapter 4-69-A, "Pests for Control or Eradication"
4. Chapter 4-70, "Plant and Non-Domestic Animal Quarantine Plant Import Rules"
5. Chapter 4-71A – "Plant and Non-Domestic Animal Quarantine Microorganism Import Rules"
6. Chapter 4-87, "Voluntary Registration of Service Persons or Service Agents"
7. Chapter 4-139, "Commodities Inspection Fees Rules"
8. Chapter 4-158, "Non-Agricultural Park Lands Program Rules"
9. Chapter 4-17, "Swine"
10. Chapter 4-20, "Non-domestic Animals"
11. Chapter 4-23, "Horses"

### **Department of Budget and Finance**

#### **Rules Recommended by Review Board for Full Analysis**

1. Chapter 6-62, "Motor Carrier Rules and Classification of Property and Passenger Carriers"
2. Chapter 6-63, "Motor Carrier Tariffs and Schedules"
3. Chapter 6-65, "Water Carriers"

## **Department of Commerce and Consumer Affairs**

### **Rules Recommended by Review Board for Full Analysis**

1. Chapter 16-51, "Fees"
2. Chapter 16-73, "Barbers"
3. Chapter 16-74, "Boxing"
4. Chapter 16-75, "Cemeteries and Funeral Trusts"
5. Chapter 16-83, "Hearing Aid Dealers and Fitters"
6. Chapter 16-84, "Massage Therapy"
7. Chapter 16-86, "Motor Vehicle Dealers and Salesmen"
8. Chapter 16-87, "Motor Vehicle Repair Dealers and Mechanics"
9. Chapter 16-88, "Naturopaths"
10. Chapter 16-101, "Veterinarians"
11. Chapter 16-106, "Timesharing"
12. Chapter 16-116, "Travel Agencies"
13. Chapter 16-117, "Activity Providers and Activity Desks"

## **Department of Health**

### **Medical Division**

#### **Rules Recommended by Review Board for Full Analysis**

1. Chapter 11-89, "Services for Developmental Disabilities Domiciliary Homes"
2. Chapter 11-95, "Freestanding Surgical Outpatient Facility"
3. Chapter 11-96, "Freestanding Adult Day Health Centers"
4. Chapter 11-97, "Home Health Agencies"
5. Chapter 11-99, "Intermediate Care Facilities for Mentally Retarded"
6. Chapter 11-156, "Communicable Diseases"

### **Environmental Division**

#### **Rules Recommended by Review Board for Full Analysis**

1. Chapter 11-39, "Air Conditional & Ventilating"
2. Chapter 11-44, "Radiologic Technology Board and Radiologic Technology Rules"
3. Chapter 11-45, "Radiation Control"

## **Department of Human Services**

### **Rules Recommended by Review Board for Full Analysis**

1. Chapter 17-402, "Services to the Blind and Visually Handicapped"
2. Chapter 17-893, "Licensing of Child-Placing Organizations"
3. Chapter 17-894, "Licensing of Child-Caring Institutions"
4. Chapter 17-896, "Licensing of Before and After School Child Care Facilities"
5. Chapter 17-1417, "Adult Day Care Services"

## **Department of Labor and Industrial Relations**

### **Rules Recommended by Review Board for Full Analysis**

1. Chapter 12-12, "Prepaid Health Care"

**Rules Recommended by Review Board for Full Analysis only if Necessary**

1. Chapter 12-11, "Temporary Disability Insurance"
2. Chapter 12-41, "Hawaii Labor Relations Board (Employment)"

**Department of Land and Natural Resources**

**Rules Recommended by Review Board for Full Analysis**

1. Chapter 13-5, "Conservation District"
2. Chapter 13-167, "Rules of Practice and Procedure for the Commission on Water Resource Management"
3. Chapter 13-209, "Activities within Natural Area Reserves"

**Rules Recommended by Review Board for Full Analysis Only if Necessary**

4. Chapter 13-234, "Fees and Charges"

**Department of Transportation**

**Rules Recommended by Review Board for Full Analysis**

1. Chapter 19-43, "Motor Vehicles"
2. Chapter 19-105, "Accommodation and Installation of Utilities on State Highways and Federal Aid County Highways"
3. Chapter 19-128, "Design, Placement, and Maintenance of Traffic Control Devices"

**Rules Recommended by Review Board for Full Analysis only if Necessary (Fee increases, Changes to Federal Regulations)**

4. Chapter 19-121, "Traffic Records"
5. Chapter 19-135, "Periodic Safety Inspection of Mopeds"
6. Chapter 19-143, "Pupil Transportation Safety"

# AGENCY JUSTIFICATIONS AND FINAL COMMENTARY OF REVIEW BOARD

## Department of Agriculture

### **1. Chapter 4-86 – “Brake Fluids, Coolants, Petroleum Products, and After-Market Additives”**

#### **Agency’s Justification**

This rule ensures that commodities such as brake fluid, engine coolant, petroleum products, gasoline, and other additives meet specific physical requirements and are delivered through devices that can be checked and made to measure accurately. The rules were established in 1971 and amended in 1981.

#### **Review Board’s 2006 Recommendation**

These rules were last amended 25 years ago. Rules need re-analysis and updating due to the introduction of new types of additives since last amendment.

#### **Response from Agency to Review Board’s Recommendation**

A conversation with Mr. William Pierpont, Branch Chief of the Measurement Standards Branch in the Quality Assurance Division on February 8, 2008, indicated that these rules are a work-in-process. The Branch is considering either amending the existing rules or repealing the rules and adopting a brand new chapter with amendments. A follow-up conversation with Mr. Pierpont has revealed that the Branch is expecting to provide the Review Board with a draft by March 2009.

#### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

### **2. Chapter 4-93 – “Packaging and Labeling”**

#### **Agency’s Justification**

This rule ensures that consumer commodities offered for sale in the State are correctly labeled as to their content identification and unit amount. The rule also defines specific identification regarding the Department of Agriculture’s logo, “Island Fresh.” The rules were established in 1981 and amended in 1995.

#### **Review Board’s 2006 Recommendation**

Many products that are represented as Hawaiian-made and Hawaiian-grown are not. Rules need re-analysis and updating.

#### **Response from Agency to Review Board’s Justification**

A conversation with Mr. William Pierpont, Branch Chief of the Measurement Standards Branch on February 8, 2008 noted that the Review Board’s comments that products represented as Hawaiian-made and Hawaiian-grown does not apply. Packaging and labeling requirements are implemented through the National Institute of Standards and Technology Handbook 130, 1993 edition, which are current. Further, the logo “Island Fresh” is completely different than “Hawaiian-made” and “Hawaiian-grown” therefore; no future plans to amend the rules are expected.

### **Final Commentary of Review Board**

The Review Board is not in agreement with the Agencies' response and justification. Therefore, a full analysis of this rule with a draft to be provided to the Review Board by December 2009 is requested. A memorandum will be sent to the Agency outlining this request with a copy sent to the Governor.

## **3. Chapter 4-101 – “Weighing and Measuring Devices”**

### **Agency's Justification**

This rule establishes the requirements for the specification and tolerance of commercial weighing and measuring devices, taximeters, wheel-load weighers, portable axle-load weighers, and axle-load scales. The rules were established in 1981 and amended in 1993.

### **Review Board's 2006 Justification**

Recent discussions with the taxi industry have brought forth numerous concerns including the establishment of clearly defined processes and procedures for the approval and implementation of rate changes, inspection and standards of taximeters, and an effective manner of calculating weights and measures. Rules need re-analysis and updating.

### **Response from Agency to Review Board's Justification**

A conversation with Mr. William Pierpont, Branch Chief of the Measurement Standards Branch on February 8, 2008, indicated there are no future plans to amend the rules. The issues brought forth by the taxi industry pertained to setting rates, determining placement of rate cards, and concerns with the sealing device. These concerns were subsequently acknowledged and remediated by the Branch.

### **Final Commentary of Review Board**

The Review Board is in concurrence with the Agency; no further analysis is required at this point in time.

## **4. Chapter 4-72 – “Plant and Non-Domestic Animal Quarantine Plant Intrastate Rules”**

### **Agency's Justification**

This rule restricts and/or prohibits the inter-island transportation of plant pests and their plant or commodity hosts to prevent the spread and establishment of plant pests detrimental to agriculture, horticultural industries and forest lands on un-infested islands of the State. Agriculture is an important economic industry to the State of Hawaii. From the inception of large-scale mono-crop production such as pineapple and sugarcane to the diversification of specialized crops, which include gourmet baby vegetables, exotic cut flowers and tropical fruits, as well as ornamental plants, Hawaii's agricultural industries have greatly expanded. As such, Hawaii's agricultural industries now include the culture of various aquatic ornamental and food species.

As a result of the expansion, there has been an increased need to regulate the inter-island transportation of plant pests and their plant or commodity hosts for the protection of Hawaii's agriculture, natural resources and environment. Presently, this administrative rule prohibits or restricts certain pests and their plant or commodity hosts from being transported inter-island. This requires inspection of all propagated plants and

propagated plant parts by the Plant Quarantine Branch prior to being transported between the islands of the State; plants not inspected are prohibited.

Without this administrative rule in place, the introduction of harmful invasive species may occur rapidly and directly affect the agricultural, horticultural and aqua-cultural industries by impacting important economic crops on un-infested islands of the State. As a consequence of the additional entry of invasive species on un-infested islands of the State, its natural resources and environment would be adversely affected by these unwanted introductions, which may further endanger the indigenous and endemic flora and fauna that are unique to the State of Hawaii. The rules were established in 1991 and amended in 1998.

#### **Review Board's 2006 Recommendation**

Rule amendments were submitted to this Board in 2006; however, the Branch pulled the rules back for further analysis and amendments.

#### **Response from Agency to Review Board's Recommendation**

This rule provides an amendment to restrict the movement of propagative plant materials that may harbor or be infested with the coqui frog. The amendment addresses the need to prevent the further spread of coqui frogs within the island of Hawaii and to other islands in the State. The Branch's targeted date for transmitting the draft rules to the Board of Agriculture for review is February 2009 with a public hearing date projected for June 2009, as the rules have been stalled due to some concerns with the language of the draft rules.

#### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

### **5. Chapter 4-73 – “Plant and Non-Domestic Animal Quarantine Plant Export Rules”**

#### **Agency's Justifications**

This rule provides for export plant and plant products inspectional and dis-infestation treatment services that meet the requirements of the state or country of destination. Agriculture is an important economic industry to the State of Hawaii. From the inception of large-scale mono-crop production such as pineapple and sugarcane to the diversification of specialized crops, which include gourmet baby vegetables, exotic cut flowers and tropical fruits, as well as ornamental plants, now include the culture of various aquatic ornamental and food species. This is a far cry from the traditional plant crops grown historically in soil.

As a result of this expansion, there has been an increased need to ship plants or plant products out of the State. Presently, this administrative rule provides for export plant and plant products' inspectional and disinfestations treatment services, which is provided by the Plant Quarantine Branch, which meets the requirements of the State or Country of destination; each State or Country has their own requirements that must be met before plants can enter their state or country. To implement the requirements, the Branch has the authority to impose nursery inspection fees as well as burrowing nematode testing fees, which may seem to impact small business. The necessary fee helps to defray the operational and travel costs borne to the Branch, which may be hampered by general budgetary constraints.

Without this administrative rule in place, the services provided by the Branch to certify plants going out of the state to other states or countries would not be possible. Programs such as the nursery certification program and the origin inspection program for cut flowers are administered through this rule. Although the rule imposes many restrictions on nurseries and the flower businesses, these requirements must be met or the destination state or country will not accept the plants or flowers being shipped or taken to the respective state or country. The rule was established in 1981.

#### **Review Board's 2006 Recommendation**

Rule amendments were submitted to the Review Board in 2006; however the Branch has subsequently pulled the rules for further analysis. The Branch is in the process of updating this rule; the Review Board is in agreement the rule should be reviewed and revised.

#### **Response from Agency to Review Board's Recommendation**

This rule provides an amendment to modify the nursery certification program and establish a compliance agreement program for exporting nurseries. The amendments will update rules based on new science and changing industry needs as well as stricter requirements for certifying nurseries. The Branch's targeted date for transmitting the draft rules to the Board of Agriculture for review is February 2009 with a public hearing has a projected date of June 2009.

#### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

### **6. Chapter 4-96 – “Schedule and Fees for Licensing Devices Susceptible of Commercial Usage, and Measuring Devices and Measurement Standards for Testing or Certification”**

#### **Agency's Justification**

This rule ensures that all commercial devices used to weigh and measure consumer commodities in the State meet the National Type Evaluation Protocol. This ensures equity in the marketplace and a good business environment. The rules were established in 1981.

#### **Review Board's 2006 Recommendation**

The rules are 25 years old; the rules need a full analysis.

#### **Response from Agency to Review Board's Recommendation**

A conversation with Mr. William Pierpont, Branch Chief of the Measurement Standards Branch in the Quality Assurance Division on February 8, 2008, indicated that the rules were in the process of being amended.

#### **Final Commentary of Review Board**

The amended rule proposal and impact statement were provided to the Review Board for review at its April 2008 board meeting. Changes to the rules included the addition of an annual examination and calibration fee for measurement standards, and increases in the annual registration fee for devices susceptible of commercial usage and updates to language for clarity. The rule changes will allow the Measurement Standards Branch to collect approximately the same amount in revenue as it costs the program to operate.



Small businesses that will be directly affected by the adoption of this rule are registered service agents or agencies, and those businesses that incorporate a device such as scales, retail gas pumps, bulk petroleum meters, and taximeters to conduct business. Fees imposed include \$100 registration fee, \$100 annual fee for registered service agents, and \$25 late fee for late annual registration renewal and late submittal of placed-in-service reports. In addition, a fifteen percent increase in all fees will go into effect five years after the proposed rules are adopted.

The Review Board reviewed the proposed rule amendments at its April 16, 2008 board meeting and recommended that they proceed to public hearing.

### **Additional Administrative Rule Reviews:**

The Department of Agriculture subsequently submitted and addressed the following additional administrative rules:

#### **1. Chapter 4-16 – “Cattle, Sheep, and Goats”**

##### **Agency’s Justification**

The rules refer to the regulation of cattle, sheep and goats. Proposed rule amendments will enhance livestock disease management through testing and tracing back to flocks or origin and other housekeeping amendments. The amendments will also update the existing rules to allow Hawaii to remain consistent with the National Scrapie Eradication Program, require additional testing for incoming cattle, and additional permit requirements for incoming livestock as well as qualifications.

A quarantine order put in place for the intrastate movement of sheep and goats has reduced the urgency to amend the rules as the Agency’s targeted date for transmitting the draft rules to the Board of Agriculture for review was January 2008.

##### **Final Commentary of Review Board**

The Review Board is in concurrence with the Agency and will follow-up with the Animal Industry Division.

#### **2. Chapter 4-29 – “Dogs, Cats and Other Carnivores”**

##### **Agency’s Justification**

The proposed amendments include definitions, arrival ports, carrier responsibility, preshipment requirements, other requirements, movement of dogs and cats originating in Hawaii, fees, and guide and service dogs. Amendments address neighbor island direct release, vaccination intervals, fee adjustments and clarification. The Agency’s targeted date for transmitting the draft rules to the Department of the Board of Agriculture was June 26, 2007 when approval was received.

##### **Final Commentary of Review Board**

In January 2008, the Department of Business, Economic Development and Tourism (DBEDT) received and reviewed proposed amendments to HAR Chapter 4-29. The Agency’s Dr. Isaac Maeda conveyed that the amendments do not have small business impact. The proposal was not provided to the Review Board as it did not meet the statutory purview.

#### **3. Chapter 69-A – “Pests for Control or Eradication”**

### **Agency's Justification**

This is an amendment to add coqui frog, little fire ant, and nettle caterpillar to the list of pests for control. This is needed so regulatory actions can be taken. The Board of Agriculture approved the draft rules on February 28, 2006 and November 28, 2006.

### **Final Commentary of Review Board**

In March 2007, the Review Board reviewed the proposed amendments; the amendments were not expected to have any small business impact. Amendments included three new items to the Agency's "list of insects, mites, other pests, and plant diseases designated as pests for control or eradication purposes." The addition of these pests to the list allow the Agency to control the pests on state-owned Agricultural Park lands, to aid nurseries, landscapers, and plant retailers in controlling infestations, and also aid in the control of these pests in small eradicable incipient infestations before they spread from small pockets and become widely established on an island.

The Review Board recommended that the proposal go to public hearing and in November 2008 the Review Board recommended that the rules proceed to the Governor for adoption.

## **4. Chapter 4-70 – “Plant and Non-Domestic Animal Quarantine Plant Import Rules”**

### **Agency's Justification**

The amendments will address restrictions on the importation of host products for the red imported fire ant and other pests, and will update current rules to minimize opportunities for entry of the red imported fire ant and other pests through plant import rules. The Agency's targeted date for transmitting the draft rules to the Board of Agriculture for review was June 2009.

### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

## **5. Chapter 4-71A – “Plant and Non-Domestic Animal Quarantine Microorganism Import Rules”**

### **Agency's Justification**

This rule is in the process of being amended as the statutes that were passed several years ago require implementation. The amendments include the requirement for registering CLIA laboratories, and minor housekeeping changes. The Agency's targeted date for transmitting the draft rules to the Board of Agriculture for review is June 2008.

### **Final Commentary of Review Board**

In April 2006, the Review Board reviewed proposed amendments that covered regulating primates going into sanctuaries, requirements for allowing the private or commercial use for exhibition on a short-term basis, the increase of a required bond from \$1,000 to \$2,000 for private entities such as carnivals and fairs, and housekeeping measures; it was recommended that the proposal proceed to public hearing.

## **6. Chapter 4-87 – “Voluntary Registration of Service Persons or Service Agents”**

### **Agency's Justification**

A conversation with Mr. William Pierpont, Branch Chief of the Measurement Standards Branch in the Quality Assurance Division on February 8, 2008, indicated that these rules are in the process of being repealed and re-adopted into a new chapter.

#### **Final Commentary of Review Board**

The Review Board is in concurrence with the Agency.

### **7. Chapter 4-139 – “Commodities Inspection Fees Rules”**

#### **Agency’s Justification**

The amendments will include an adoption of a new chapter to consolidate all Commodities Branch inspection fees. The fees entail inspection fees for flowers and foliage, fresh fruits and vegetables, animal feed, shell eggs, and coffee. Amendments will also include changing the standards for Hawaii green coffee and repealing grade standards for parchment coffee. The Agency’s targeted date for transmitting the draft rules to the Board of Agriculture for review is June 2009.

#### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

### **8. Chapter 4-158 – “Non-Agricultural Park Lands Program Rules”**

#### **Agency’s Justification**

This is an adoption of a new chapter to administer the new “non-agricultural park lands” programs. Act 90, SLH 2003, transferred certain public lands classified for agricultural use by DLNR to DOA to ensure the long-term productive use of public lands leased or available to be leased for agricultural purposes. By default, the lands in this new program are administered under DLNR rules until these rules can be passed. The Agency’s targeted date for transmitting the draft rules to the Board of Agriculture for review was January 2007 and approved on October 23, 2007. A public hearing was held in October 2007.

#### **Final Commentary of Review Board**

In February 2007, the Review Board reviewed the proposed amendments. The proposal affect agri-businesses leasing State of Hawaii lands, which were currently managed by DLNR. The rules have built-in accommodations for various possible economic circumstances that the lessees may experience in order to cause the least amount of business disruptions possible. The transfer of the lands and leases to this program provides a level of stability many of the agri-businesses do not currently enjoy. The rule proposal included a \$30 processing fee for documents and fines for violations. Fines for violations start at \$100 per day, but not more than \$2,500 for the first violation and up to \$1,000 per day, or for the third and subsequent violations. The Review Board recommended that the proposal proceed to public hearing.

### **Following are additional rules, justification and recommendations of the Review Board**

#### **1. Chapter 4-17 – “Swine”**

#### **Agency’s Justification**

This rule authorizes the department to undertake disease control measures intended to control and eradicate certain disease of local and national economic significance or that may affect public health adversely. Preventing the introduction of diseases reduces the

potential for animal losses due to death or poor growth and maintains the general health and welfare of domestic pigs.

The rule is justified due to the importance of disease surveillance, diagnosis and eradication on the economic viability of the swine industry and in protecting public health from infectious disease transmitted from animals to man. General health and welfare of livestock is enhanced through disease control and eradication activities, resulting in a more wholesome product for the Hawaii market and enhanced consumer confidence in Hawaii products. The rules were established in 1981.

#### **Review Board 2006 Recommendation**

The rules are 25 years old; the agency has indicated that the rules are in the process of being updated.

#### **Final Commentary of Review Board**

On February 14, 2008, Dr. James Foppoli, Administrator of Animal Industry Division, indicated that these rules are still in the process of being amended. The Review Board will continue to monitor the status.

### **2. Chapter 4-20 – “Non-domestic Animals”**

#### **Agency’s Justification**

This rule controls the importation of diseases and pests that affect non-domestic animals such as deer, elk, llamas, camels and other exotic species of animals that are not prohibited entry into Hawaii. Non-domestic animals may carry and transmit diseases that affect cattle or other livestock. Introduction of certain diseases, that are currently absent in Hawaii, could impede or prevent national or international animal trade (primarily cattle), or present serious public health concerns. Importation of non-domestic animals into Hawaii, except to zoos, is uncommon. Therefore, the economic impact is minimal. This chapter also authorizes the department to undertake disease control measures intended to control and eradicate certain diseases of local and national economic significance or that may affect public health adversely.

This rule is justified due to the importance of disease surveillance, diagnosis and eradication on the economic viability of the livestock industries and in protecting public health from infectious disease transmitted from animals to man. In addition, the general health and welfare of livestock is enhanced through disease control and eradication activities. The rules were established in 1981.

#### **Review Board’s 2006 Recommendation**

The rules are 25 years old; the agency has indicated that the rules are in the process of being updated.

#### **Final Commentary of Review Board**

On February 14, 2008, Dr. James Foppoli, Administrator of Animal Industry Division, indicated that there is no need, at this point in time, to amend the rules, despite their age.

### **3. Chapter 4-23 – “Horses”**

#### **Agency’s Justification**

This rule controls the importation of diseases and pests that affect horses. Preventing the introduction of certain horse diseases and pests into Hawaii is essential to maintain a healthy horse population. In addition, freedom from certain diseases reduces the economic burden for horse owners resulting from illness and death. Since the majority of horses in Hawaii are pets, there is little impact on small business by these import requirements. The rules were established in 1949 and last amended in 1981.

#### **Review Board 2006 Recommendation**

The rules are 25 years old; the Agency has indicated that the rules are in process of being updated.

#### **Final Commentary of Review Board**

On February 14, 2008, Dr. James Foppoli, Administrator of Animal Industry Division, indicated that these rules are still in the process of being amended. The Review Board will continue to monitor the status.

### **Department of Budget and Finance**

#### **Public Utilities Commission**

##### **1. Chapter 6-62 – “Motor Carrier Rules and Classification of Property and Passenger Carriers”**

#### **Agency’s Justification**

Pursuant to HRS Chapter 271, the rules are necessary to administer, execute, and enforce the intent of the motor carrier laws, particularly the policies set forth under HRS § 271-1. The rules were established in 1992.

#### **Review Board’s 2006 Recommendation**

Since the rules have been established, there have been many changes to the industry. Full analysis and update should be performed.

#### **Response from Agency to Review Board’s Recommendation**

In response to the Review Board’s request, the Commission solicited proposals for amendments to HAR Chapter 6-62, “Motor Carrier Rules and Classification of Property and Passenger Carriers,” and HAR Chapter 6-63, “Motor Carrier Tariffs and Schedules” from motor carrier industry professional organizations. Hawaii Tourism Authority (HTA) proposed a change to 6-62-20, Motor Vehicle Marking.

Under HTA’s recommendation, motor carriers that are subject to State and Federal motor carrier safety regulations would mark their motor vehicles pursuant to the federal rules on marking of commercial motor vehicles. Those that are not subject to the motor carrier safety regulations would have the option to follow the Commission’s existing rules on motor vehicle marking. No other comments or recommendations were submitted for the Commission’s consideration.

Upon review and analysis of HAR chapters 6-62 and 6-63 and the response from HTA, the Commission has decided that: (a) Suggested revisions to HAR Chapter 6-62 are not required at this time but will be considered in any subsequent rulemaking proceedings; and (b) HAR Chapter 6-63 does not currently require any revisions. Except for HTA, the organizations appear to be satisfied with the existing rules.

With respect to HTA's proposed modification, the recommendation is not substantively critical for effective motor carrier regulation at this time. The recommendation, as described above, does not call for a substantial change to the existing section except to apply the federal rules on marking of commercial motor vehicles to certain motor carriers.

### **Final Commentary of Review Board**

The Review Board is not in agreement with the Agencies' response and justification. Therefore, a full analysis of this rule with a draft to be provided to the Review Board by December 2009 is requested. A memorandum will be sent to the Agency outlining this request with a copy sent to the Governor.

## **2. Chapter 6-63 – “Motor Carrier Tariffs and Schedules”**

### **Agency's Justification**

As required by HRS Chapter 271, the rules are necessary to govern the form and content of tariffs and schedules of common and contract carriers by motor vehicles; specifically those tariffs and schedules described under HRS §§ 271-20, 271-21, and 271-22. The rules were established in 1994.

### **Review Board's 2006 Recommendation**

Rules are twelve years old. Full analysis and update should be performed.

### **Response from Agency to Review Board's Recommendation**

In response to the Review Board's request, the Commission solicited proposals for amendments to HAR Chapter 6-62, “Motor Carrier Rules and Classification of Property and Passenger Carriers” and HAR Chapter 6-63, “Motor Carrier Tariffs and Schedules,” from motor carrier industry professional organizations. Hawaii Tourism Authority (HTA) proposed a change to 6-62-20, Motor Vehicle Marketing.

Under HTA's recommendation, motor carriers that are subject to State and Federal motor carrier safety regulations would mark their motor vehicles pursuant to the federal rules on marking of commercial motor vehicles. Those that are not subject to the motor carrier safety regulations would have the option to follow the Commission's existing rules on motor vehicle marking. No other comments or recommendations were submitted for the Commission's consideration.

Upon review and analysis of HAR chapters 6-62 and 6-63 and the response from HTA, the Commission has decided that: (a) Suggested revisions to HAR Chapter 6-62 are not required at this time but will be considered in any subsequent rulemaking proceedings; and (b) HAR Chapter 6-63 does not currently require any revisions. Except for HTA, the organizations appear to be satisfied with the existing rules.

With respect to HTA's proposed modification, the recommendation is not substantively critical for effective motor carrier regulation at this time. The recommendation, as described above, does not call for a substantial change to the existing section except to apply the federal rules on marking of commercial motor vehicles to certain motor carriers.

### **Final Commentary of Review Board**

The Review Board is not in agreement with the Agencies' response and justification. Therefore, a full analysis of this rule with a draft to be provided to the Review Board by December 2009 is requested. A memorandum will be sent to the Agency outlining this request with a copy sent to the Governor.

### **3. Chapter 6-65 – “Water Carriers”**

#### **Agency’s Justification**

As required by HRS Chapter 271G, the rules are necessary to govern the following: (1) Form and content of tariffs of water carriers of property and passengers, and the information and data to be submitted for the establishment of new or revised rates, fares, or charge; and (2) Filing of financial and statistical information by water carriers of property and passengers. It appears the rules have not been amended since first promulgated in 1976.

#### **Review Board’s 2006 Recommendation**

Rules are over 30 years old; full analysis and update should be performed.

#### **Response from Agency to Review Board’s Recommendation**

The Commission has determined that HAR Chapter 6-65, “Water Carriers” do not require revisions at this time, as they were last revised in 1999. Thus, the assumption noted as a concern that the “rules are over 30 years old” is an incorrect assumption.

#### **Final Commentary of Review Board**

The Review Board is not in agreement with the Agencies' response and justification. Therefore, a full analysis of this rule with a draft to be provided to the Review Board by December 2009 is requested. A memorandum will be sent to the Agency outlining this request with a copy sent to the Governor.

## **Department of Commerce and Consumer Affairs**

### **1. Chapter 16-51 – “Fees”**

#### **Agency’s Justification**

The purpose of the rules sets forth general fees applicable to the entire department (publication, dishonored check and photocopying fees), and also sets forth in Section 16-51-2 an hourly fee of \$25 for the examination of financial institutions. The hourly fee in this section, which was last amended and compiled in 1991, is obsolete since it implements HRS Section 401-8, which was repealed in 1993 with the enactment of HRS Chapter 412, the Code of financial Institutions which currently provides for an hourly fee of \$40.

#### **Review Board’s 2006 Recommendation**

The Agency is in the process of analyzing and reviewing the rules for either repeal or amendment. The Review Board is in concurrence with the Agency that the rules should be analyzed or reviewed for either repeal or amendment.

#### **Response from Agency to Review Board’s Recommendation**

The Agency agrees that section 16-51-2 is obsolete and was effectively superseded by chapter 412, HRS. Additionally, it appears that section 16-51-2 had prior application only to financial institutions regulated under repealed Chapter 401, HRS. Consequently, section 16-51-2 has no application to the examination of escrow depositories under

Chapter 449, or the examination of money transmitters under Chapter 489D. As such, the Agency no longer needs section 16-51-2 and is in the process of repealing the section.

Additionally, while analyzing section 16-51-2, it became apparent that section 16-51-2, which specifies the fee for dishonored payments, is unnecessary. The underlying statute to section 6-510-4 is section 40-35.5, which was recently amended by Act 240, SLH 2007. Section 16-51-4 is superfluous because it merely restates section 40-35.5. Consequently, it is appropriate to also repeal section 16-51-4. Therefore, in addition to section 16-51-2, the Agency will also be repealing section 16-51.4. The Agency's targeted date for transmitting the draft rules to the Department of the Attorney General for review is December 2007.

#### **Final Commentary of Review Board**

In January 2008, the Review Board reviewed the proposed amendments to these rules and recommended that they proceed to public hearing, and in May 2008 the Review Board reviewed the rules after public hearing; noting that no changes had been made.

### **2. Chapter 16-73 – “Barbers”**

#### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of barbers and rules under the department's regulatory authority. The rules are needed as they facilitate licensing and enforcement. The rules were established in 1994.

#### **Review Board's 2006 Recommendation**

The Agency indicated that the rules are in the process of being amended and are expected to be finalized within two years. The Review Board is in concurrence with the Agency that the rules should be amended.

#### **Response from Agency to Review Board's Recommendation**

The Agency plans to amend the rules to address public health and safety issues such as the exclusion or controlled use of implements, equipment, and activities that have been shown to adversely affect consumers if used or if used improperly. Additionally, descriptions of allowable exceptions to the place of practice will be expanded, and descriptions of exemptions from licensure will be included. The Agency's targeted date for transmitting the draft rules to the Department of the Attorney General for review was December 2007. The Agency has since updated this date by the latest, December 2009, and indicated that there has been activity on the amendments.

#### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

### **3. Chapter 16-74 - “Boxing”**

#### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of the boxing industry under the department's regulatory authority. The rules are needed as they facilitate licensing and enforcement. They were established in 1981 and amended in 1991.

#### **Review Board's 2006 Recommendation**



The rules are arduous and long; the Agency has indicated that the rules are in the process of being amended and are expected to be finalized within a year. The Review Board is in concurrence with the Agency that the rules should be amended.

#### **Response from Agency to Review Board's Recommendation**

The Review Board expressed concerns that the rules are arduous and long. The Agency intends to amend the rules to: (1) remove outdated requirements that are no longer relevant; (2) update and conform the rules to the Federal Boxing Safety Act of 1996; and (3) implement statutory changes made by Act 135, Session Laws of Hawaii (SLH) 2004. The Agency's targeted date for transmitting the draft rules to the Department of the Attorney General for review is December 2007.

#### **Final Commentary of Review Board**

The Review Board is in concurrence with the Agency.

### **4. Chapter 16-75 - "Cemeteries and Funeral Trusts"**

#### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of the cemetery and funeral trust industry under the department's regulatory authority. The rules are still needed as they facilitate licensing and enforcement. The rules were established in 1969 and amended in 1991.

#### **Review Board's 2006 Recommendation**

This industry has had its share of publicity. Full analysis and update should be performed.

#### **Response from Agency to Review Board's Recommendation**

The Review Board indicated that the industry has had its share of publicity and recommended that a full analysis and update be performed. The Agency plans to amend the rules to: (1) make them consistent with Act 188, SLH 2007; (2) incorporate current practices; and (3) update references to corporations to include limited liability companies. The Agency's targeted date for transmitting the draft rules to the Department of the Attorney General for review is August 2008.

#### **Final Commentary of Review Board**

The Review Board is in concurrence with the Agency.

### **5. Chapter 16-83 – "Hearing Aid Dealers and Fitters"**

#### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of hearing aid dealers and fitters under the department's regulatory authority. The rules are necessary as they facilitate licensing and enforcement. The rules were established in 1982 and amended in 1994.

#### **Review Board's 2006 Recommendation**

Since the rules were last amended 12 years ago, there have been huge changes in the industry. Full analysis and update should be performed.

### **Response from Agency to Review Board's Recommendation**

The Review Board expressed concerns that the rules were last amended 12 years ago. Consequently, the Review Board recommended that a full analysis and update be performed. The Agency intends to amend the rules to: (1) conform to the changes made by Act 88, SLH 1997 relating to establishing experience requirements for licensure and clarifying provisions for direct supervision of unlicensed individuals; (2) identify and clarify the examination and passing score required for licensure; (3) repeal references relating to re-examination; and (4) clarify the license renewal and license restoration requirements. The Agency's targeted date for transmitting the draft rules to the Department of the Attorney General for review was November 2008. An update by the Agency has revealed that the rule revisions are complete and are expected to be provided to the Review Board by June 2009.

### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

## **6. Chapter 16-84 – “Massage Therapy”**

### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of massage therapists under the department's regulatory authority. The rules are necessary as they facilitate licensing and enforcement. The rules were established in 1966 and amended in 1990.

### **Review Board's 2006 Recommendation**

The rules were last amended 16 years old. Full analysis and update should be performed.

### **Response from Agency to Review Board's Recommendation**

Because the rules were last amended 16 years ago, the Board recommended that a full analysis and update be performed. The Agency plans to amend the rules to: (1) clarify apprentice and apprenticeship requirements; (2) clarify the requirements for massage therapy establishments; and (3) increase education and training requirements to obtain a license as a massage therapist from 570 to 600 hours based on the addition of required studies including pathology and thermal and hydrotherapy courses. The Agency's targeted date for transmitting the draft rules to the Department of the Attorney General for review is December 2007. An update by the Agency revealed that there have been some set-backs due to having new board members; a draft of the rules is expected to be provided to the Review Board by no later than December 2009.

### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

## **7. Chapter 16-86 – “Motor Vehicle Dealers and Salesmen”**

### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of motor vehicle dealers and salesmen under the department's regulatory authority; they are necessary as they facilitate licensing and enforcement. The rules were established in 1981 and amended in 1993.

### **Review Board's 2006 Recommendation**

The rules were last amended 13 years old. Full analysis and update should be performed.

#### **Response from Agency to Review Board's Recommendation**

Because the rules were last amended 13 years ago, the Review Board recommended that a full analysis and update be performed. The Agency does not envision submitting proposed rules sooner than December 2008 due to pending issues for the Motor Vehicle Industry Licensing Board requiring further research and analysis.

However, matters that are likely to be included in the proposed rules are intended to clarify areas relating to "dealer" (issues such as wholesale, retail, more than two vehicle sales per year, etc.), "premise" (issues such as approved zoning), "salesperson" (the effects of disclosure relating to criminal conviction), "consumer consultant," and "bond".

An update from the Agency revealed that the rule revisions are actively being worked on every other month when the board meets; a draft is expected to be provided to the Review Board by December 2009.

#### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

### **8. Chapter 16-87 – "Motor Vehicle Repair Dealers and Mechanics"**

#### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of motor vehicle repair dealers and mechanics under the department's regulatory authority. The rules are necessary as they facilitate licensing and enforcement. The rules were established in 1976 and amended in 1991.

#### **Review Board's 2006 Recommendation**

The rules were last amended 15 years ago. Full analysis and update should be performed.

#### **Response from Agency to Review Board's Recommendation**

Because the rules were last amended 15 years ago, the Review Board recommended that a full analysis and update be performed. The Agency does not anticipate submitting proposed rules sooner than November 2008 due to pending issues for the Motor Vehicle Repair Industry Board requiring further research and analysis. However, matters that are likely to be included in the proposed rules are intended to clarify areas relating to "mechanic" (license types, motorcycle examination and experience requirements, etc.), "repair dealer" (requirements for place of business), "written estimate required and waiver of estimate," and "supervisory mechanic or head mechanic."

An update from the Agency revealed that the rule revisions are expected to be provided to the Review Board by December 2009.

#### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

### **9. Chapter 16-88 – "Naturopaths"**

### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of naturopaths under the department's regulatory authority. The rules are necessary as they facilitate licensing and enforcement. The rules were established in 1979 and amended in 1994.

### **Review Board's 2006 Recommendation**

The rules are 12 years old. Full analysis and update should be performed.

### **Response from Agency to Review Board's Recommendation**

Because the rules are 12 years old, the Review Board recommended that a full analysis and update be performed. The Agency plans to amend the rules to remove outdated requirements and add provisions to follow the national testing agency procedures. The Agency's targeted date for transmitting the draft rules to the Department of the Attorney General for review is December 2008.

An update from the Agency revealed that the rule revisions are expected to be provided to the Review Board by June 2009.

### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

## **10. Chapter 16-101 – "Veterinarians"**

### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of veterinarians under the department's regulatory authority. The rules are necessary as they facilitate licensing and enforcement. The rules were established in 1967 and amended in 1986.

### **Review Board's 2006 Recommendation**

The rules were last amended 20 years ago. Full analysis and update should be performed.

### **Response from Agency to Review Board's Recommendation**

Because the rules were last amended 20 years ago, the Review Board recommended that a full analysis and update be performed. The Agency intends to align the rules with changes that have been made to licensing qualifications on the national level relating to the: (1) content and format of the national licensing examination; (2) nationally-recognized foreign graduate program; and (3) qualifications of graduates of veterinary medical programs at schools outside of the U.S. and those that are not approved by the American Veterinary Medical Association. The Agency's targeted date for transmitting the draft rules to the Department of the Attorney General for review was December 2007.

An update from the Agency revealed that the rule revisions are expected to be provided to the Review Board by December 2009.

### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

## **11. Chapter 16-106 – "Timesharing"**

### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of timesharing under the department's regulatory authority. The rules are necessary as they facilitate licensing and enforcement. The rules were established in 1980 and amended in 1990.

### **Review Board's 2006 Recommendation**

The rules are necessary to protect the general; the rules were last amended 16 years ago. Full Analysis and update should be performed.

### **Response from Agency to Review Board's Recommendation**

Because the rules were last amended 16 years ago, the Review Board recommended that a full analysis and update be performed. The Agency plans to propose amendments that will: (1) simplify requirements (e.g. repeal certain renewal requirements such as submitting a title report for developers); (2) repeal unnecessary requirements (e.g. no longer require the filing of advertising and promotional materials); and (3) delete requirement that were repealed in the statute. The Agency's targeted date for transmitting the draft rules to the Department of the Attorney General for review was August 2008.

An update from the Agency revealed that the rules are actively being worked on with the industry and that rule revisions are expected to be provided to the Review Board by June 2009.

### **Final Commentary of Review Board**

The Review Board is in concurrence and will follow-up with the Agency.

## **12. Chapter 16-116 – "Travel Agencies"**

### **Agency's Justification**

The purpose of the rules is to implement licensing and regulation of travel agencies under the department's regulatory authority. The rules are necessary as they facilitate licensing and enforcement. The rules were established in 1992.

### **Review Board's 2006 Recommendation**

The industry has been facing extinction because of the Internet. Full analysis and update should be performed.

### **Response from Agency to the Review Board's Recommendation**

The Review Board indicated that it believed that the travel agency industry has been facing extinction because of the Internet. Consequently, the Review Board recommended that a full analysis and update be performed. The Agency has reviewed the rules and determined that no substantive amendments are necessary at this time. The Agency has received an average of 25 complaints a year (there are about 1,247 registered travel agencies) over the past four years (some years have had an unusual higher volume due to investigations of travel agencies that were still conducting business after they failed to renew their registration). The relatively low number of complaints compared to the number of registered travel agencies does not appear to indicate that there is a need to rule changes.

Additionally, the Review Board's concern that it believes that the travel agency industry has been facing extinction because of the Internet does not appear to be a licensing issue. Travel services and accommodations sold over the Internet to Hawaii residents require a license.

#### **Final Commentary of Review Board**

The Board is in concurrence with the Agency at this point in time.

### **13. Chapter 16-117 – “Activity Providers and Activity Desks”**

#### **Agency's Justification**

The purpose of the rules implements licensing and regulates the activity providers and activity desks under the department's regulatory authority. The rules are necessary as they facilitate licensing and enforcement; the rules were established in 1995.

#### **Review Board's 2006 Recommendation**

There is substantial small business impact largely due to fraud in the industry. Full analysis and update should be performed.

#### **Response from Agency to Review Board's Recommendation**

The Review Board expressed concerns that there is substantial small business impact largely due to fraud in the industry. Consequently, the Review Board recommended that a full analysis and update be performed. The Agency has reviewed the rules and determined that no substantive amendments are necessary at this time. The Agency has received an average of 18 complaints a year (there are approximately 325 registered activity desks) over the past four years (Note: in 2007, of the current 54 complaints, six are against licensed activity desks and 48 are for unlicensed activity, mostly against one company).

#### **Final Commentary of Review Board**

The Board is in concurrence with the Agency at this point in time.

## **Department of Health**

### **Medical**

#### **1. Chapter 11-89 – “Services for Developmental Disabilities Domiciliary Homes”**

##### **Agency's Justification**

The rules establish minimum requirements for the certification and licensure of developmental disabilities domiciliary homes for adult individuals with developmental disabilities. §333 F-2(c) (4), HRS, requires that developmental disabilities domiciliary establish a continuum of residential alternatives in the community which includes the provision of domiciliary homes for adult individuals with developmental disabilities. These rules set standards and provides for the regulation of such homes through certification and licensure. This is needed to ensure the health and safety of this vulnerable population. The rules were established in 1992.

##### **Review Board's 2006 Recommendation**

Standards have changed and enforcement of the rules is different since the rules were established in 1992. Therefore, some provisions should be deleted. Re-analysis and update of rules should be performed. *Note:* Agency's website indicates rules are pending amendment and compilation.

### **Response from Agency to Review Board's Recommendation**

On March 20, 2008, correspondence from Health Director Chiyome Leinaala Fukino, M.D., indicated that Office of Health Care Assurance will continue to keep in mind the Small Business Regulatory Review Board's recommendations as efforts continue regarding administrative rule analysis and revision.

### **Final Commentary of Review Board**

As the population regarding developmental disabilities domiciliary homes is growing and identified in the community, it is recommended that the Agency address the needs of the population and bring these rules and regulations regarding services to this population current. The Review Board strongly recommends that these rules are amended with a first draft delivered to this Board by December 2009. A memorandum will be sent to the Agency outlining this request with a copy sent to the Governor.

## **2. Chapter 11-95 – “Freestanding Surgical Outpatient Facility”**

### **Agency's Justification**

The rules establish minimum requirements for the protection of the health, welfare and safety of patients, personnel, and the public in freestanding surgical outpatient facilities; in all instances where other agencies of government have similar regulations, the stricter rules shall apply.

These rules contain state licensure requirements. Such licensure ensures that the federal and medical standards for health facilities are being met. Thus, licensure is a pre-requisite for federal reimbursement. Without licensure, the health and safety of patients, employees and the public will be compromised and federal reimbursement will not be realized. The rules were established in 1986.

### **Review Board's 2006 Recommendation**

Better defined guidelines and standards are needed, especially with safety standards. The rules are too vague and are 20 years old. Re-analysis and update of rules should be performed. *Note:* Agency's website indicates rules are pending amendment and compilation.

### **Response from Agency to Review Board's Recommendation**

On March 20, 2008, correspondence from Health Director Chiyome Leinaala Fukino, M.D., indicated that Office of Health Care Assurance will continue to keep in mind the Small Business Regulatory Review Board's recommendations as efforts continue regarding administrative rule analysis and revision.

### **Final Commentary of Review Board**

The Review Board will monitor these rules for updates from the Agency.

## **3. Chapter 11-96 – “Freestanding Adult Day Health Centers”**

### **Agency's Justification**

The rules establish minimum requirements for the protection of health, welfare, and safety of clients and the public in adult day care centers. These rules contain state licensure requirements. Licensures of these settings are critical to ensure provision of care is within current federal and medical standards to ensure the health and safety of patients, employees and the public. The rules were established in 1991.

### **Review Board's 2006 Recommendation**

The agency has indicated that the rules are in need of revisions; rules are 15 years old. The Review Board is in agreement with the Agency that these rules should be reviewed and revised.

### **Response from Agency to Review Board's Recommendation**

On March 20, 2008, correspondence from Health Director Chiyome Leinaala Fukino, M.D., indicated that Office of Health Care Assurance will continue to keep in mind the Small Business Regulatory Review Board's recommendations as efforts continue regarding administrative rule analysis and revision.

### **Final Commentary of Review Board**

These are essential rules and must be clear and separate as well as distinguished from other adult programs because the centers are freestanding. Review Board concurs with the Agency.

## **4. Chapter 11-97 – “Home Health Agencies”**

### **Agency's Justification**

These rules outline licensing requirements for Home Health Agencies (HHA) and defines penalty for those who violate this chapter. HHA has the option of being Medicare/Medicaid certified in order to receive reimbursement, and there is an increasing interest for HHA's that receive private funding, to be licensed, in order to be reimbursed by private insurance and/or long term care insurance. Such licensing not only insures the health and safety of patients, employees and the public, but also looks toward reducing the abuse and exploitation of the elderly. The rules were established in 1982.

### **Review Board's 2006 Recommendation**

Agency has indicated that the rules are in need of revisions; rules are 25 years old and exhibit inconsistent standards – standards and accreditation need to be in place. The Review Board is in agreement with the Agency that these rules should be reviewed and revised.

### **Response from Agency to Review Board's Recommendation**

On March 20, 2008, correspondence from Health Director Chiyome Leinaala Fukino, M.D., indicated that Office of Health Care Assurance will continue to keep in mind the Small Business Regulatory Review Board's recommendations as efforts continue regarding administrative rule analysis and revision.

### **Final Commentary of Review Board**

Currently, procedures are being enforced that are not reflected in the rules. If enforcement is sought, those procedures should be incorporated in the rules. The Review Board strongly recommends that these rules are amended with a first draft delivered to this Board by December 2009. A memorandum will be sent to the Agency outlining this request with a copy sent to the Governor.

## **5. Chapter 11-99 – “Intermediate Care Facilities for the Mentally Retarded”**

### **Agency's Justification**



The rules establish minimum requirements for the protection of the health, welfare, and safety of patients, personnel, and the public in small intermediate care facilities for the mentally retarded. In all instances where other agencies of government have similar regulations, the stricter rules shall apply.

The Intermediate Care Facility/Mentally Retarded population is the most vulnerable of the disabled population. These regulations provide for assurance of their safety and welfare. The state licensure regulations are mandatory to provide at least minimal assurance for safety and oversight of such individuals who otherwise are not able to care for themselves. The rules were established in 1985.

#### **Review Board's 2006 Recommendation**

Agency has indicated that the rules are in need of revisions; rules are over 20 years old. The Review Board is in agreement with Agency that these rules should be reviewed and revised.

#### **Response from Agency to Review Board's Recommendation**

On March 20, 2008, correspondence from Health Director Chiyome Leinaala Fukino, M.D., indicated that Office of Health Care Assurance will continue to keep in mind the Small Business Regulatory Review Board's recommendations as efforts continue regarding administrative rule analysis and revision.

#### **Final Commentary of Review Board**

It is very important that these rules are updated because there is a greater population within the community so the resources are limited to them. The Review Board strongly recommends that these rules be reviewed and amended with a first draft delivered to this Board by December 2009. A memorandum will be sent to the Agency outlining this request with a copy sent to the Governor.

### **6. Chapter 11-156 – “Communicable Diseases”**

#### **Agency's Justification**

The rules specify diseases that are considered contagious, communicable or dangerous and establish reporting requirements. The rules are necessary to protect the public from morbidity and mortality due to transmission of communicable and dangerous diseases. All 50 states in the nation and all industrialized countries have laws mandating the reporting of communicable, contagious, and dangerous diseases; the mandate in Hawaii State Law is §325-2, HRS. These rules set forth the specifications and requirements for reporting of such diseases and are essential to public health. The rules were established in 1981 and amended in 2001.

#### **Review Board's 2006 Recommendation**

Modes of urgency and routine need addressing. Re-analysis and update of rules should be performed. *Note:* Agency's website indicates rules are pending amendment and compilation.

#### **Response from Agency to Review Board's Recommendation**

On August 15, 2007, provided proposed rule changes that fall under three distinct areas: 1) Changes concerning infectious disease reporting, 2) Changes concerning sexually

transmitted infections reporting, and 3) Changes concerning named HIV reporting. Hawaii was one of the last states to require HIV reporting.

### **Final Commentary of Review Board**

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

## **Environmental**

### **1. Chapter 11-39 – “Air Conditioning & Ventilation System”**

#### **Agency’s Justification**

The rules are required for core public health. The rules implement §321-11 (13), HRS for the public health and safety respecting any place or building where noisome, noxious trades and manufacturing are carried on, or intended to be carried on by seeking to assure adequate and healthful design, construction, installation and operation of comfort air conditioning and ventilating systems; and provide minimum ventilating requirements.

Public health and safety are adversely impacted in the absence of regulating mechanical ventilation systems providing outside air, supply air, return air, and exhaust air. Inappropriate and inadequate ventilation can lead to carbon monoxide poisoning in parking garages, indoor air problems, and other detrimental health effects. The rules were established in 1983.

#### **Review Board’s 2006 Recommendation**

The rules are in need of updating. Re-analysis and update of rules should be performed. *Note:* Agency’s website indicates rules are pending repeal and replacement by chapter 48.

#### **Response from Agency to Review Board’s Recommendation**

HAR Chapter 11-48, the replacement for HAR Chapter 11-39, has been completed and reviewed by the program’s assigned deputy attorney general. An informational meeting on the proposed rule was held on February 8, 2008. Over fifty individuals representing mechanical engineering, architecture, state and county government, property managers, were in attendance. The agency is in the process of implementing a small business review committee for the new rule and expected to complete the small business impact statement by the end of October 2008.

### **Final Commentary of Review Board**

In October 2008, amended rules were proposed to the Board. Upon review, it was recommended that the proposed rules proceed to public hearing.

### **2. Chapter 11-44 – “Radiologic Technology Board and Radiologic Technology Rules”**

#### **Agency’s Justification**

The purpose of the rules is required for public health and safety. The rules establish minimum state standards of education, training and experience for persons who apply x-rays to human beings for diagnostic purposes or ionizing radiation to human beings for therapeutic purposes, or radiopharmaceuticals to human beings for diagnostic and therapeutic purposes.

Unlicensed and untrained personnel can cause unnecessary exposure of ionizing radiation to medical providers, patients, and the general public. Ionizing radiation is a known carcinogen. This rule is necessary to ensure only properly trained and qualified individuals practice radiologic technology. The rules were established in 1989.

#### **Review Board's 2006 Recommendation**

These rules are in need of updating. Re-analysis and update of rules should be performed.

#### **Response from Agency to Review Board's Recommendation**

A small business committee was created to review proposed revisions for this rule.

#### **Final Commentary of Review Board**

The Review Board reviewed these amended rules in June 2008 and recommended that they proceed to public hearing.

### **3. Chapter 11-45 – “Radiation Control”**

#### **Agency's Justification**

The rules are required for core public health. The rules set minimum standards for all persons and facilities that receive, possess, use, transfer, own or acquire any source of radiation, all persons who install and service sources of radiation, and all persons who provide radiation services.

Controlling the use of ionizing radiation from x-ray systems and non-NRC radioactive materials is essential in minimizing unnecessary exposure to medical providers, patients, and the general public. Ionizing radiation is a known carcinogen. Following the stochastic theory, any amount of ionizing radiation exposure may cause long term effects. The rules were established in 1999.

#### **Review Board's 2006 Recommendation**

The rules are in need of updating. Re-analysis and update of rules should be performed.

#### **Response from Agency to Review Board's Recommendation**

This rule is currently being revised to reflect current national standards and the Suggested State Regulations for the Control of Radiation developed by the Conference of Radiation Control Program Directors, Inc. Due to the volume of technical changes, a draft revision is not expected before January 2009.

#### **Final Commentary of Review Board**

The Review Board is in concurrence of the proposed modifications to the rules and will follow-up with the agency.

## **Department of Human Services**

### **1. Chapter 17-402 – “Services to the Blind and Visually Handicapped”**

#### **Agency's Justification**

The purpose of the rule is to continue implementation as it is funded by the Rehabilitation Act of 1973, and amended by Randolph-Shepard Act. The rules implement HRS chapter 347 and §102-14; they were established in 1981.

### **Review Board's 2006 Recommendation**

Definitions are outdated; i.e., the terms "handicapped" and "disabled" are no longer legally used. Review and update are needed.

### **Response from Agency to Review Board's Recommendation**

On December 11, 2007, a meeting held with the Review Board discussion leader and Director of Department of Human Resources Lillian Kollar revealed that the Review Board's recommendations to the selected rules would require legislation. The validity of the Review Board's 2006 comments/recommendations was also questioned.

### **Final Commentary of Review Board**

Upon review and guidance of outside legal counsel, Louis Erteschik of the Hawaii Disability Rights Center, it was indicated that while the modern trend is to eliminate certain words, the use or non-use of the terms "handicapped" and "disabled" is more of a stylistic form or the need to be "politically correct," rather than that these terms are no longer legally used. The Review Board accepts Attorney Erteschik's guidance; therefore, no update is required at this time.

## **2. Chapter 17-893 – "Licensing of Child-Placing Organizations"**

### **Agency's Justification**

The purpose of these rules is to establish standards for child placing "organizations." Therefore, the reason for the rules is to implement authorizing statute 346-16, HRS. The rules were established in 1987 and amended in 1992.

### **Review Board's 2006 Recommendation**

The rules require formatting and housekeeping changes. Review and update are needed.

### **Response from Agency to Review Board's Recommendation**

On December 11, 2007, a meeting held with the Review Board discussion leader and Director of Department of Human Resources Lillian Kollar revealed that the Review Board's recommendations to the selected rules would require legislation.

### **Final Commentary of Review Board**

It is agreed that since the Review Board's recommendations were non-substantive, there is no need at this time to update the subject rules.

## **3. Chapter 17-894 – "Licensing of Child-Caring Institutions"**

### **Agency's Justification**

The purpose of the rules is to establish standards for child placing "institutions." Therefore, the reason for the rules is to implement authorizing statute 346-17, HRS. The rules were established in 1956 and amended in 1992.

### **Review Board's 2006 Recommendation**

These rules require formatting and housekeeping changes. Review and updates are needed.

### **Response from Agency to Review Board's Recommendation**

On December 11, 2007, a meeting held with the Review Board discussion leader and Director of Department of Human Resources Lillian Kollar revealed that the Review Board's recommendations to the selected rules would require legislation.

#### **Final Commentary of Review Board**

It is agreed that since the Review Board's recommendations were non-substantive, there is no need at this time to update the subject rules.

### **4. Chapter 17-896 – “Licensing of Before and After School Child Care Facilities”**

#### **Agency's Justification**

The rules govern health and safety requirements for programs that care for school-aged children in child care facilities. The purpose of the rules is to implement authorizing statute. The rules were established in 1989 and amended in 2002.

#### **Review Board's 2006 Recommendation**

Definitions are outdated; i.e., the terms “handicapped” and “disabled” are no longer legally used. Review and updates are needed.

#### **Response from Agency to Review Board's Recommendation**

On December 11, 2007, a meeting held with the Review Board discussion leader and Director of Department of Human Resources Lillian Kollar revealed that the Review Board's recommendations to the selected rules would require legislation. The validity of the Review Board's 2006 comments/recommendations was also questioned.

#### **Final Commentary of Review Board**

Upon review and guidance of outside legal counsel, Louis Erteschik of the Hawaii Disability Rights Center, it was indicated that while the modern trend is to eliminate certain words, the use or non-use of the terms “handicapped” and “disabled” is more of a stylistic form or the need to be “politically correct,” rather than that these terms are no longer legally used. The Review Board accepts Attorney Erteschik's guidance; therefore, no update is required at this time.

### **5. Chapter 17-1417 – “Adult Day Care Services”**

#### **Agency's Justification**

The rules establish eligibility criteria for the receipt of adult day services and scope of the available services. There is no statutory mandate for this service. Adult day care is part of a continuum of long-term care related services made available to delay the institutionalization of disabled and elderly adults. The rules were established in 1992 and amended in 1995.

#### **Review Board's 2006 Recommendation**

Last revisions were in 1995; definitions are outdated (i.e., the terms “handicapped” and “disabled” are no longer legally used); these types of services do not have medical staffing in their centers. Review and update are required.

#### **Response from Agency to Review Board's Recommendation**

On December 11, 2007, a meeting held with the Review Board discussion leader and Director of Department of Human Resources Lillian Kollar, revealed that the Review

Board's recommendations to the selected rules would require legislation. The validity of the Review Board's 2006 comments/recommendations was also questioned.

### **Final Commentary of Review Board**

Upon review and guidance of outside legal counsel, Louis Erteschik of the Hawaii Disability Rights Center, it was indicated that while the modern trend is to eliminate certain words, the use or non-use of the terms "handicapped" and "disabled" is more of a stylistic form or the need to be "politically correct," rather than that these terms are no longer legally used. The Review Board accepts Attorney Erteschik's guidance; therefore, no update is required at this time.

## **Department of Labor and Industrial Relations**

### **1. Chapter 12-11 – "Temporary Disability Insurance"**

#### **Agency's Justification**

The purpose of the rules is to illustrate disability plans with plan designs different from that of the statutory plan, and also provide benefits at least as favorable as those required under section 392.41. The rules were established in 1993, and are necessary to ensure that an employer's self-insured plan provides cash benefits as favorable as the statutory plan.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. The rules update section 392-41, HRS, which were amended on January 16, 1993, wherein the benefit rate was increased from 55% to 58% as required by Act 31, SLH 1992.

#### **Review Board's 2006 Recommendation**

These rules are 13 years old and appear to have huge small business impact. Complete review is required only if updates to regulations have taken place.

#### **Response from Agency to Review Board's Recommendation**

A conversation with Mr. Darwin Ching, Director of DLIR on September 14, 2007, indicated that these rules are in the process of being updated. The Agency expected the rules to be completed by December 2007; this was not done.

#### **Final Commentary of Review Board**

The Review Board sent a second request to the Agency for amended rules with a draft to be received by December 2009.

The Agency responded by indicating that the Disability Compensation Division will take the Board's recommendation under advisement, and should there be a need for amendments to the rules, the Review Board will be notified.

### **Chapter 12-11-3 – "Financial Solvency"**

The purpose of this section is to require that employers approved for temporary disability insurance (TDI) self-insurance pursuant to §392-41 submit the audited financial

statements for review on an annual basis no later than three months after the close of the self-insured employers' fiscal year. There are approximately 600 employers with approved self-insured TDI plans. This section is required to enable the department to review self-insured employers' financial solvency to ensure payment of disability benefits.

The original DLIR regulation relating to the Hawaii TDA law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and chapter 11, Title 12, the Administrative Rules relating to TDI was adopted in May 1981. This section implements section 392-41, HRS, by self-insuring their TDI plans, employers can save on the premiums that would otherwise be payable to their TDI carriers.

### **Chapter 12-11-16 – “Existing and New Plans”**

The purpose of this section is to illustrate disability plans with plan designs different from that of the statutory plan and also to provide benefits at least as favorable as those required under §392-41. This section is necessary to ensure that an employer's self-insured plan provides cash benefits as favorable as the statutory plan.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TEI, was adopted on May 11, 1981. This section updates section 392-41, HRS, which was amended on January 16, 1993, wherein the benefit rate was increased from 55% to 58% as required by Act 31, SLH 1992.

### **Chapter 12-11-24 – “Notices and Reports required with Respect to Plans”**

The purpose of this section is to clarify what constitutes a material modification of a plan previously accepted by DLIR. All material modifications must be filed with DLIR to be effective. This section is necessary to require carriers and self-insured employers continue to file all material modifications so that plans on file with DLIR are updated for effective enforcement of employers' compliance with the TDI law.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effect on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Since the major change proposed in May 1981 was renumbering, Regulation XXXIV relating to TDI was repealed and this chapter was established on May 11, 1981. This section implements section 392-41, HRS, on the provision for payment of benefits.

### **12-11-35 – “Claim for Disability Benefits”**

The purpose of this section is to provide procedures and specific time frames for filing a TDI claim. The rules are necessary because it helps clarify the steps and the specific time requirements for filing a TDI claim. The original DLIR Regulation XXXIV relating to

the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969.

On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements sections 392-25, 392-26, 392-27, and 392-44, on the eligibility requirements and payment of benefits. The timeframe within which a TDI claim must be filed was amended on November 3, 1989 to change from 30 to 90 days in order to be consistent with §392-27, HRS.

#### **12-11-36 – “Responsibility of Employer to Provide Benefits”**

The purpose of this section is to provide guidelines as to which employer is responsible for disability benefits when an employee changes employment. It specifies that, during the two-week period following termination of employment, the prior employer is still responsible for any disability benefits before the terminated employee enters into a new employment. This section is expected to effectively prevent an employer from avoiding paying disability benefits by simply terminating the employee who just filed a TDI claim.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and become effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements section 392-41, HRS, on provision for payment of benefits.

#### **12-11-38 – “Concurrent Employment”**

The purpose of this section is to provide guidelines as to how an employee would qualify for and file disability claims when engaged in more than one employment. This section clarifies how the eligibility is determined for an employee who has concurrent employments. If a disabled employee had two jobs and qualified for TDI benefits, that employee is entitled to disability benefits from both employments.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements sections 392-25 and 392-43.5, HRS, on entitlement of TDI benefits. The benefit amount is based on the employee's average weekly wage. Since TDI provides partial wage replacement, if an employee suffered wage loss from both employments, that employee should be entitled to disability benefits from both employments.

#### **12-11-40 – “Claim for Reimbursement out of Workers’ Compensation Benefits”**

The purpose of this section is to specifically state that when a workers’ compensation (WC) claim is being controverted, the disabled employee can then file a TDI claim. The TDI must pay disability benefits first and assert subrogation rights against the employer’s WC carrier. This section is expected to enable the disabled employee to receive



disability benefits under the TDI law in a timely manner while the WC claim is being adjudicated.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements section 392-41, HRS, on TDI carriers' subrogation rights when WC benefits are awarded only after the TDI benefits have already been paid for the same disability. There is no added burden to the employers; if an injury is determined to be work-related through the WC adjudication process, the WC carrier is required to reimburse the TDI carrier for the TDI benefits already paid out.

#### **12-11-41 – “Denial of Claim”**

The purpose of this section is to provide procedures to ensure that the TDI denials by carriers or self-insured employers are proper and that the appeal process is in place if the disabled employees disagree with the denials of claims filed. This section ensures that TDI claims denied by carriers or employers are proper and that the disabled employees are afforded the due process in appealing the denials if they so desire.

The original DLIR Regulation XXXIV, relating to the Hawaii TDI law, was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the administrative rules relating to TDI, was adopted on May 11, 1981. This section implements section 392-44.5, HRS, in specifying the due process in denying and appealing TDI claims. Associated costs provide employers the opportunity to deny claims which will eliminate the cost of improper TDI claims.

#### **12-11-46 – “Average Weekly Wage”**

The purpose of this section is to provide guidelines for computation of the average weekly wage based on which TDI benefit amount is calculated. This section provides additional guidelines in determining the average weekly wage in situations not addressed in §392-7, HRS; these guidelines will provide a uniform and less controversial methodology in computing the average weekly wages thus resulting in timely disbursement of disability benefits.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the administrative rules relating to TDI was adopted on May 11, 1981. This section supplements the methodology on computation of average weekly wage as specified in §392-7, HRS.

#### **12-11-49 – “Failure to Provide Coverage”**

The purpose of this section is to provide requirements on the disposition of unauthorized employer withholdings by the employer who did not provide TDI coverage. This section authorizes the Director to order the portion of withholdings not exceeding 0.5% of the employees' weekly wages be deposited into the TDI Special Fund, and the balance be refunded to the employees.

The original DLIR Regulation XXX IV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the administrative rules, relating to TDI, were adopted on May 11, 1981. This section implements sections 392-41, 392-43 and 392-61, HRS, on the disposition of improper employee withholdings.

#### **12-11-50 – “Deductions Greater than Authorized”**

The purpose of this section provides requirements on the disposition of employee withholdings greater than authorized by the employer who provided TDI coverage. This section authorizes the Director to order the excessive employee withholdings be deposited into the TDI Special Fund if the employees, to whom the refunds are due, cannot be located for a period of two years.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the administrative rules relating to TDI was adopted on May 11, 1981. This section implements sections 392-43 and 392-61, HRS, on the disposition of unauthorized employee deductions.

#### **12-11-56 – “Posting of Notice of Coverage”**

The purpose of this section provides that all employers post a notice (Form DC-50) conspicuously at all work sites that insurance for disability benefits has been obtained for all eligible employees. This is for employers with a fully-insured plan. The rules facilitate the overall enforcement of the TDI law in that all the employees are properly informed of the availability of temporary disability insurance.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulations XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the administrative rules relating to TDI was adopted on May 11, 1981. This section implements section 392-91, HRS in mandating that a notice of coverage be posted at all worksites.

#### **12-11-66 – “Posting of notice of coverage”**

The purpose of this section provides that all employers post a notice (Form DC-50) conspicuously at all work sites that insurance for disability benefits has been obtained for all eligible employees. This is for employers with a self-funded plan, and facilitates the

overall enforcement of the TDI law in that all the employees are properly informed of the availability of temporary disability insurance.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulations XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the administrative rules relating to TDI was adopted on May 11, 1981. This section implements section 392-91, HRS, in mandating that a notice of coverage be posted at all work sites.

#### **12-11-67 – “Application”**

The purpose of this section is to authorize the Director to offer employers an alternative other than purchasing a statutory plan in order to comply with the TDI law. Instead of purchasing an insured plan from one of the authorized TDI carriers, this section allows the employers another alternative to comply with the TDI law by applying for TDI self-insurance.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the administrative rules relating to TDI was adopted on May 11, 1981. This section implements section 392-41, HRS, in explaining the self-insurance process. By self-insuring their TDI plans, employers can actually save on the premiums that would otherwise be payable to their TDI carriers.

#### **12-11-68 – “Agreement”**

The purpose of this section is to require employers wishing to self-insure their short-term disability plans execute with the Director of DLNR an agreement (Form TDI-15), wherein conditions on benefits payable, claim records and adjudication are specified and mutually agreed upon. This section, established in 1992, requires a local claims office be maintained for claims processing, and implements standards for self-insurance mutually agreed upon between DLIR and the employer applicants.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the administrative rules relating to TDI was adopted on May 11, 1981.

This section was amended on January 13, 1992, when a new condition was added to the agreement that all self-insured employers are required to maintain a complete claims service office or engage an independent claims adjusting agent with draft authority for the processing of TDI payments in a timely manner. The rules implement sections 392-41 and 392-41.5, HRS.

#### **12-11-69 – “Requirements for Self-Insurance”**

The purpose of this section allows provision of security deposit as an alternative to satisfy the financial requirements for TDI self-insurance. This section establishes an alternative for employers to qualify financially for TDI self-insurance.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the administrative rules relating to TDI was adopted on May 11, 1981. This section implements section 392-41, HRS, in explaining specifically how employers could satisfy the financial requirement for self-insurance.

If any employer is qualified for self-insurance based on its financial statements, no security deposit is necessary. If, however, an employer's financials are not satisfactory, a security deposit is required, which may be treated as a long-term "savings account." By self-insuring its TDI plan, the employer actually saves on the premiums that would otherwise be payable to the TDI carrier.

#### **12-11-70 – "Amount of Securities or Bond"**

The purpose of this section is to authorize the Director to establish the amounts of security deposit for employers applying for TDI self-insurance. The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements section 392-41, HRS in explaining how the amount of security deposit for TDI self-insurance is determined. The cost of a bond is less than the TDI insurance premium.

#### **12-11-72 – "Termination of Self-Insurer's Status and Withdrawal of Security Deposit"**

The purpose of this section authorizes DLIR Director to return the security deposit posted for TDI self-insurance to the employer only after 24 months from termination of self-insured status in order to ensure full payment on all outstanding TDI benefits. This section is necessary to ensure maintenance of the security deposit for self-insurance until all TDI benefits are paid.

The original DLNR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements section 392-41, HRS, in specifying a timeframe for the return of the security deposit.

#### **12-11-73 – "Self-Insurance Deposit Credit"**

The purpose of this section authorizes the Director to reduce the amount of security deposit for TDI self-insurance if the employer is also self-insured for workers' compensation (WC) purposes. The employer must, however, demonstrate to the satisfaction of the DLIR Director that the aggregate total of security deposit posted is adequate to cover all obligations of the employer under both laws. This section allows the employer to post a lower aggregate amount of security deposit for self-insurance under both TDI and WC laws.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements section 392-41, HRS, in pointing out a self-insured employer may be allowed to post a lower aggregate total of security deposit if self-insured for both TDI and WC. If financially feasible, the combined security deposit required for both TDI and WC self-insurance may be lower than what is required separately.

#### **12-11-75 – “Revocation of Self-Insurance Status”**

The purpose of this section authorizes DLIR Director to revoke a self-insured plan previously approved at any time for good cause. This section ensures that all self-insured plans have been approved by the Director.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements sections 392-91, HRS, in pointing out that an approved self-insured plan may be revoked for good cause. If an employer's self-funded plan is revoked, that employer would have to purchase an insured plan for its eligible employees.

#### **12-11-76 – “Employee Contributions towards the Cost of Coverage by a Self-Insurer”**

The purpose of this section establishes that if an employer allocates the cost of administering a self-insured plan to the eligible employees, employee withholding cannot exceed that as allowed for a fully insured plan. This section ensures that the employees will not be over-charged by an employer with a self-insured TDI plan approved by the DLIR.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements sections 392-43 and 392-61, HRS, in reiterating that the same set of rules on employee withholding apply whether the employer's TDI plan is fully insured or self-funded.

### **12-11-77 – “Limitation of Fund”**

The purpose of this section specifies the maximum account balance of the fund established by employers for their self-insured TDI plans. Once the account balance reaches 5% of the highest monthly payroll in the last 12 completed calendar months, no further withholdings from employees are allowed. The DLIR Director may reduce the maximum fund balance as allowed under this rule.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981.

### **12-11-85 – “Periodic reports”**

The purpose of this section requires all employees with approved self-insured disability plans to file an annual report (TDI-21) by March 1 of each year. The annual reports received by the CLIR are processed and summary reports are generated, which are provided to carriers, upon request, for future analysis. Employers with possible excessive employee withholdings or questionable insurance coverage are so indicated in the reports; accounts with such error messages are investigated, and compliance enforced if necessary.

The original DLIR Regulation XXXIV relating to the Hawaii TDI law was promulgated and became effective on December 25, 1969 after a public hearing on September 15, 1969. On February 25, 1981, a public hearing was held to consider the proposed renumbering of all sections in Regulation XXXIV as mandated by Act 216, SLH 1979. Regulation XXXIV relating to TDI was repealed and Chapter 11, Title 12, the Administrative Rules relating to TDI was adopted on May 11, 1981. This section implements section 392-91, HRS, in specifying what information is required of self-insured employees when filing annual reports.

## **2. Chapter 12-12 – “Prepaid Health Care”**

### **Agency’s Justification**

12-12-1 – Definitions - “Seasonal employment” and “Seasonal period(s)”

The purpose of the rule specifies that employees engaged in seasonal employment are excluded under the Prepaid Health Care Act. It establishes the criteria used to determine the seasonal period during which employers need not provide health care coverage for employees engaged in such seasonal pursuits. Employers are given relief for providing health care coverage to employees who work during seasonal periods only.

Sections 1 and 2 under Regulation XLII were originally promulgated in 1974 to clarify the definition of regular employee under section 393-3, Chapter 393, HRS. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapters 12, Title 12. There have been no substantive changes since inception. Employees save money because they do not need to provide health care coverage to seasonal workers.

### **Review Board’s 2006 Recommendation**

This rule is very old and appears to have huge small business impact. Complete review is required

### **Response from Agency to Review Board's Recommendation**

A conversation with Mr. Darwin Ching, Director of Department of Labor on September 14, 2007, indicated that these rules are regulated by Federal statute, Employee Retirement Income Security Act. As a result, no changes will be made to the rules unless the Federal law changes.

### **Final Commentary of Review Board**

The Review Board is in concurrence with the Agency.

#### **12-12-2 – “Determination of Seasonal Pursuit and Seasonal Period”**

The purpose of this section specifies that employees engaged in seasonal employment are excluded under the Prepaid Health Care Act. It establishes the criteria used to determine the seasonal period during which employers need not provide health care coverage for employees engaged in such seasonal pursuits. Employers are given relief for providing health care coverage to employees who work during seasonal periods only. The rule was established in May 7, 1981.

Sections 1 and 2 under Regulation XLII were originally promulgated in 1974 to clarify the definition of regular employee under section 393-3, Chapter 393, HRS. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapters 12, Title 12. There have been no substantive changes since inception. Employees save money because they do not need to provide health care coverage to seasonal workers.

#### **12-12-6 – “Employee Already Disabled”**

The purpose of this section shifts the responsibility for providing a reasonable extension of benefits to a disabled employee from the health care contractor to the employer. The rules ensure that disabled employees are continuously covered under a health care plan should the employer elect to charge their plans.

Section 6 under Regulation XLII was originally promulgated in 1974 using the NAIC Model rules and provisions governing Group Coverage Discontinuance and Replacement Model Regulation to determine if the preceding or succeeding health care contractor was responsible for coverage of disabled employees when employers elected to change plans. The rule was amended on June 19, 1968 making the employers responsible for continued coverage of their disabled employees instead of depending on the rules of NAIC, which was not a governmental agency or a subordinate of the Director. As the delegation of rule-making authority to the NAIC raised serious concerns regarding the validity of our rule, the rules were amended to its current language.

Insurance companies were opposed to the rule change because they followed NAIC guidelines and usually provided continued coverage of disabled employees on the back-end should the employer switch plans. A mutual benefit society was in support because they provided coverage to disabled employees on the front end but not on the back end as it believed that once the employer switched plans the disabled employee should be covered by the new plan. Premium rates under the new plan may be increased due to the added liability of paying for the medical costs of an employee who is already disabled when the new plan begins.

#### **12-12-12 – “More than One Plan”**

The purpose of this section specifies that employers are required to provide an approved health care plan for their eligible employees. In some situations employers provide more than one plan for their employees. The rules clarify that the employer will not be liable for more than the cost of the least expensive plan should the employer offer more than one plan. Employers who offer more than one plan can do so without the penalty of having to pay the added cost of the more expensive plan. Employees can choose among different plans however must accept the responsibility of the added cost.

Section 12 under Regulation XLII was originally promulgated in 1974 to clarify section 393-12, Chapter 393, HRS regarding choice of plan. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. There have been no substantive changes since inception. Premium costs may not change but the allocation of premium payment is decreased for an employer if the employee elects the more expensive plan.

#### **12-12-17 – “Employer’s Obligation”**

The purpose of this section specifies that employers must notify their employees of their entitlement to health care coverage. This section provides the guidelines that employers shall follow and also clarifies some employee responsibilities. It protects both the employer and employees through ongoing communication.

Section 17 under Regulation XLII was originally promulgated in 1974 to clarify sections 393-11, 393-12, 393-13, 393-14 and 393-15, Chapter 393, HRS regarding the mandatory coverage. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. There have been no substantive changes since inception.

#### **12-12-18 – “Supplemental Coverage to Required Health Care Benefits”**

The purpose of this section specifies that employers are required to provide an approved health care plan for their eligible employees and contribute to the cost of such plans. Employers may elect to pay the entire monthly premium or withhold 50% of the premium cost from employees but to not to exceed 1.5% of employee’s monthly gross earnings. In some situations employees provide a richer plan package for their employees that include supplemental benefits, such as drug, vision and dental. This may increase the cost of the plan.

This section clarifies if supplemental benefits are provided as an option and employees choose such benefits then the cost for such supplemental benefits can be passed on to the employees. However, if the employees must subscribe to the added benefits without having the option to decline such supplemental benefits, then the cost of the total package becomes the basis for allocation of premium cost as specified in section 393-13, HRS. Employers can offer richer plans and not be responsible for the added cost if employees are given the opportunity to opt out, thus reducing employer’s cost. The opposite can also happen, whereby an employer’s cost can increase if health care contractors sell the basic medical plan and supplemental riders as a package and do not make this opt-out provision available.

This section was added in May 1981 to clarify liability for payment under 393-13 when Regulation XLII was codified under Rules and Related administrative rules, Chapter 12, Title 12. No testimony was submitted in objection to this rule. Higher cost to small



employers because the medical and supplemental riders are sold as a package with no opt-out provisions for the riders. Thus, premium cost allocation is based on the total package.

#### **12-12-24 – “Self-insurer”**

The purpose of this section specifies that employers can self-insure and qualify as a health care contractor provided they are financially solvent and approved by DLIR to utilize a self-insured health care plan. Employers are not required to purchase only those plans sold in the State of Hawaii. Employers are free to design and offer their own health care plan. If they are financially able to defray or reimburse the expenses of health care under an approved self-insured plan, they can decrease their cost by not having to pay premiums for an insured plan.

Section 24 under Regulation XLII was originally promulgated in 1974 to clarify sections 393-7 and 393-12, Chapter 393, HRS, regarding required health care benefits and choice of plan. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. Although there is no provision for self-insurance stated in the law, this rule allows employers to self-insure; lower cost to employers who can afford to self-insure. Employers are not required to purchase insured plans.

#### **12-12-28 – “Cancellation of Contract”**

The purpose of this section provides for at least a 10 day notification to DLIR and employer before canceling health care contract and the reason for such action. It protects both the employer and employees by not allowing the health care contractor to cancel a policy without cause or prior notification.

Section 28 under Regulation XLII was originally promulgated in 1974 to implement sections 393-7, 393-12 and 393-13, Chapter 393, HRS, regarding the provisions on mandatory coverage. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. No substantive changes made since inception.

#### **12-12-29 – “Refusal to insure”**

The purpose of this section is to ensure that no employer applicant is refused coverage by health care contractors, except for nonpayment of premiums. It protects both the employer and employee by not allowing health care contractors to refuse coverage for reasons other than non-payment of premium.

Section 29 under Regulation XLII was originally promulgated in 1974 to implement sections 393-7, 393-12 and 393-13, Chapter 393, HRS to ensure all eligible employees are afforded the mandatory coverage. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12. No substantive changes made since inception.

#### **12-12-41 – “Withholding by Employers”**

The purpose of this section specifies that employers are required to provide an approved health care plan for their eligible employees and contribute to the cost of the plans. Employers may elect to pay the entire monthly premium or withhold 50% of the premium cost from employees not to exceed 1.5% of employees' monthly gross earnings. It clarifies employers' responsibility for remitting such withholdings to the health care

contractor and the consequences for not obtaining the coverage with such withholdings. This section is necessary to ensure that withholding of employees' wages for premium cost allocation is transmitted to health care for the mandated coverage.

On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 7, Title 12. No substantive changes have been made since inception. The associated costs are higher costs to employers if they fail to provide the mandated coverage; they must pay 100% of the employees cost incurred during the periods of non-coverage.

#### **12-12-42 – “Deductions Greater than Authorized”**

The purpose of this section specifies that employers are required to provide an approved health care plan for their eligible employees and contribute to the cost of such plans. Employers may elect to pay the entire monthly premium or withhold 50% of the premium cost from employees but not to exceed 1.5% of employee's monthly gross earnings. This section clarifies what employers must do if they withheld from an employee's wages more than was permitted by law. This section is necessary to ensure that employers are aware of the consequences of deducting more than is what is allowed under the law. Also, any excess not returned to employees are deposited into the premium supplementation fund.

Section 42 under Regulation XLII was originally promulgated in 1974 to clarify sections 393-13, and 393-41 Chapter 393, HRS, regarding the liability for premium payments and establishment of the premium supplementation fund. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. No substantive changes made since inception. An employer found to have over withheld premiums from employees must reimburse their employees and may be fined.

#### **12-12-46 – “Experience Rating”**

The purpose of these rules is to clarify how to disperse any experience credit or dividend received from the health care contractors among employees and employer. This section is necessary to ensure that both employers and employees share any refunds awarded by the health care contractors.

Section 46 under Regulation XLII was originally promulgated in 1974 to clarify sections 393-7, and 393-13 Chapter 393, HRS, regarding the liability for premium payments and required health care benefits. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. No substantive changes made since inception.

#### **12-12-62 – “Principal and Secondary Employer”**

The purpose of this section specifies that employees who work for more than one employer and are eligible for health coverage under each employer must notify each employer of its designation of principal or secondary employer, based on hours and/or wages paid. The principle employer must provide the coverage while the secondary employer is not enquired to provide coverage. This section clarifies which employer is responsible in situations where employees are eligible for coverage under both employers and eliminated dual coverage.

Section 62 under Regulation XLII was originally promulgated in 1974 to implement sections 393-6 and 393-16, Chapter 393, HRS, dealing with principal and secondary employers. On May 7, 1981, Regulation XLII was replaced with related administrative

rules, Chapter 12, Title 12. No substantive changes since inception; no costs to secondary employer.

#### **12-12-63 – “Other Employer Reports”**

The purpose of this section specifies that employers must notify DLIR of the health care plans that are provided to their employees or any subsequent changes in plans. For employees who refuse such coverage, waiver forms must be refilled with DLIR every December 31. Filing of waiver forms (Form HC-5) protects employers because this notification allows the employer to not provide the mandatory coverage to those employees who are covered elsewhere.

Section 63 under Regulation CLII was originally promulgated in 1974 to implement sections 393-17 and 393-21, Chapter 393, HRS, regarding exemptions permitted under the law. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. No substantive changes since inception. Employees save money because they do not need to provide coverage to employees who sign waivers.

#### **12-12-64 – “Posting of Notice of Coverage”**

The purpose of this section specifies that employers must notify their employees of the health care plans that are provided to their employees by posting such information in a conspicuous place in and about their business so employees are aware of their entitlement to coverage. Employees are made aware of the eligibility requirement for coverage under the PHC Act.

Section 64 under Regulation CLII was originally promulgated in 1974 to implement sections 393-7, Chapter 393, HRS regarding required health care benefits. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. No substantive changes since inception.

#### **12-12-70 – “Entitlement to Premium Supplementation”**

The purpose of the rules is to provide some relief to employers with less than 8 employees by reimbursing part of the employers paid to health care contractors to cover their eligible employees; employers must meet certain criteria. The rule provides monetary assistance to those employers who are having a difficult time paying the premiums for the required employee health care coverage.

Sections 70 and 71 under Regulation XLII was originally promulgated in 1974 to clarify the process in filing for premium supplementation in accordance with section 393-45, 393-46 and 393-47, Chapter 393, HRS, regarding entitlement claim to premium supplementation. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. No substantive changes since inception. Qualified employers may be entitled to premium reimbursement from the Premium Supplementation Fund.

#### **12-12-71 – “Claim for Premium Supplementation”**

The purpose of this section is to provide some relief to employers with less than 8 employees by reimbursing part of the employers paid to health care contractors to cover their eligible employees; employers must meet certain criteria. This section provides monetary assistance to those employers who are having a difficult time paying the premiums for the required employee health care coverage.

Sections 70 and 71 under Regulation XLII was originally promulgated in 1974 to clarify the process in filing for premium supplementation in accordance with section 393-45, 393-46 and 393-47, Chapter 393, HRS, regarding entitlement claim to premium supplementation. On May 7, 1981, Regulation XLII was replaced with related administrative rules, Chapter 12, Title 12. No substantive changes since inception. Qualified employers may be entitled to premium reimbursement from the Premium Supplementation Fund.

### **3. Chapter 12-41 – “Hawaii Labor Relations Board (Employment)”**

#### **Agency’s Justification**

The purpose of the rules define “due process” accorded to parties appearing before the Hawaii Labor Relations Board (HLRB) and specifically provide how petitions are to be filed, how representation elections will be conducted, how unfair labor practice contested will be conducted, etc. The rules are necessary for the conduct of HLRB’s private sector proceedings, and without these procedural rules, HLRB’s proceedings and decisions will more likely be subject to court challenge and overturned on due process grounds.

HLRB administers this chapter, which affects small business insofar as the company employs organized workers. The rules, promulgated pursuant to HRS Chapter 377, Hawaii Employment Relations Act, provide procedures for unfair labor practice proceedings, the determination of collective bargaining units, the selection of exclusive representatives, declaratory rulings, and rule making. They are similar to the Hawaii Rules of Civil Procedure for the circuit courts or procedural rules promulgated by the National Labor Relations Board setting forth filing requirements and procedures governing hearings and other proceedings.

The rules were promulgated on November 10, 1983 to govern proceedings arising under HRS Chapter 377, Hawaii Employment Relations Act. In 1985, the board was renamed HLRB, and assumed jurisdiction to administer the provisions of Chapter 377.

#### **Review Board’s 2006 Recommendation**

The rules are 23 years ago. Complete review is required only if updates to regulations have taken place.

#### **Response from Agency to Review Board’s Recommendation**

A conversation with Mr. Darwin Ching, Director of Department of Labor on September 14, 2007, indicated that these rules are in the process of being updated. The Agency expected the rules to be completed by December 2007; this was not done.

#### **Final Commentary of Review Board**

The Review Board sent a second request to the Agency for amended rules with a draft to be received by December 2009.

The Agency responded by indicating that the Hawaii Labor Relations Board (HLRB) has completed a draft of a new chapter for administrative rules to govern Hawaii Occupational Safety and Health appeals before the Board; additionally, the HLRB has completed a draft of a new chapter of rules that consolidates and updates Chapter 12-41 (proceedings before the Hawaii Employment Relations Board) and Chapter 12-42 (proceedings before the Hawaii Public Employment Relations Board). The HLRB is currently drafting the small business impact statements for the proposed new chapters,

articulating the exact changes to be made, reasons for the changes, effect on the department, and impact on small businesses.

## **Department of Land and Natural Resources**

### **1. Chapter 13-209 – “Activities within Natural Area Reserves”**

#### **Agency’s Justification**

The purpose of the rules is to govern permitted activities, prohibited activities, and special use permits, and penalties. The rules were established in 1981.

#### **Review Board’s 2006 Recommendation**

The rules are 25 years; Agency indicates rules are in the process of being amended. The Review Board is in concurrence with Agency that the rules are in need of amending.

#### **Response from Agency to Review Board’s Recommendation**

The Agency performed a full analysis on the existing rules in late 2005 and early 2006. Based on this analysis, several amendments were developed to improve and enhance the ability of the State to protect the natural area reserves system and the unique biological, geological, and cultural resources found within them. The proposed amendments went through the appropriate channels of review including public hearing in June 2006. The amended rules were adopted in January 2007.

#### **Final Commentary of Review Board**

The Review Board has no further comment.

### **2. Chapter 13-167 – “Rules of Practice and Procedure for the Commission on Water Resource Management”**

#### **Agency’s Justification**

The purpose of the rules is to govern the practice and procedure of the Commission on Water Resources Management of the State under Chapter 91, Hawaii Revised Statutes, the Constitution and Water Laws of the State, the Constitution and Laws of the United States, and such other related acts as may now or hereinafter be administered by the Commission. These rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding. The rules were established in 1988.

#### **Review Board’s 2006 Recommendation**

Rules are 18 years old. Review and update is needed.

#### **Response from Agency to Review Board’s Recommendation**

Agency is planning to update these rules; a draft to the Review Board is expected in the first quarter of 2009.

#### **Final Commentary of Review Board**

The Review Board has no further comment.

### **3. Chapter 13-234 – “Fees and Charges”**

#### **Agency’s Justification**

The purpose of the rules is to regulate the schedule of fees and charges of the small boat harbors rules. The administrative jurisdiction for recreational boating and related vessel activities were transferred from the Department of Transportation, Harbors Division to DLNR, Division of Boating and Ocean Recreation, effective July 1, 1992, in accordance with Act 272, SLH 1991. The rules were established in 1981, and amended in 1992.

#### **Review Board's 2006 Recommendation**

The rules are 14 years old. If fees have changed since the last amendment, review and update is needed.

#### **Response from Agency to Review Board's Recommendation**

Agency indicates that this rule was amended a few years ago when mooring fees were addressed and cruise ship fees were removed. Agency is planning to completely revise the rules that will include simplifying, making them more user-friendly, and resolving longstanding issues; a draft to the Review Board is expected mid-2009.

#### **Final Commentary of Review Board**

The Review Board has no further comment.

### **4. Chapter 13-5 – “Conservation District”**

#### **Agency's Justification**

The purpose of the rules is to regulate land use in the conservation district for the purpose of conserving, protecting, and preserving the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare. The rules were established in 1994.

#### **Review Board's 2006 Recommendation**

Agency indicates that the rules are in the process of being amended. The Review Board is in concurrence with the Agency that the rules are in need of amending.

#### **Response from Agency to Review Board's Recommendation**

The proposed rules continue to undergo internal DLNR review as it has been for the last couple of years. DLNR's proposed amendments have been reviewed by the Legislative Reference Bureau rules section on two separate occasions as well as the Department of the Attorney General. DLNR estimates that the request for public hearings and the small business impact determination of the proposed rule amendments will be considered by the Board of Land and Natural Resources in the near future. The proposed rules are currently being reviewed by the Chairperson of DLNR.

#### **Final Commentary of Review Board**

The Review Board is in concurrence with the Agency.

## **Department of Transportation**

### **1. Chapter 19-43 - “Motor Vehicles”**

#### **Agency's Justification**

The purpose of these rules govern the applicability of statutes, traffic codes and ordinances; jurisdiction of harbor master over vehicles; licensing, safety inspection and insurance; operation of vehicles; traffic controls; parking fees and charges; removal of

vehicles; ground transportation; admittance into cargo storage areas; speed limits; emergency type vehicles; vehicles classified as cargo; parking stalls; reserved parking stalls; tow zone or tow-away zone; authority to remove illegally parked cars; parking prohibitions; curb markings; traffic lane markings; parking zones; restricted or special parking; parking meter zone; designation of parking meter stalls; placement of parking meters; method of parking; meter operating hours; operation of parking meters; reserved parking zone; parking time limits; and parking by permit; violations. The rules were established in 1974.

The rules authorize the collection of parking fees and charges, towing and impounding of vehicles, and permits for operating vehicles, which could result in significant economic impacts to small businesses operating in commercial harbors.

#### **Review Board's 2006 Recommendation**

The rules are 32 years old. Rules should be reviewed and updated.

#### **Response from Agency to Review Board's Recommendation**

This rule authorizes the collection of parking fees and charges, towing and impounding of vehicles, and permits for operating vehicles, which could result in significant economic impacts to small businesses operating in commercial harbors.

These rules also governing applicability of statutes, traffic codes and ordinances; jurisdiction of harbor master over vehicles; licensing, safety inspection and inspection; operation of vehicles; traffic controls; parking fees and charges; removal of vehicles; ground transportation; admittance into cargo storage areas; speed limits; emergency type vehicles; vehicles classified as cargo; parking stalls; reserved parking stalls; tow zone or tow-away zone; authority to remove illegally parked cars; parking prohibitions; curb markings; traffic lane markings; parking zones; restricted or special parking; parking meter zone; designation of parking meter stalls; placement of parking meters; method of parking; meter operating hours; operation of parking meters; reserved parking zone; parking time limits; parking by permit; and violations.

#### **Final Commentary of Review Board**

A meeting held on November 30, 2007 with Director Barry Fukunaga, revealed that these rules will be updated regarding implications due to security in 1 – 2 years. The Review Board is in concurrence, and will follow-up with the Agency for the status of the amendments.

## **2. Chapter 19-105 - "Accommodation and Installation of Utilities on State Highways and Federal Aid County Highways"**

#### **Agency's Justification**

The purpose of the rules is to necessitate compliance with state and federal requirements by issuing a permit which is a costly item. The rules were established in 1981. The rules impact small business and are federally mandated by 23 CFR Chapter 1, Part 645.

#### **Review Board's 2006 Recommendation**

The rules are 25 years old. Rules should be reviewed and updated.

### **Response from Agency to Review Board's Recommendation**

This rule will have an impact on small business. It is necessary to be in compliance with state and federal regulations; permit is issued to do work which is a costly item. This rule is to be amended; no target date has been set.

### **Final Commentary of Review Board**

The Review Board is in concurrence, and will follow-up with the Agency for the status of the amendments.

## **3. Chapter 19-121 - "Traffic Records"**

### **Agency's Justification**

The purpose of these rules relates to the ever-increasing number of traffic accidents occurring on the public highways each year; it is therefore deemed in the public interest that a statewide, interrelated traffic records system shall be established.

The system is designed to assure that appropriate data on traffic accidents, drivers, motor vehicles, and roadways are available to provide: 1) A reliable indication of the magnitude and nature of the highway traffic accident problem; 2) a reliable means for identifying short-term changes and long-term trends in the magnitude and nature of traffic accidents; and 3) a valid basis for: a) the detection of high and or potentially high accident locations and causes; b) the detection of health, behavioral, and related factors contributing to accident causes; c) the design of accident, fatality, and injury countermeasures; d) the development of means for evaluating the cost effectiveness of these measures, and; e) the planning and implementation of selected enforcement and other operational programs. The rules were established in 1994.

### **Review Board's 2006 Recommendation**

The rules are 12 years old. Update of rules is necessary if fees have changed.

### **Response from Agency to Review Board's Recommendation**

The rule will have an impact on small business depending on what part of the rule is applicable. Currently, a \$70,000 bond requirement is incorporated into the rule, which is federally mandated by Title 18, USC Section 2721. There is currently no target date set to amend the rules.

### **Final Commentary of Review Board**

The Review Board is in concurrence with the Agency; no update appears necessary at this time.

## **4. Chapter 19-128 - "Design, Placement, and Maintenance of Traffic Control Devices"**

### **Agency's Justification**

The purpose of the rules is to establish the proper design, installation, placement and coordination of traffic control devices on public streets and highways which contribute substantially not only to the efficient movement of traffic, but also to the development of a safer environment on streets and highways. The rules impact small business, and may impact some contractors; for example, spacing of cones and types of work zone safety (signage) requirements. The rules were established in 1982.



### **Review Board's 2006 Recommendation**

The rules are 24 years old. Rules should be reviewed and updated.

### **Response from Agency to Review Board's Recommendation**

This rule has an impact on small business and it depends on what part of the rule is amended. It may impact some contractors. Example: Spacing of cones and types of work zone safety (signage) requirements (DBEDT and the Regulatory Review Board may need to determine). This rule is in current status and no target date has been set.

### **Final Commentary of Review Board**

A meeting held on November 30, 2007 with Director Barry Fukunaga, revealed that no update is necessary; Review Board concurs.

## **5. Chapter 19-135 - "Periodic Safety Inspection of Mopeds"**

### **Agency's Justification**

The purpose of these rules is to allow private inspection stations to conduct inspections for an \$8.75 fee. Stations often are moped dealers or gas stations and moped inspections provide ancillary income of about \$7.25 per moped inspected. There are approximately 15,000 mopeds registered statewide. The rules impact small business and were established in 1986.

### **Review Board's Recommendation**

Update of rules is necessary only if regulations have changed.

### **Response from Agency to Review Board's Recommendation**

This rule has an impact on small business as private inspection stations conduct the inspections for a fee (\$8.75). The stations often are moped dealers or gas stations and moped inspections provide ancillary income of about \$7.25 per moped inspected. There are approximately 15,000 mopeds registered statewide. The rule will be amended and the target date is within 1 – 2 years.

### **Final Commentary of Review Board**

The Review Board is in concurrence, and will follow-up with the Agency for the status of the amendments.

## **6. Chapter 19-143 - "Pupil Transportation Safety"**

### **Agency's Justification**

The purpose of these rules is to provide safe transportation of students by setting safety requirements relating to school bus equipment, design, construction, and identification, driver training and qualification operations, loading and unloading, and maintenance and inspection.

The rules impact small business as there may be a cost for school bus equipment compliance. The rules were established in 1989 and are federally mandated by 49 CRF, FMSCR Parts 390-399.

### **Review Board's 2006 Recommendation**

Rules were established in 1989. Update of rules is necessary only if changes to the Federal Motor Vehicle Safety Standards and Motor Carrier Safety Regulations have been made.

**Response from Agency to Review Board's Recommendation**

This rule has an impact on small business as the rule sets safety standards to school bus equipment. In order to be compliant, there might be costs to the schools. This rule is in current status and no target date has been set.

**Final Commentary of Review Board**

The Review Board is in concurrence with the Agency; no update is necessary at this time.

*Small Business Regulatory Review Board*

*No. 1 Capitol District Building – 4<sup>th</sup> Floor*

*250 South Hotel Street*

*Honolulu, Hawaii 96813*

*Phone (808) 586-2594*

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**V. Administrative Matters**

D. Update on Upgrading the Board's Website

*No Handouts*

**V. Administrative Matters**

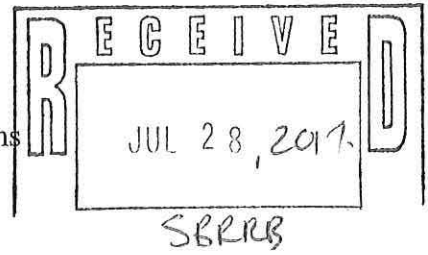
E. Update on the Board's Upcoming Advocacy Activities and Program in Accordance with the Board's Powers under Section 201M-5, HRS

*No Handouts*

#### **IV. New Business**

- A. Discussion and Action on Proposed Amendments to HAR Title 12, Chapter 15, Hawaii Workers' Compensation Medical Fee Schedule and Exhibit A, "Workers Compensation Supplement Medical Fee Schedule," promulgated by DLIR**

State of Hawaii  
Department of Labor and Industrial Relations  
Disability Compensation Division



Pre-Public Hearing  
Small Business Impact Statement  
to the  
Small Business Regulatory Review Board (SBRRB)  
(8/16/17 Meeting @ 10:00 a.m.)

Department or Agency: Department of Labor and Industrial Relations (DLIR)

Administrative Rule Title and Chapter: Title 12, Chapter 15

Chapter Name: Hawaii Workers' Compensation Medical Fee Schedule (MFS) and Exhibit A (Workers' Compensation Supplemental Medical Fee Schedule)

Contact Person/Title: JoAnn A. Vidinhar, Administrator, Disability Compensation Division

Phone Number: 587-8774

E-Mail Address: [Joann.A.Vidinhar@hawaii.gov](mailto:Joann.A.Vidinhar@hawaii.gov)

Date: August 16, 2017

- A. Statement of the topic of the proposed rules or a general description of the subjects involved: Proposed amendments to Hawaii Administrative Rules (HAR), relating to Title 12, Chapter 15 (Hawaii Workers' Compensation Medical Fee Schedule and Exhibit A)

Amendments to §12-15-32, §12-15-34, §12-15-90, and Exhibit A.

1. We are proposing to amend Sections 12-15-32 and 12-15-34, HAR, by allowing physicians and providers of service other than physicians, respectively, to transmit treatment plans by mail or facsimile to an address or facsimile number provided by the employer. The proposed changes implement Act 101, signed by the Governor, effective June 21, 2016, which adds a new section 386-21.2 to the workers' compensation law, entitled "Treatment plans".
2. We are also proposing to amend Section 12-15-90, HAR, and billing codes in Exhibit A, pursuant to section 386-21(c), HRS, which requires the director to update the fee schedule required by this section every three years or annually. Comprehensive MFS surveys were conducted in 2014 and 2016 to update the current fee schedule dated January 1, 2014. However, due to testimonies at the public hearings, the department deferred adoption of the previous proposed MFS administrative rules and Exhibit A. The proposed change to

the administrative rules in Section 12-15-90, HAR, changes the effective date of Exhibit A, Workers' Compensation Supplemental Medical Fee Schedule, to January 1, 2018.

Fees in Exhibit A, Workers' Compensation Supplemental Medical Fee Schedule, are amended.

B. The draft rules will be available for viewing in person at the Disability Compensation Division (DCD), 830 Punchbowl Street, Room 209; on the DCD website at <http://labor.hawaii.gov/dcd>; and on the Lieutenant Governor's Website pursuant to HRS §92-7 one month before the public hearing (pending approval from the Governor), tentatively scheduled for November 2017.

I. Rule Description: Amendment.

II. Will the proposed rule(s) affect small business? Yes.

III. Is the proposed rule being adopted to implement a statute or ordinance that does not require the agency to interpret or describe the requirements of the statute or ordinance? No.

IV. Is the proposed rule being adopted pursuant to emergency rulemaking? No.

If the proposed rule affects small business and are not exempt as noted above, please provide a reasonable determination of the following:

1. Description of the small businesses that will be required to comply with the proposed rules and how they may be adversely affected.

The proposed Medical Fee Schedule changes in the administrative rules and in Exhibit A may affect small businesses, namely physicians and other providers of service who treat injured workers. The physicians and providers of service will be allowed to transmit treatment plans by mail or facsimile which should assist them in getting faster responses to their requests for treatment. The proposed 2018 Exhibit A will update the fee schedule and will reflect the current reimbursable amount for medical services.

The proposed 2018 Exhibit A may also affect all businesses (large and small) which are required to have workers' compensation insurance, because of a potential effect on premium costs.

2. 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.



There are no fees or fines proposed.

3. The probable monetary costs and benefits to the agency or 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.

N/A.

4. 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 other mitigating techniques.

The proposed amendments to section 12-15-90, HAR, and billing codes in Exhibit A, were surveyed and amended pursuant to Act 97, (SLH 2013), which required the State Auditor to assist DLIR in the administrative adjustment of the workers' compensation medical fee schedule. The DLIR conducted the survey using the Auditor's recommendation to include current procedural terminology (CPT) codes representing medical services that have been delivered and paid for ("transacted CPT codes") in at least two of a three-year period and to allow the Director to decide whether to retain or remove dental codes from the fee schedule.

On February 17, 2017, the DLIR's Research and Statistics Office (R&S) sent letters to five pre-paid health care plan contractors (PHCPC) requesting their schedule of all maximum allowable medical fees (prevalent physician fee without tax) for a non-work related injury. One PHCPC provided R&S with an outdated schedule of fees and could not update it before the survey close date. Therefore, the 2017 survey summary is based on responses from four PHCPC.

The survey was conducted using frequently transacted codes from four large self-insured employers (Department of Human Resources Development (DHRD), Department of Education (DOE), City and County of Honolulu (C&C), and the University of Hawaii (UH)), and from the National Council on Compensation Insurance (NCCI), who gathers data from Hawaii's private workers' compensation insurance carriers. R&S analyzed the 2014 Workers' Compensation Medical Fee Schedule, 2017 Medicare Fee Schedule, 2017 Federal Workers' Compensation Fee Schedule (OWCP), and 2017 survey results from the health care plan contractors to determine the prevailing charges for eligible CPT codes for the 2018 medical fee schedule.

On February 17, 2017, R&S also sent letters to nine dental insurers, which were chosen from a list provided by the Department of Commerce and Consumer Affairs (DCCA), requesting their 2017 Hawaii schedule of all

maximum allowable dental fees (prevalent non-facility dental fee without tax) according to the 2016 American Dental Association's Current Dental Terminology (CDT) and the number of subscribers and dependents covered by their plan in Hawaii. R&S received data from eight dental insurers.

5. The availability and practicability of less restrictive alternatives that could be implemented in lieu of the proposed rules.

N/A.

6. Consideration of creative, innovative, or flexible methods of compliance for small businesses. The businesses that will be directly affected by, bear the costs of, or directly benefit from the proposed rules.

The proposed changes to Sections 12-15-32 and 12-15-34, HAR, will benefit physicians and providers of service other than physicians by allowing them to transmit treatment plans by mail or facsimile to an address or facsimile number provided by the employer. This should assist them in getting faster responses to their requests for additional treatment for the injured workers.

The proposed Medical Fee Schedule changes in the proposed 2018 Exhibit A will also affect physicians and other providers of service, who are small business owners and who treat injured workers, by providing a potential increase in the reimbursable amount for medical services for treatment of the injured workers. The proposed changes may also affect all businesses (large and small) which are required to have workers' compensation insurance, because of a potential increase in premium costs.

7. How the agency involved small business in the development of the proposed rules.

On February 17, 2017, DLIR's R & S Office sent letters to five prepaid health care plan contractors (PHCPC) requesting their schedule of all maximum allowable medical fees (prevalent physician fee without tax) for a non-work related injury. The survey was conducted using the Auditor's recommendations of using frequently transacted CPT codes. These frequently transacted codes came from four large self-insured carriers including the Department of Human Resources Development (DHRD), Department of Education (DOE), University of Hawaii (UH), and the City & County of Honolulu (C & C), and the National Council on Compensation Insurance (NCCI) who gathers data from Hawaii's private WC insurance carriers.

On February 17, 2017, R&S also sent letters to nine dental insurers requesting their 2017 Hawaii schedule of all maximum allowable dental fees (prevalent non-facility dental fee without tax) according to the 2016 American Dental Association's Current Dental Terminology (CDT) and the number of subscribers and dependents covered by their plan in Hawaii. The dental survey was also conducted using the auditor's methodology of selecting the

CDT codes transacted in workers' compensation cases in at least two of the three years under review. Only eight dental insurers responded.

Codes in Exhibit A will include the following changes due to the survey of prevailing charges. Exhibit A will contain a total of 869 codes (822 CPT, 45 CDT, and two DLIR created codes). The changes to each section in Exhibit A are as follows:

Evaluation and Management: 16 codes are retained and 19 new consistently transacted codes that have a survey average above 2017 Medicare Par plus 10% are added. This represents a 20.5 average percent increase between the 2014 and the proposed 2018 Exhibit A.

Medicine: 66 codes are retained and 93 new codes that have a survey average above 2017 Medicare Par plus 10% are added. This represents a 3.4 average percent increase between the 2014 and the proposed 2018 Exhibit A.

Radiology: 117 codes are retained and 61 new codes that have a survey average above 2017 Medicare Par plus 10% are added. This represents a 0.1 average percent increase between the 2014 and the proposed 2018 Exhibit A.

Surgery: 235 codes are retained and 215 new codes that have a survey average above 2017 Medicare Par plus 10% are added. This represents a 2.5 average percent increase between the 2014 and the proposed 2018 Exhibit A.

Two DLIR created codes in Special Evaluation and Management Services: There is an increase of 2.9% based on the CPI-U (all items) percent change over three years (2014-2016).

Dental Services: 25 codes are retained and 20 new consistently transacted codes are added. This represents a 9.6 average percent increase between the 2014 and the proposed 2018 Exhibit A.

By letter dated June 22, 2017, DLIR requested from the Department of Commerce and Consumer Affairs (DCCA) and the Insurance Commissioner an assessment by the NCCI and review by DCCA's actuary regarding the proposed 2018 Exhibit A. By response dated July 19, 2017, DCCA reported that NCCI estimates that the impact on overall workers' compensation system costs in Hawaii due to the physician fee schedule change is an increase of 0.9% (\$2 M). The DCCA consulting actuary, Randy Jacobson, in an independent analysis, found the NCCI's methodologies used in determining the overall impact to be reasonable and logical. The DCCA actuary was also asked to comment on the effect the proposed changes will have on motor

vehicle insurance since the personal injury protection benefits (“PIP”) under motor vehicle insurance is tied to the workers’ compensation fee schedule. The DCCA actuary’s analysis indicates that if NCCI’s assumptions for medical costs are applied to PIP, then there will also be an increase of 1.5% to PIP rates.

8. 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.

N/A.

The Hawaii Workers' Compensation Medical Fee Schedule is based on the Medicare Fee Schedule. When the Medicare reimbursement rates drop or increase, there is a corresponding drop or increase in the workers' compensation reimbursement rates. By using transacted codes, the proposed changes to the Medical Fee Schedule, Exhibit A, will result in a slightly higher fee reimbursements to some workers' compensation providers of service. The proposed fees in the Workers' Compensation Supplemental Medical Fee Schedule Exhibit A in general do continue to reimburse at a higher rate than Medicare, as is the intent of the statute.

The proposed changes to Exhibit A may have an impact on the injured workers if business owners see a change in their premium costs for workers’ compensation and no fault insurance coverages. If there is an increase in premium costs, these increases may be passed down to the consumers.

The Hawaii Small Business Regulatory Flexibility Act (Chapter 201M) requires an assessment of the impact on small business. Assessments such as these were conducted in coordination with the NCCI and reviewed by Randy Jacobson, the DCCA’s consulting actuary. NCCI estimates the impact of the changes to the Hawaii Workers' Compensation Supplemental Medical Fee Schedule proposed to be effective January 1, 2018, would result in an increase of 0.9% (\$2M) on Hawaii's overall workers' compensation system costs. The consulting actuary agrees with NCCI's assessment of an overall increase of 0.9% on workers' compensation costs and adds that there will also be an increase of 1.5% on the no-fault personal injury protection (PIP) rates.

The amendments to the Workers’ Compensation Medical Fee Schedule Administrative Rules, in Title 12, Chapter 15 (HAR), and billing codes in Exhibit A of the Workers’ Compensation Supplemental Medical Fee Schedule, will update the fee schedule as required by section 386-21(c), HRS, and reflects the current reimbursable amount for medical services.

We request the approval of the Small Business Regulatory Review Board for our proposed amendments to Title 12, Chapter 15, HAR, relating to the Workers’ Compensation Medical Fee Schedule and Exhibit A so we may proceed to public hearing.

If you have any questions, you may contact JoAnn Vidinhar, Administrator of the Disability Compensation Division, at 587-8774. Thank you for your assistance in this matter.

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Amendments to Chapter 12-15  
Hawaii Administrative Rules  
Workers' Compensation  
Relating to Medical Fee Schedule

July 28, 2017

1. Section 12-15-32, Hawaii Administrative Rules, is amended to read as follows:

"§12-15-32 Physicians. (a) Frequency and extent of treatment shall not be more than the nature of the injury and the process of a recovery requires. Authorization is not required for the initial fifteen treatments of the injury during the first sixty calendar days.

(b) If the physician believes treatments in addition to that allowed by subsection (a) are required, the physician shall ~~mail~~ transmit a treatment plan to the employer by mail or facsimile under separate cover at least seven calendar days prior to the start of the additional treatments to an address or facsimile number provided by the employer. A treatment plan shall be for one hundred twenty calendar days and shall not exceed fifteen treatments within that period. Treatments provided with less than seven calendar days notice are not authorized. A complete treatment plan shall contain the following elements:

- (1) Projected commencement and termination dates of treatment;
- (2) A clear statement as to the impression or diagnosis;
- (3) A specific time schedule of measurable objectives to include baseline measurements at the start of the treatment plan and projected goals by the end of the treatment plan;
- (4) Number and frequency of treatments;
- (5) Modalities and procedures to be used; and
- (6) An estimated total cost of services.



Treatment plans which do not include the above specified elements but which are reasonable and necessary may not be denied by the employer, but upon written notification from the employer, the physician shall correct the deficiency(s) and the employer's liability is deferred as long as the treatment plan remains deficient. Neither the injured employee nor the employer shall be liable for services provided under a treatment plan that remains deficient. Both the front page of the treatment plan and the envelope in which the plan is mailed or the cover sheet if the plan is sent by facsimile shall be clearly identified as a "WORKERS' COMPENSATION TREATMENT PLAN" in capital letters and in no less than ten point type.

(c) A treatment plan shall be deemed received by an employer when the plan is sent by mail or facsimile with reasonable evidence showing that the treatment plan was received.

~~[-(e)]~~ (d) The employer may file an objection to the treatment plan with documentary evidence supporting the denial and a copy of the denied treatment plan with the director, copying the physician and the injured employee. Both the front page of the denial and the envelope in which the denial is filed shall be clearly identified as a "TREATMENT PLAN DENIAL" in capital letters and in no less than ten point type. The employer shall be responsible for payment for treatments provided under a complete treatment plan until the date the objection is filed with the director. Furthermore, the employer's objection letter must explicitly state that if the attending physician or the injured employee does not agree with the denial, they may request a review by the director of the employer's denial within fourteen calendar days after postmark of the employer's denial, and failure to do so shall be construed as acceptance of the employer's denial.

~~[-(d)]~~ (e) The attending physician or the injured employee may request in writing that the director review the employer's denial of the treatment plan. The request for review shall be filed with the director, copying the employer, within fourteen calendar days after postmark of the employer's denial. A copy of the denied treatment plan shall be submitted with the request for review. Both the front page of the request for review and the envelope in which the request is filed shall be clearly identified

as a "REQUEST FOR REVIEW OF TREATMENT PLAN DENIAL" in capital letters and in no less than ten point type. For cases not under the jurisdiction of the director at the time of the request, the injured employee shall be responsible to have the case remanded to the director's jurisdiction. Failure to file a request for review of the employer's denial with the director within fourteen calendar days after postmark of the employer's denial shall be deemed acceptance of the employer's denial.

~~[(e)]~~ (f) The director shall issue a decision, after a hearing, either requiring the employer to pay the physician within thirty-one calendar days in accordance with the medical fee schedule if the treatments are determined to be reasonable and necessary or disallowing the fees for treatments determined to be unreasonable or unnecessary. Disallowed fees shall not be charged to the injured employee.

~~[(f)]~~ (g) The decision issued pursuant to subsection ~~[(e)]~~ (f) shall be final unless appealed pursuant to section 386-87, HRS. The appeal shall not stay the director's decision.

~~[(g)]~~ (h) The psychiatric evaluation or psychological testing with the resultant reports shall be limited to four hours unless the physician submits prior documentation indicating the necessity for more time and receives pre-authorization from the employer. Fees shall be calculated on an hourly basis as allowed under Medicare.

~~[(h)]~~ (i) For physical medicine, treatments may include up to four procedures, up to four modalities, or a combination of up to four procedures and modalities, and the visit shall not exceed sixty minutes per injury. When treating more than one injury, treatments may include up to six procedures, up to six modalities, or a combination of up to six procedures and modalities, and the entire visit shall not exceed ninety minutes.

~~[(i)]~~ (j) Any physician who exceeds the treatment guidelines without proper authorization shall not be compensated for the unauthorized services.

~~[(j)]~~ (k) No compensation shall be allowed for preparing treatment plans and written justification for treatments which exceed the guidelines.



~~[(k)]~~ (l) Failure to comply with the requirements in this section may result in denial of fees.

~~[(l)]~~ (m) Treatment, prescribed on an in-patient basis in a licensed acute care hospital where the injured employee's level of care is medically appropriate for an acute setting as determined by community standards, are excluded from the frequency of treatment guidelines specified herein." [Eff 1/1/96; am 1/1/97; am ] (Auth: HRS §§386-21, 386-21.2, 386-26, 386-72) (Imp: HRS §§386-21, 386-21.2, 386-26, 386-27)

2. Section 12-15-34, Hawaii Administrative Rules, is amended to read as follows:

"§12-15-34 Providers of service other than physicians. (a) Frequency and extent of treatment shall not be more than the nature of the injury and the process of a recovery require. Any health care treatment or service performed by a Hawaii licensed or certified provider of service other than a physician shall be directed by the attending physician based on a written prescription signed, dated, and approved by the attending physician. The prescription may authorize up to an initial fifteen treatments of the injury during the first sixty calendar days. For therapists, the prescription may authorize up to an initial twenty treatments of the injury during the first sixty calendar days.

(b) If the attending physician believes treatments in addition to that allowed by subsection (a) are required, the provider of service other than a physician, in lieu of the attending physician, may ~~[mail]~~ transmit a treatment plan for review and approval to the attending physician who shall, after approval, ~~[mail]~~ transmit the treatment plan to the employer by mail or facsimile under separate cover at least seven calendar days prior to the start of the additional treatments to an address or facsimile number provided by the employer. A treatment plan shall be for one hundred twenty calendar days and shall not exceed fifteen treatments within that period. Treatments provided with less than seven calendar days notice are not authorized. A complete treatment plan shall contain the following elements:

- (1) Projected commencement and termination dates of treatment;
- (2) A clear statement as to the impression or diagnosis;
- (3) A specific time schedule of measurable objectives to include baseline measurements at the start of the treatment plan and projected goals by the end of the treatment plan;
- (4) Number and frequency of treatments;
- (5) Modalities and procedures to be used; and

Treatment plans which do not include the above specified elements but which are reasonable and necessary may not be denied by the employer, but upon written notification from the employer, the physician or the provider of service, with approval by the attending physician, shall correct the deficiency(s) and the employer's liability is deferred as long as the treatment plan remains deficient. Neither the injured employee nor the employer shall be liable for services provided under a treatment plan that remains deficient. Both the front page of the treatment plan and the envelope in which the plan is mailed or the cover sheet if the plan is sent by facsimile shall be clearly identified as a "WORKERS' COMPENSATION TREATMENT PLAN" in capital letters and in no less than ten point type.

(c) A treatment plan shall be deemed received by an employer when the plan is sent by mail or facsimile with reasonable evidence showing that the treatment plan was received.

~~[-(e)]~~ (d) The employer may file an objection to the treatment plan with documentary evidence supporting the denial and a copy of the denied treatment plan with the director, copying the attending physician, the provider of service and the injured employee. Both the front page of the denial and the envelope in which the denial is filed shall be clearly identified as a "TREATMENT PLAN DENIAL" in capital letters and in no less than ten point type. The employer shall be responsible for payment for treatments provided under a complete treatment plan until the date the objection is filed with the director. Furthermore, the employer's objection letter must explicitly state that if the attending physician or the

injured employee does not agree with the denial, they may request a review by the director of the employer's denial within fourteen calendar days after postmark of the employer's denial, and failure to do so shall be construed as acceptance of the employer's denial.

~~[(d)]~~ (e) The attending physician or the injured employee may request in writing that the director review the employer's denial of the treatment plan. The request for review shall be filed with the director, copying the employer, within fourteen calendar days after postmark of the employer's denial. A copy of the denied treatment plan shall be submitted with the request for review. Both the front page of the request for review and the envelope in which the request is filed shall be clearly identified as a "REQUEST FOR REVIEW OF TREATMENT PLAN DENIAL" in capital letters and in no less than ten point type. For cases not under the jurisdiction of the director at the time of the request, the injured employee shall be responsible to have the case remanded to the director's jurisdiction. Failure to file a request for review of the employer's denial with the director within fourteen calendar days after postmark of the employer's denial shall be deemed acceptance of the employer's denial.

~~[(e)]~~ (f) The director shall issue a decision, after a hearing, either requiring the employer to pay the provider of service other than a physician within thirty-one calendar days in accordance with the medical fee schedule if the treatments are determined to be reasonable and necessary or disallowing the fees for treatments determined to be unreasonable or unnecessary. Disallowed fees shall not be charged to the injured employee.

~~[(f)]~~ (g) The decision issued pursuant to subsection ~~[(e)]~~ (f) shall be final unless appealed pursuant to section 386-87, HRS. The appeal shall not stay the director's decision.

~~[(g)]~~ (h) The provider of service other than a physician shall submit reports at least monthly to the attending physician and employer regarding an injured employee's progress. The preparation and submission of written reports or progress notes to the employer by the provider of service other than a physician are an integral part of the service fee.

~~[-(h)]~~ (i) Treatments may include up to four procedures, up to four modalities, or a combination of up to four procedures and modalities, and the visit shall not exceed sixty minutes per injury. When treating more than one injury, treatments may include up to six procedures, up to six modalities, or a combination of up to six procedures and modalities, and the entire visit shall not exceed ninety minutes. This section applies to providers of service other than physicians including physical therapists, occupational therapists, massage therapists, and acupuncturists.

~~[-(i)]~~ (j) Any provider of service other than a physician who exceeds the treatment guidelines without proper authorization shall not be compensated for the unauthorized services.

~~[-(j)]~~ (k) No compensation shall be allowed for preparing treatment plans and written justification for treatments which exceed the guidelines.

~~[-(k)]~~ (l) Failure to comply with the requirements in this section may result in denial of fees.

~~[-(l)]~~ (m) Therapy by physical therapists and occupational therapists, prescribed on an in-patient basis in a licensed acute care hospital where the injured employee's level of care is medically appropriate for an acute setting as determined by community standards or, prescribed on an out-patient post-surgery basis not to exceed thirty calendar days, are excluded from the frequency of treatment guidelines specified herein."

[Eff 1/1/96; am 1/1/97; am ] (Auth: HRS §§386-21, 386-21.2, 386-26, 386-72) (Imp: HRS §§386-21, 386-21.2, 386-26, 386-27)

3. Section 12-15-90, Hawaii Administrative Rules, is amended to read as follows:

**"§12-15-90 Workers' compensation medical fee schedule.** (a) Charges for medical services shall not exceed one hundred ten per cent of participating fees prescribed in the Medicare Resource Based Relative Value Scale System fee schedule (Medicare Fee Schedule) applicable to Hawaii or listed in exhibit A, located at the end of this chapter and made a part of this chapter, entitled "Workers' Compensation

Supplemental Medical Fee Schedule", dated [~~January 1, 2014~~] January 1, 2018. The Medicare Fee Schedule in effect on January 1, 1995 shall be applicable through June 30, 1996. Beginning July 1, 1996 and each calendar year thereafter, the Medicare Fee Schedule in effect as of January 1 of that year shall be the effective fee schedule for that calendar year.

(b) If maximum allowable fees for medical services are listed in both the Medicare Fee Schedule and the Workers' Compensation Supplemental Medical Fee Schedule, dated [~~January 1, 2014~~] January 1, 2018, located at the end of this chapter as exhibit A, charges shall not exceed the maximum allowable fees allowed under the Workers' Compensation Supplemental Medical Fee Schedule, dated [~~January 1, 2014~~] January 1, 2018, located at the end of this chapter as exhibit A.

(c) If the charges are not listed in the Medicare Fee Schedule or in the Workers' Compensation Supplemental Medical Fee Schedule, dated [~~January 1, 2014~~] January 1, 2018, located at the end of this chapter as exhibit A, the provider of service shall charge a fee not to exceed the lowest fee received by the provider of service for the same service rendered to private patients. Upon request by the director or the employer, a provider of service shall submit a statement to the requesting party, itemizing the lowest fee received for the same health care, services, and supplies furnished to any private patient during the one-year period preceding the date of a particular charge. Requests shall be submitted in writing within twenty calendar days of receipt of a questionable charge. The provider of service shall reply in writing within thirty-one calendar days of receipt of the request. Failure to comply with the request of the employer or the director shall be reason for the employer or the director to deny payment.

(d) Fees listed in the Medicare Fee Schedule shall be subject to the current Medicare Fee Schedule bundling and global rules if not specifically addressed in these rules. The Health Care Financing

Administration Common Procedure Coding System (HCPCS) alphabet codes adopted by Medicare will not be allowed, except for injections and durable medical equipment, unless specifically adopted by the director. The director may defer to a fee listed in the Medicare HCPCS Fee Schedule when a fee is not listed in the Workers' Compensation Supplemental Medical Fee Schedule, Exhibit A.

(e) Providers of service will be allowed to add the applicable Hawaii general excise tax to their billing." [Eff 1/1/96; am 1/1/97; am 11/22/97; am 12/17/01; am 12/13/04; am 11/6/06; am 12/14/07; am 2/28/11; am 12/30/13; am ] (Auth: HRS §§386-21, 386-26, 386-72) (Imp: HRS §§386-21, 386-26)

4. Material, except source notes, to be repealed is bracketed. New material is underscored.

5. Additions to update source notes to reflect these amendments are not underscored.

6. These amendments to Title 12, Chapter 15, Hawaii Administrative Rules, relating to the Hawaii Workers' Compensation Medical Fee Schedule shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules drafted in the Ramseyer format, pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on (date to be inserted upon adoption) and filed with the Office of the Lieutenant Governor.

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Director

APPROVED AS TO FORM:

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Deputy Attorney General

**EXHIBIT A**

**Chapters 12-15  
Hawaii Administrative Rules**

**WORKERS' COMPENSATION SUPPLEMENTAL  
MEDICAL FEE SCHEDULE**

**January 1, 2018**

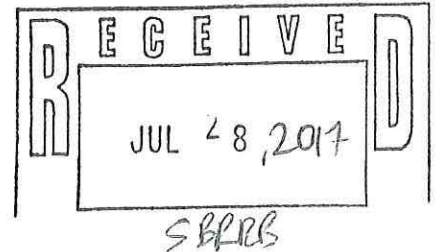
The codes in the Workers' Compensation Supplemental Medical Fee Schedule are obtained from the American Medical Association, the American Dental Association or the State Department of Labor and Industrial Relations.

The five character codes included in the Workers' Compensation Supplemental Medical Fee Schedule are obtained from 2017 Current Procedural Terminology (CPT®), copyright 2016 by the American Medical Association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians.

The responsibility for the content of the Workers' Compensation Supplemental Medical Fee Schedule is with DLIR and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in the Workers' Compensation Supplemental Medical Fee Schedule. Fee schedules, relative value units, conversion factors and/or related components are not assigned by the AMA, are not part of CPT, and the AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of the Workers' Compensation Supplemental Medical Fee Schedule should refer to the most current CPT codes and descriptive terms. Applicable FARS/DFARS apply.

CPT is a registered trademark of the American Medical Association

The five character codes starting with the letter "D" included in the Workers' Compensation Supplemental Medical Fee Schedule are obtained from Current Dental Terminology 2017, copyright 2016 by the American Dental Association (ADA). CDT is developed by the ADA to achieve uniformity, consistency and accurate reporting of dental treatment.





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## SURGERY

### Integumentary System

Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
10060	\$157.64	12007	\$362.23	13133	\$231.43
10061	\$275.03	12011	\$189.70	13151	\$613.78
10120	\$207.95	12013	\$209.90	13152	\$791.54
10121	\$389.06	12014	\$234.78	13153	\$254.90
11000	\$77.14	12015	\$285.09	13160	\$980.01
11001	\$30.19	12031	\$365.59	14040	\$1,120.24
11010	\$704.34	12032	\$486.33	15004	\$478.26
11043	\$311.92	12034	\$472.91	15050	\$675.48
11044	\$435.71	12035	\$550.06	15100	\$1,021.38
11055	\$61.93	12041	\$352.17	15101	\$223.27
11056	\$74.47	12042	\$456.14	15120	\$1,136.58
11601	\$280.48	12044	\$533.29	15240	\$1,119.97
11602	\$309.48	12051	\$385.71	15260	\$1,428.80
11719	\$17.85	12052	\$432.67	15738	\$1,716.06
11730	\$144.22	12053	\$526.58	16000	\$93.91
11740	\$73.79	12054	\$566.83	16020	\$114.04
11750	\$335.40	13100	\$446.08	16025	\$201.24
11760	\$315.28	13101	\$603.72	16030	\$244.84
12001	\$177.25	13121	\$630.55	17003	\$11.57
12002	\$188.55	13122	\$167.70	17004	\$190.91
12004	\$214.66	13131	\$513.16		
12005	\$268.32	13132	\$818.38		

### Musculoskeletal System

20520	\$275.03	21407	\$804.03	23130	\$771.72
20525	\$741.23	21408	\$1,105.80	23350	\$181.12
20526	\$90.56	21423	\$981.30	23405	\$765.14
20550	\$80.50	21470	\$1,492.05	23410	\$1,204.09
20551	\$80.50	22551	\$2,623.25	23412	\$1,203.42
20552	\$73.79	22552	\$575.17	23420	\$1,425.45
20553	\$83.85	22554	\$1,846.24	23430	\$1,056.51
20600	\$77.14	22558	\$2,143.21	23440	\$924.08
20605	\$90.56	22585	\$480.17	23455	\$1,428.80
20610	\$103.97	22600	\$1,612.67	23500	\$274.66
20612	\$73.79	22612	\$2,015.75	23552	\$805.59
20900	\$653.33	22614	\$523.22	23570	\$288.42
20902	\$611.91	22630	\$1,947.78	23620	\$327.14
20924	\$647.67	22632	\$380.07	23650	\$415.90
20926	\$522.86	22633	\$2,224.80	23655	\$586.95
20930	\$230.30	22634	\$589.95	23700	\$241.74
20931	\$132.37	22830	\$988.38	24149	\$1,445.40
20936	\$212.96	22840	\$975.65	24305	\$712.82
20937	\$228.07	22842	\$1,076.63	24340	\$755.24
21310	\$177.76	22845	\$1,072.27	24341	\$1,113.53
21320	\$402.48	22849	\$1,565.01	24342	\$1,044.47
21360	\$673.04	22850	\$879.71	24343	\$896.22
21365	\$1,369.05	22852	\$843.51	24344	\$1,337.40
21390	\$989.27	22856	\$1,961.79	24357	\$607.07
21395	\$1,232.63	23120	\$722.81	24358	\$707.69

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Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
24359	\$882.10	26541	\$990.84	27724	\$1,536.89
24366	\$836.02	26548	\$964.87	27750	\$422.90
24515	\$1,075.75	26560	\$724.92	27758	\$1,091.92
24600	\$496.39	26567	\$843.41	27759	\$1,301.35
24605	\$707.69	26600	\$409.19	27760	\$400.96
24665	\$807.11	26605	\$390.09	27766	\$812.38
24666	\$933.53	26608	\$604.42	27786	\$383.95
24685	\$807.82	26686	\$766.57	27792	\$932.41
25000	\$494.63	26720	\$292.03	27810	\$572.21
25024	\$950.44	26725	\$466.21	27814	\$1,116.88
25105	\$598.10	26727	\$670.80	27823	\$1,279.56
25111	\$440.34	26735	\$868.69	27827	\$1,436.56
25118	\$501.82	26742	\$440.86	27828	\$1,677.54
25240	\$532.00	26750	\$258.26	27840	\$455.45
25246	\$204.80	26756	\$521.87	27842	\$608.22
25260	\$910.33	26765	\$684.22	27870	\$1,260.53
25270	\$734.92	26770	\$368.94	28002	\$562.94
25272	\$816.43	26860	\$709.98	28008	\$534.81
25290	\$541.39	26951	\$812.42	28090	\$583.33
25295	\$648.49	26952	\$802.24	28122	\$769.79
25310	\$765.83	27096	\$308.57	28222	\$628.86
25320	\$1,221.89	27130	\$2,049.29	28238	\$818.88
25337	\$1,101.29	27216	\$1,306.30	28300	\$801.64
25390	\$946.95	27227	\$2,020.01	28400	\$303.94
25400	\$985.62	27228	\$2,290.97	28415	\$1,382.88
25405	\$1,268.46	27235	\$1,161.20	28445	\$1,423.67
25440	\$945.86	27236	\$1,460.79	28475	\$318.49
25447	\$1,021.81	27245	\$1,843.43	28485	\$623.84
25505	\$768.07	27248	\$972.95	28510	\$154.60
25545	\$841.64	27350	\$801.09	28725	\$960.18
25605	\$828.44	27370	\$200.54	28730	\$905.27
25606	\$819.26	27380	\$754.00	29065	\$140.87
25607	\$922.97	27385	\$811.67	29075	\$127.45
25608	\$1,094.27	27403	\$786.02	29105	\$127.45
25609	\$1,327.47	27405	\$860.78	29125	\$100.62
25628	\$925.74	27427	\$872.96	29130	\$60.37
25645	\$728.49	27446	\$1,412.69	29200	\$37.76
25825	\$969.31	27447	\$2,190.16	29240	\$35.84
26020	\$539.71	27457	\$1,154.99	29260	\$35.88
26035	\$1,052.64	27486	\$1,715.47	29280	\$36.10
26055	\$788.19	27487	\$2,259.18	29405	\$120.74
26075	\$405.17	27506	\$1,891.66	29425	\$124.10
26080	\$486.92	27524	\$1,069.93	29445	\$168.01
26105	\$415.26	27530	\$482.72	29515	\$103.97
26110	\$402.15	27535	\$1,157.13	29520	\$39.68
26115	\$705.01	27536	\$1,452.54	29530	\$35.84
26145	\$634.34	27560	\$435.24	29540	\$32.27
26320	\$439.73	27570	\$198.82	29550	\$23.80
26340	\$432.67	27603	\$741.23	29580	\$64.03
26350	\$1,026.32	27625	\$713.94	29581	\$82.88
26356	\$1,703.83	27640	\$1,021.38	29584	\$93.24
26410	\$811.67	27650	\$972.66	29700	\$78.97
26418	\$831.79	27652	\$931.79	29806	\$1,509.30
26426	\$768.16	27658	\$463.51	29807	\$1,472.41
26433	\$664.43	27675	\$605.33	29820	\$707.69
26440	\$780.74	27680	\$562.20	29821	\$778.13
26445	\$730.00	27687	\$562.38	29822	\$751.30
26480	\$943.79	27691	\$923.08	29823	\$895.52
26525	\$820.08	27695	\$591.50	29824	\$859.14
26540	\$942.47	27698	\$842.56	29825	\$747.56

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Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
29826	\$297.00	29873	\$686.88	29888	\$1,401.97
29827	\$1,517.72	29874	\$700.13	29891	\$829.79
29828	\$1,304.71	29875	\$670.75	29897	\$620.41
29835	\$620.55	29876	\$832.92	29898	\$746.85
29837	\$647.07	29877	\$885.46	29905	\$837.86
29838	\$754.47	29879	\$942.47	29906	\$853.65
29844	\$636.24	29880	\$960.01	29914	\$1,219.87
29846	\$665.85	29881	\$896.85	29915	\$1,243.14
29848	\$644.78	29882	\$929.52	29916	\$1,244.58
29862	\$996.51	29884	\$788.02		
29867	\$1,623.86	29887	\$910.84		

### Respiratory System

31231	\$295.15	31570	\$408.32	32551	\$187.59
31240	\$195.12	31575	\$139.42		

### Cardiovascular System

35206	\$930.99	36247	\$1,969.13	36569	\$321.58
35207	\$962.38	36410	\$23.76	36600	\$40.25
36245	\$1,676.00	36415	\$4.34	36620	\$60.85
36246	\$1,063.21	36430	\$46.91		

### Digestive System

45378	\$516.23	49568	\$315.26	49652	\$891.84
49505	\$670.38	49585	\$545.80	49653	\$1,111.71
49507	\$704.11	49587	\$574.68		
49520	\$774.58	49650	\$528.36		
49560	\$884.14	49651	\$672.45		

### Urinary System

51700	\$93.90	51798	\$25.86		
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### Male Genital System

55520	\$550.26				
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### Female Genital System

57288	\$869.84				
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### Maternity Care and Delivery

59025	\$59.78				
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### Nervous System

62270	\$202.86	63047	\$1,560.24	64421	\$189.60
62362	\$469.40	63048	\$301.63	64445	\$164.79
62368	\$70.76	63075	\$1,949.94	64450	\$147.58
62369	\$154.95	63655	\$1,002.58	64455	\$59.00
62370	\$162.36	63663	\$997.19	64479	\$299.22
63030	\$1,368.43	63685	\$446.50	64480	\$142.36
63035	\$271.67	63688	\$453.26	64483	\$345.46
63042	\$1,654.98	64405	\$129.38	64484	\$187.82
63045	\$1,545.83	64415	\$146.81	64491	\$113.76

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Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
64492	\$115.25	64634	\$243.72	64718	\$805.79
64495	\$104.69	64635	\$531.08	64721	\$607.07
64510	\$163.33	64636	\$222.21	64772	\$691.03
64520	\$236.08	64640	\$169.41	64776	\$505.52
64550	\$23.48	64646	\$182.63	64782	\$561.69
64616	\$153.36	64702	\$622.43	64831	\$906.97
64617	\$222.68	64704	\$448.22	64832	\$410.15
64633	\$536.70	64708	\$601.10	64856	\$1,236.90

### Eye and Ocular Adnexa

65205	\$80.50	65435	\$107.33	68720	\$946.84
65210	\$97.27	67036	\$1,125.88	68810	\$200.71
65222	\$100.62	67145	\$650.54	68815	\$514.53
65426	\$972.66	67820	\$62.56		
65430	\$137.61	67917	\$767.01		

### Auditory System

69200	\$191.18	69210	\$73.79
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### Operating Microscope

69990	\$305.21
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## RADIOLOGY

Fees include both the technical and professional components. In the absence of any prior agreement, the professional component shall be thirty-five percent of the scheduled fee.

### Diagnostic Radiology (Diagnostic Imaging)

70030	\$40.25	70547	\$740.74	72074	\$70.43
70100	\$46.96	70548	\$730.72	72080	\$57.02
70110	\$57.02	70551	\$300.55	72100	\$57.02
70140	\$46.96	70553	\$492.15	72110	\$80.50
70150	\$67.08	71010	\$40.25	72114	\$103.97
70160	\$46.96	71020	\$50.31	72120	\$73.79
70200	\$67.08	71035	\$50.31	72125	\$409.19
70220	\$63.73	71100	\$50.31	72128	\$409.19
70250	\$53.66	71101	\$60.37	72131	\$409.19
70260	\$77.14	71110	\$63.73	72132	\$523.22
70330	\$70.43	71111	\$80.50	72133	\$623.84
70336	\$673.55	71120	\$53.66	72141	\$291.72
70355	\$40.25	71130	\$57.02	72142	\$425.24
70360	\$40.25	71250	\$425.96	72146	\$292.19
70450	\$345.46	71260	\$523.22	72148	\$290.76
70470	\$529.93	71270	\$637.26	72149	\$420.22
70480	\$368.39	71275	\$391.50	72156	\$495.50
70486	\$181.30	71550	\$669.54	72157	\$496.45
70488	\$590.30	71552	\$1,210.74	72158	\$493.57
70491	\$486.33	72020	\$36.89	72170	\$43.60
70496	\$382.38	72040	\$53.66	72190	\$57.02
70498	\$381.41	72050	\$77.14	72192	\$405.83
70540	\$656.55	72052	\$97.27	72193	\$506.45
70543	\$545.87	72070	\$53.66	72195	\$670.30
70544	\$660.51	72072	\$60.37	72197	\$665.03

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Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
72200	\$43.60	73220	\$658.28	73723	\$618.59
72202	\$53.66	73221	\$309.76	74000	\$43.60
72220	\$46.96	73222	\$497.73	74020	\$60.37
72265	\$264.97	73223	\$618.10	74022	\$70.43
72275	\$171.05	73525	\$157.64	74150	\$405.83
72295	\$385.71	73560	\$43.60	74160	\$533.29
73000	\$43.60	73562	\$50.31	74175	\$400.59
73010	\$43.60	73564	\$57.02	74176	\$258.28
73020	\$36.89	73565	\$44.97	74178	\$461.83
73030	\$46.96	73580	\$194.53	74181	\$669.89
73040	\$167.70	73590	\$43.60	74183	\$666.46
73050	\$54.08	73600	\$40.25	75635	\$849.89
73060	\$46.96	73610	\$46.96	75710	\$643.97
73070	\$40.51	73620	\$40.25	75716	\$677.51
73080	\$50.31	73630	\$46.96	75736	\$643.97
73090	\$43.60	73650	\$40.25	75774	\$560.12
73100	\$43.60	73660	\$40.25	76000	\$62.36
73110	\$50.31	73700	\$382.36	76001	\$211.30
73115	\$147.58	73701	\$479.62	76100	\$118.89
73120	\$40.25	73706	\$465.16	76376	\$29.87
73130	\$46.96	73718	\$567.99	76377	\$90.31
73200	\$382.36	73720	\$661.63		
73201	\$479.62	73721	\$309.28		
73218	\$656.66	73722	\$502.05		

#### Diagnostic Ultrasound

76512	\$164.55	76775	\$150.93	76881	\$151.10
76513	\$150.93	76801	\$160.58	76882	\$43.49
76514	\$19.06	76815	\$110.54	76937	\$40.24
76519	\$122.71	76817	\$126.92	76942	\$76.68
76700	\$197.89	76856	\$167.70		
76705	\$147.58	76857	\$61.49		
76770	\$187.82	76870	\$167.70		

#### Radiologic Guidance

77001	\$110.55	77012	\$158.81
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#### Bone/Joint Studies

77073	\$45.95	77080	\$53.78
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#### Radiation Oncology

77290	\$674.15	77334	\$264.97	77336	\$140.87
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#### Nuclear Medicine

78104	\$348.82	78305	\$318.63	78452	\$646.29
78122	\$258.26	78306	\$355.52	78805	\$271.67
78300	\$234.78	78320	\$415.90	78806	\$496.39

Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
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## MEDICINE

Fees include both the technical and professional components. In the absence of any prior agreement, the professional component shall be thirty-five percent of the scheduled fee.

### Vaccines, Toxoids

90636	\$99.07	90715	\$46.96	90746	\$63.32
90714	\$21.90	90732	\$86.62		

### Psychiatry

90791	\$154.68	90834	\$99.69	90847	\$151.70
90792	\$173.73	90837	\$167.74		
90832	\$84.86	90846	\$126.80		

### Biofeedback

90901	\$53.27				
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### Gastroenterology

91035	\$626.61	91110	\$1,217.70		
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### Ophthalmology

92002	\$110.68	92071	\$45.43	92225	\$34.44
92004	\$201.24	92082	\$62.57	92235	\$169.72
92012	\$110.68	92083	\$83.46	92250	\$86.01
92014	\$160.99	92132	\$39.75	92284	\$82.71
92015	\$23.50	92133	\$47.73	92285	\$27.47
92020	\$42.42	92134	\$52.21	92286	\$49.17
92025	\$48.21	92136	\$115.85	92310	\$78.69

### Special Otorhinolaryngologic Services

92507	\$97.37	92550	\$25.24	92590	\$74.94
92511	\$144.51	92551	\$13.52	92591	\$99.11
92526	\$106.68	92557	\$63.40	92592	\$35.51
92541	\$69.74	92567	\$26.83	92595	\$51.33
92542	\$67.08	92570	\$38.42	92610	\$106.71
92545	\$50.39	92577	\$29.60	92611	\$107.45
92547	\$23.48	92587	\$69.43		
92548	\$140.87	92588	\$96.86		

### Cardiovascular

93000	\$33.45	93040	\$16.84	93289	\$82.28
93005	\$20.12	93042	\$10.06	93306	\$298.79
93010	\$11.21	93224	\$187.96	93308	\$137.15
93015	\$135.82	93225	\$57.02	93325	\$80.50
93016	\$26.86	93226	\$93.91	93351	\$353.39
93017	\$83.85	93280	\$73.19		
93018	\$20.12	93282	\$79.37		

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Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
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### Noninvasive Vascular Diagnostic Studies

93926	\$171.42	93971	\$158.92	93976	\$250.52
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### Pulmonary

94010	\$46.80	94645	\$18.48	94727	\$54.02
94060	\$80.14	94664	\$23.22	94729	\$69.46
94150	\$47.46	94667	\$35.44	94760	\$6.71
94640	\$24.64	94726	\$69.18	94762	\$43.60

### Neurology and Neuromuscular Procedures

95805	\$721.28	95907	\$147.58	95929	\$277.90
95810	\$821.21	95908	\$157.64	95930	\$172.20
95811	\$862.70	95909	\$214.66	95951	\$2,089.25
95851	\$27.00	95910	\$285.09	95957	\$397.70
95852	\$20.13	95911	\$342.11	95971	\$61.93
95861	\$224.72	95912	\$399.13	95972	\$72.10
95885	\$87.20	95913	\$462.85		
95887	\$107.33	95925	\$182.99		

### Central Nervous System Assessments/Tests

96101	\$97.27				
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### Health and Behavior Assessment/Intervention

96150	\$25.59	96152	\$23.15		
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### Hydration, Therapeutic, Prophylactic, Diagnostic Injections and Infusions, and Chemotherapy and Other Highly Complex Drug or Highly Complex Biologic Agent Administration

96360	\$92.58	96366	\$24.00	96376	\$20.77
96361	\$24.07	96367	\$39.97		
96365	\$91.06	96375	\$29.03		

### Physical Medicine and Rehabilitation

97010	\$5.04	97116	\$36.89	97542	\$38.34
97012	\$20.12	97124	\$33.54	97545	\$119.69
97014	\$16.77	97140	\$36.89	97546	\$51.17
97016	\$24.15	97150	\$20.67	97605	\$51.27
97024	\$8.49	97530	\$46.96	97606	\$61.71
97032	\$23.48	97532	\$32.90	97750	\$40.25
97110	\$43.60	97535	\$43.90	97760	\$50.31
97112	\$43.60	97537	\$37.31		

### Acupuncture

97810	\$52.39	97813	\$55.95		
97811	\$35.31	97814	\$39.55		

### Chiropractic Manipulative Treatment

98940	\$30.19				
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Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
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### Special Services, Procedures and Reports

99000	\$8.17	99050	\$48.25
99002	\$10.89	99053	\$70.50

### Qualifying Circumstances for Anesthesia

99100	\$44.79
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### Other Services and Procedures

99173	\$3.42	99183	\$131.33
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## DENTAL SERVICES

### Diagnostic

D0120	\$41.81	D0210	\$94.66	D0272	\$30.96
D0140	\$52.13	D0220	\$19.29	D0330	\$83.69
D0150	\$57.69	D0230	\$15.07	D0470	\$64.96

### Preventive

D1110	\$68.87
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### Restorative

D2160	\$115.71	D2335	\$183.74	D2940	\$73.72
D2330	\$84.86	D2391	\$106.64	D2950	\$179.19
D2331	\$127.28	D2740	\$837.28	D2954	\$204.42
D2332	\$158.31	D2750	\$789.63		

### Endodontics

D3310	\$412.71
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### Periodontics

D4211	\$211.85
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### Prosthodontics, Removable

D5110	\$988.75	D5211	\$776.37	D5820	\$395.17
D5130	\$1,048.91	D5212	\$806.73		

### Implant Services

D6010	\$1,712.90	D6059	\$1,131.93	D6104	\$296.69
D6057	\$566.15	D6065	\$1,074.45		

### Prosthodontics, Fixed

D6240	\$752.13	D6245	\$756.50	D6750	\$786.07
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Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
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**Oral & Maxillofacial Surgery**

D7140	\$92.58	D7880	\$490.00
D7210	\$198.03	D7953	\$307.20

**Adjunctive General Services**

D9110	\$76.43	D9430	\$55.53	D9942	\$102.80
D9310	\$91.08	D9940	\$408.83		

**EVALUATION AND MANAGEMENT**

**Office or Other Outpatient Services**

99201	\$70.36	99205	\$304.83	99214	\$158.77
99202	\$114.00	99211	\$37.07	99215	\$212.24
99203	\$165.55	99212	\$66.32		
99204	\$245.01	99213	\$107.83		

**Hospital Inpatient Services**

99232	\$124.79
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**Consultations**

99241	\$66.58	99245	\$237.19	99254	\$183.81
99242	\$99.81	99251	\$53.76	99255	\$222.85
99243	\$143.46	99252	\$83.10		
99244	\$186.63	99253	\$126.71		

**Emergency Department Services**

99281	\$50.31	99283	\$133.00	99285	\$322.51
99282	\$90.19	99284	\$225.58		

**Critical Care Services**

99292	\$147.36
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**Case Management Services**

99366	\$65.67	99367	\$85.93	99368	\$55.55
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**Preventive Medicine Services**

99395	\$116.14	99408	\$40.23
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**Non-Face-to-Face Services**

99441	\$22.23	99443	\$60.50
99442	\$40.98		

Code	Maximum Fee	Code	Maximum Fee	Code	Maximum Fee
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### Special Evaluation and Management Services

Code	Description	Maximum Fee
99456A*	Complex consultation pursuant to Section 386-79, HRS - work related or medical disability examination by other than the treating physician that includes: <ul style="list-style-type: none"> <li>▪ completion of a medical history commensurate with the patient's condition;</li> <li>▪ performance of an examination commensurate with the patient's condition;</li> <li>▪ formulation of a diagnosis, assessment of capabilities and stability, and calculation of impairment;</li> <li>▪ development of future medical treatment plan;</li> <li>▪ completion of necessary documentation/certificates and report; and</li> <li>▪ review of records relating to the patient's condition.</li> </ul>	\$207.25
99456B*	Each additional 30 minute increment (an increment must be at least 30 minutes.)	\$103.63

\*Department of Labor Code

**Bundled Services:** Certain codes, such as telephone calls, are considered by the Health Care Financing Administration (HCFA) to be "bundled" services. Bundled services are not payable, nor should they be billed, when performed incident to or in conjunction with another service even if the other service is performed on a different day. When services that are designated as bundled are denied, the physician may not collect from the patient.

## **IV. New Business**

- B. Discussion and Action on Proposed Amendments to HAR Title 19, Chapter 44, **Rules Relating to Service and Procedures, Charges, Tools and Fees**, promulgated by DOT

DAVID Y. IGE  
GOVERNOR



STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
HARBORS DIVISION  
79 S. NIMITZ HIGHWAY  
HONOLULU, HAWAII 96813

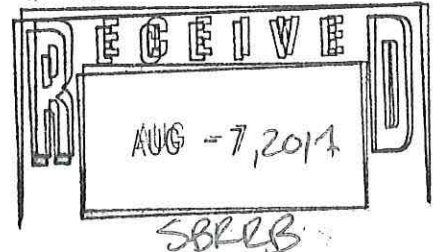
August 4, 2017

FORD N. FUCHIGAMI  
DIRECTOR

Deputy Directors  
JADE T. BUTAY  
ROSS M. HIGASHI  
EDWIN H. SNIFFEN  
DARRELL T. YOUNG

IN REPLY REFER TO:

DEP-H 7060.18



TO: ANTHONY BORGE, CHAIR  
SMALL BUSINESS REGULATORY REVIEW BOARD

FROM: DARRELL T. YOUNG,  
DEPUTY DIRECTOR OF TRANSPORTATION

SUBJECT: PROPOSED RULEMAKING; SMALL BUSINESS IMPACT STATEMENT

The Department of Transportation Harbors Division proposes to amend Chapter 19-44, Hawaii Administrative Rules, to increase its dockage, cruise passenger, and port entry fees. We propose to increase dockage and port entry fees by a rate of 20% effective July 1, 2019, by 15% effective July 1, 2020, and by 15% effective July 1, 2021. Ships longer than 900 feet will also be subject to higher rates for dockage and port entry. Cruise passenger fees will be adjusted from \$7.50 per passenger to \$15.00 per passenger in Honolulu Harbor and \$8.00 per passenger in all other harbors effective July 1, 2018.

As Hawaii's commercial harbor system is 100% self-funded, it collects harbor use fees to fund its operations and capital improvement projects. The Harbors Division is undertaking a \$450 million project to construct a new cargo yard to alleviate congestion in the hub-and-spoke harbor system and must raise its use fee rates to finance this and other projects that are part of the Harbors Modernization Plan.

Most of the revenue, between 75 to 78 percent, into the harbor enterprise is derived from its wharfage tariffs, or fees paid by shipping companies for use of the state's wharves and piers for unloading of cargo. The balance of revenue is generated from other harbor use fees like dockage, cruise passenger, port entry and fees, as well as land dispositions and other services. Dockage fees are paid by vessels for the time a vessel uses a berth space at a commercial harbor. Cruise passenger fees are paid by cruise ships on a per capita basis and are for the use of a cruise terminal facility during the time the ship is docked or berthed at the adjacent pier. Port entry fees are paid by vessels as the enter each commercial harbor.

Chair Anthony Borge

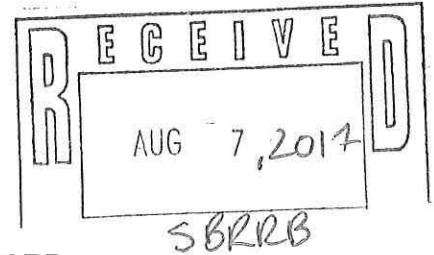
August 4, 2017

Page 2

We have assessed the list of the 99 harbor users that have paid dockage, cruise passenger, and port entry fees in the past two years and have found that eight meet the definition of a small business as defined by Section 201M-1, Hawaii Revised Statutes. Of the eight small businesses, seven are “pass through” businesses which incur the fee but immediately pass on the charge to another entity for reimbursement. The remaining business paid a one-time dockage fee of \$5.24 for fishing vessel in Nawiliwili Harbor; this as an outlier as fishing vessels are generally not permitted to use the commercial piers in Nawiliwili Harbor and this company has no record of other business in the commercial harbor system.

Given our analysis, we conclude that these proposed amendments do not affect Hawaii’s small businesses and there is no “potential or actual requirement imposed upon a small business . . . that will cause a direct and significant economic burden upon a small business” and these proposed amendments are not directly related to the formation, operation, or expansion of a small business.

We appreciate the opportunity to appear before the Small Business Regulatory Review Board at its meeting on August 16, 2017, to present our proposed rule amendments. If you have any questions or need additional information, please contact Dre Kalili at 587-3668.



PRE-PUBLIC HEARING  
SMALL BUSINESS IMPACT STATEMENT  
TO THE

SMALL BUSINESS REGULATORY REVIEW BOARD

(Hawaii Revised Statutes §201M-2)

Department or Agency: Department of Transportation - Harbors Division

Administrative Rule Title and Chapter: 19-44

Chapter Name: Rules Relating to Services and Procedures, Charges, Tolls and Fees

Contact Person/Title: Dre Kalili/ Revenue Enhancement Manager

Phone Number: 587-3668

E-mail Address: dreanalee.k.kalili@hawaii.gov Date: 8/4/2017

A. To assist the SBRRB in complying with the meeting notice requirement in HRS §92-7, please attach a statement of the topic of the proposed rules or a general description of the subjects involved.

B. Are the draft rules available for viewing in person and on the Lieutenant Governor's Website pursuant to HRS §92-7? Yes  No  (If Yes, please provide webpage address and when and where rules may be viewed in person)

The draft rules are available for viewing in person at 79 S. Nimitz Highway. They will be posted once submitted to Governor for approval for public hearings.

(Please keep the proposed rules on this webpage until after the SBRRB meeting.)

I. Rule Description: New  Repeal  Amendment  Compilation

II. Will the proposed rule(s) affect small business? Yes  No  (If No, no need to submit this form.)

\* "Affect small business" is defined as "any potential or actual requirement imposed upon a small business . . . 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." HRS §201M-1

\* "Small business" is defined as a "for-profit enterprise consisting of fewer than one hundred full-time or part-time employees." HRS §201M-1

III. Is the proposed rule being adopted to implement a statute or ordinance that does not require the agency to interpret or describe the requirements of the statute or ordinance? Yes  No  (If Yes, no need to submit this form.)

(e.g., a federally-mandated regulation that does not afford the agency the discretion to consider less restrictive alternatives.) HRS §201M-2(d)

IV. Is the proposed rule being adopted pursuant to emergency rulemaking? (HRS §201M-2(a)) Yes  No  (If Yes, no need to submit this form.)

\* \* \*



**If the proposed rule affects small business and are not exempt as noted above, please provide a reasonable determination of the following:**

1. Description of the small businesses that will be required to comply with the proposed rules and how they may be adversely affected.
  
2. 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.

If the proposed rule imposes a new or increased fee or fine:

- a. Amount of the current fee or fine and the last time it was increased.
  
  - b. Amount of the proposed fee or fine and the percentage increase.
  
  - c. Reason for the new or increased fee or fine.
  
  - d. Criteria or methodology used to determine the amount of the fee or fine (i.e., Consumer Price Index, Inflation rate, etc.).
3. The probable monetary costs and benefits to the agency or 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.

4. 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 other mitigating techniques.
  
5. The availability and practicability of less restrictive alternatives that could be implemented in lieu of the proposed rules.
  
6. Consideration of creative, innovative, or flexible methods of compliance for small businesses. The businesses that will be directly affected by, bear the costs of, or directly benefit from the proposed rules.
  
7. How the agency involved small business in the development of the proposed rules.
  - a. If there were any recommendations made by small business, were the recommendations incorporated into the proposed rule? If yes, explain. If no, why not.
  
8. 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.

If yes, please provide information comparing the costs and benefits of the proposed rules to the costs and benefits of the comparable federal, state, or county law, including the following:

- a. Description of the public purposes to be served by the proposed rule.
  
- b. The text of the related federal, state, or county law, including information about the purposes and applicability of the law.
  
- c. A comparison between the proposed rule and the related federal, state, or county law, including a comparison of their purposes, application, and administration.
  
- d. A comparison of the monetary costs and benefits of the proposed rule with the costs and benefits of imposing or deferring to the related federal, state, or county law, as well as a description of the manner in which any additional fees from the proposed rule will be used.
  
- e. A comparison of the adverse effects on small business imposed by the proposed rule with the adverse effects of the related federal, state, or county law.

\* \* \*

Small Business Regulatory Review Board / DBEDT  
Phone: (808) 586-2594  
Email: [dbedt.sbrrb@hawaii.gov](mailto:dbedt.sbrrb@hawaii.gov)

This Statement may be found on the  
SBRRB Website at:  
<http://dbedt.hawaii.gov/sbrrb/small-business-impact-statements-pre-and-post-public-hearing>

# DRAFT

## DEPARTMENT OF TRANSPORTATION

Amendments to Chapter 19-44, Hawaii Administrative Rules.

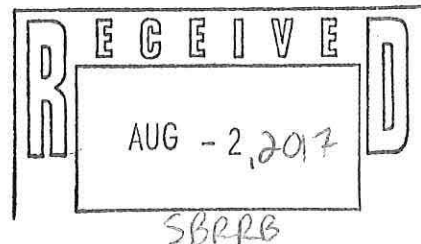
1. Section 19-44-20, Hawaii Administrative Rules, is amended to read as follows:

"§19-44-20 Full dockage rate. (a) Dockage shall be assessed against all vessels, except as otherwise provided, at the full dockage rates [except as otherwise provided.] as set forth in the exhibit, dated July 1, 2018, entitled "DOCKAGE RATES (July 1, 2018)", located at the end of this chapter; the exhibit as it may be amended, is incorporated herein, and is hereby made a part of this section. When new dockage rates are set at a future date by rule amendment, an updated exhibit will be incorporated to supersede the exhibit dated July 1, 2018. In computing dockage, only halves of days shall be considered and dockage shall be assessed as follows:

- (1) Twelve hours or less shall be charged one-half of one full day's dockage.
- (2) Over twelve hours and not more than twenty-four hours shall be charged one full day's dockage.

[(b) Full dockage rates for vessels shall be as follows:

			Charge Per 24-Hour Day			
			↓	↓	↓	↓
Overall in Meters	Overall In Feet	.	.	.	.	.



# DRAFT

From	But Less Than	From	But Less Than	Charge Per Mo. Per Lin. Ft. For Smaller Comm. Vessels (1)	Smaller Comm. Vessels (2)	Inter-island Vessels or Intra-island Vessels (3)	Other Vessels (4)
0.00	12.19	0	40	.	\$9.24	.	.
12.19	15.24	40	50	.	\$10.56	.	.
15.24	19.81	50	65	.	\$14.52	.	.
19.81	22.86	65	75	\$5.50	\$17.16	\$17.88	\$34.38
22.86	25.91	75	85	\$5.67	\$23.76	\$24.75	\$41.25
25.91	30.48	85	100	\$5.78	\$33.00	\$34.38	\$55.00
30.48	36.58	100	120	\$5.94	\$39.60	\$41.25	\$61.88
36.58	42.67	120	140	\$6.05	\$46.20	\$48.13	\$68.75
42.67	48.77	140	160	\$6.16	\$52.80	\$55.00	\$82.50
48.77	54.86	160	180	\$6.33	\$59.40	\$61.88	\$96.25
54.86	60.96	180	200	\$6.44	\$66.00	\$68.75	\$116.88
60.96	68.58	200	225	\$6.60	\$79.20	\$82.50	\$130.63
68.58	76.20	225	250	\$6.93	\$92.40	\$96.25	\$158.13
76.20	83.82	250	275	\$7.26	\$105.60	\$110.00	\$178.75
83.82	91.44	275	300	\$7.59	\$118.80	\$123.75	\$206.25
91.44	99.06	300	325	.	.	\$151.25	\$247.50
99.06	106.68	325	350	.	.	\$178.75	\$295.63
106.68	114.30	350	375	.	.	\$206.25	\$343.75
114.30	121.92	375	400	.	.	\$247.50	\$412.50
121.92	129.54	400	425	.	.	\$288.75	\$481.25
129.54	137.16	425	450	.	.	\$330.00	\$550.00
137.16	144.78	450	475	.	.	\$371.25	\$618.75
144.78	152.40	475	500	.	.	\$412.50	\$687.50

# DRAFT

152.40	160.02	500	525	.	.	\$474.38	\$790.63
160.02	167.64	525	550	.	.	\$536.25	\$893.75
167.64	175.26	550	575	.	.	\$618.75	\$1031.25
175.26	182.88	575	600	.	.	\$701.25	\$1168.75
182.88	190.50	600	625	.	.	\$783.75	\$1306.25
190.50	198.12	625	650	.	.	\$866.25	\$1443.75
198.12	205.74	650	675	.	.	\$948.75	\$1581.25
205.74	213.36	675	700	.	.	\$1031.25	\$1718.75
213.36	220.98	700	725	.	.	\$1113.75	\$1856.25
220.98	228.60	725	750	.	.	\$1237.50	\$2062.50
228.60	236.22	750	775	.	.	\$1402.50	\$2337.50
236.22	243.84	775	800	.	.	\$1567.50	\$2612.50
243.84	259.08	800	850	.	.	\$1732.50	\$2887.50
259.08	274.32	850	900	.	.	\$1897.50	\$3162.50
274.32	and over	900	and over	.	.	.	\$3162.50

plus an additional \$4.81 per linear foot or \$15.79 per linear meter or fraction thereof, of overall length in excess of 900 linear feet or 274.32 meters. In the event this resulting charge is not an even whole dollar, the charge shall be rounded to the next nearest whole dollar.]

[(c)] (b) Column (1) of the [dockage rate table in subsection (b)] exhibit, dated July 1, 2018, entitled "DOCKAGE RATES (July 1, 2018)", located at the end of this chapter shall be [used for] applied to smaller commercial vessels, except those described in section 19-44-23, [from] at least sixty-five feet long but less than three hundred feet long, or the metric equivalent thereof, not engaged in overseas operations or in the transporting of any overseas cargo when assigned annual dockage permits. This column also applies to those vessels described in section 19-44-36. The rates in this column are charged per month.

[(d)] (c) Column (2) of the [dockage rate table in subsection (b)] exhibit, dated July 1, 2018, entitled "DOCKAGE RATES (July 1, 2018)", located at

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the end of this chapter shall be [used for] applied to smaller commercial vessels less than three hundred feet long, or the metric equivalent thereof, not engaged in overseas operations or in the transporting of any overseas cargo and those specified in section 19-44-23 and not assigned annual dockage permits. This column also applies to those vessels described in section 19-44-36. The rates in this column are charged per twenty-four hour day.

[(e)] (d) Column (3) of the [dockage rate table in subsection (b)] exhibit, dated July 1, 2018, entitled "DOCKAGE RATES (July 1, 2018)", located at the end of this chapter shall be [used for] applied to vessels predominantly used in the transporting of inter-island cargo or intra-island cargo. The rates in this column are charged per twenty-four hour day.

[(f)] (e) Column (4) of the [dockage rate table in subsection (b)] exhibit, dated July 1, 2018, entitled "DOCKAGE RATES (July 1, 2018)", located at the end of this chapter shall be [used for] applied to vessels when rates in columns (1), (2), and (3) of the [table in subsection (b)] exhibit are not applicable and when no other dockage rate or mooring rate in another section of these rules and tariff is applicable. The rates in this column are charged per twenty-four hour day. [Eff 5/20/82; am 12/5/83; am 12/20/85; am 11/7/91; am and comp 2/26/96; am and Comp 2/1/10; am ] (Auth: HRS §266-2, 266-17) (Imp: HRS §266-13, 266-17)

2. Section 19-44-64, Hawaii Administrative Rules, is amended to read as follows:

"§19-44-64 Waiver of wharfage. No wharfage shall be chargeable against the following:

- (1) Vessel's stores and supplies, not including fuel, intended for a vessel's and its crew's own consumption and use;
- (2) Dunnage and stevedoring equipment of all kinds, including non-revenue generating company business, when used for the purpose of stowing, loading of discharging vessel

# DRAFT

cargo, except for situations in which such equipment is placed in shipping devices, that otherwise contain no cargo;

- (3) Cargo which has gone astray or cargo which for operational reasons a vessel must discharge and reload in order to load or discharge cargo originating at, or destined for, the wharf at which a vessel is docked; provided that the cargo is restowed on the same voyage of the vessel and the vessel has not left the pier;
- (4) Trailer chassis meeting the criteria of a shipping device, when carrying cargo;
- (5) Fish, fresh or frozen, including shellfish from all U.S. vessels, except that which is being transported between ports as cargo; or
- (6) Any other item at the discretion of the department." [Eff 5/20/82; am 12/5/83; am and comp 2/26/96; comp 2/01/10; am 12/23/16; am ] (Auth: HRS §266-2, 266-17) (Imp: HRS §266-2, 266-17)

3. Section 19-44-66, Hawaii Administrative Rules, is amended to read as follows:

"§19-44-66 Wharfage rates. Wharfage rates in dollars per unit shall be assessed as set forth in the exhibit, dated [February 1, 2017,] July 1, 2018, entitled ["WHARFAGE RATES (February 1, 2017)",] "WHARFAGE RATES (February 1, 2017)," located at the end of this chapter; the exhibit as it may be amended, is incorporated herein, and is hereby made a part of this section. When new wharfage rates are set at a future date by rule amendment, an updated exhibit will be incorporated to supersede the exhibit dated [February 1, 2017] July 1, 2018. Incremental increases shall be assessed as set forth in section 19-44-73." [Eff 5/20/82; am 12/5/83; am 12/20/85; am 11/7/91; am and comp 2/26/96; am 3/10/97; am 12/09/02; am 2/11/05; am and comp 2 /01/10; am 12/23/16;



# DRAFT

am ] (Auth: HRS §266-2, 266-17) (Imp:  
HRS §266-2, 266-17)

4. Section 19-44-70, Hawaii Administrative Rules,  
is amended to read as follows:

"[§19-44-70 Passenger fees. (a) Any passenger vessel which is used for private gain and does not have a valid mooring permit which uses state commercial harbors property or facilities shall pay the following fees in addition to dockage and any other applicable fees:

- (1) Per passenger (includes in transit) embarking from shore to ship--\$2.50;
- (2) Per passenger (includes in transit) disembarking from ship to shore--\$2.50; and
- (3) Passengers in transit on a vessel on a continuous trip whose point of origin and termination is a state port, a total for disembarking and embarking at each port per passenger--\$1.85.

(b) Beginning on July 1, 2011, any passenger vessel which is used for private gain and does not have a valid mooring permit which uses state commercial harbors property or facilities shall pay the following fees through June 30, 2012, in addition to dockage and any other applicable fees:

- (1) Per passenger (includes in transit) embarking from shore to ship--\$5.00;
- (2) Per passenger (includes in transit) disembarking from ship to shore--\$5.00; and
- (3) Passengers in transit on a vessel calling on multiple state ports, a total for disembarking and embarking at each transit port per passenger--\$5.00.

Incremental increases shall be assessed as set forth in section 19-44-73.

(c) Offshore mooring. Any vessel using a state wharf for disembarking and embarking passengers by means of any boat or lighter while moored offshore shall pay a total of 35 cents per passenger disembarking and embarking at each port.

# DRAFT

(d) Report. A report shall be filed with the department on a form provided by the department within fifteen days after date of embarking or disembarking of facilities and the charges due shall be remitted along with the report.]

§19-44-70 Passenger fees. (a) Any passenger vessel which uses state commercial harbors property or facilities, is used for private gain, and does not have a valid permit that otherwise addresses passenger fees, shall pay passenger fees as set forth in the exhibit, dated July 1, 2018, entitled "PASSENGER FEES (July 1, 2018)", located at the end of this chapter; the exhibit as it may be amended, is incorporated herein, and is hereby made a part of this section. When new passenger fees are set at a future date by rule amendment, an updated exhibit will be incorporated to supersede the exhibit dated July 1, 2018. Passenger vessels shall also pay dockage, port entry, and any other applicable harbor use fees, except as otherwise provided.

(b) Passenger fees are charged per passenger upon port entry into each state commercial harbor. Passenger fees are charges on a per voyage or per itinerary basis, and will not be charged more than once if a vessel uses a state commercial harbor property or facility more than once on a single voyage or itinerary.

(c) Effective July 1, 2018, facility cleaning costs will be covered by passenger fees and will not be separately charged to passenger vessels.

(d) Each passenger vessel shall file a report with the department on a form provided by the department within fifteen days after the departure of the passenger vessel from the last state commercial harbor used by the vessel on that voyage or itinerary. All charges due shall be remitted along with the report.

[Eff 5/20/82; am 12/20/85; am 11/7/91; am and comp 2/26/96; am 3/10/97; am and comp 2/1/10;  
am ] (Auth: HRS §266-2, 266-17) (Imp:  
HRS §266-2, 266-17)

# DRAFT

5. Section 19-44-73, Hawaii Administrative Rules, is amended to read as follows:

"§19-44-73 Incremental increases to wharfage rates[ and passenger fees]. (a) Wharfage rates set forth in sections 19-44-65(b), (c) and (d), 19-44-66, 19-44-68 and 19-44-69, shall increase on the following dates by the following percentages:

- (1) February 1, 2017...17% increase over the then prevailing rate;
- (2) October 1, 2017...15% increase over the then prevailing rate;
- (3) July 1, 2018...15% increase over the then prevailing rate;
- (4) July 1, 2019 and thereafter: Annual increases shall be 3% over the then prevailing wharfage rate, or at the annual percentage increase in the Consumer Price Index (CPI), whichever is greater.

(b) All incoming and outgoing overseas and inter-island/intra-island transshipment unit load cargo rates shall increase as set forth in the exhibit, dated February 1, 2017, entitled "WHARFAGE RATES (February 1, 2017)," located at the end of this chapter; the exhibit as it may be amended, is incorporated herein, and is hereby made a part of this section. When new wharfage rates are set at a future date by rule amendment, an updated exhibit will be incorporated to supersede the exhibit dated February 1, 2017.

[(c) All passenger fees set forth in section 19-44-70 shall increase on the following dates to the following rates:

July 1, 2012.....	\$5.50 per passenger
July 1, 2013.....	6.00 per passenger
July 1, 2014.....	6.50 per passenger
July 1, 2015.....	7.00 per passenger
July 1, 2016.....	7.50 per passenger]

[Eff 2/01/10; am 12/23/16; am ]

(Auth: HRS §266-2, 266-17) (Imp: HRS §266-2, 266-17)

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6. Section 19-44-92, Hawaii Administrative Rules, is amended to read as follows:

"§19-44-92 Port entry fee schedule. Port entry fees shall be based upon overall length of vessel in linear feet as [follows:] set forth in the exhibit, dated July 1, 2018, entitled "PORT ENTRY FEE SCHEDULE (July 1, 2018)", located at the end of this chapter; the exhibit as it may be amended, is incorporated herein, and is hereby made a part of this section. When new port entry rates are set at a future date by rule amendment, an updated exhibit will be incorporated to supersede the exhibit dated July 1, 2018.

Length of Vessel Overall in Meters		Overall in Feet			
From	But Less Than	From	But Less Than	Honolulu Harbor and Barbers Point	Other Harbors
0	60.96	0	200	\$34.38	\$27.50
60.96	91.44	200	300	\$68.75	\$48.13
91.44	106.68	300	350	\$103.13	\$68.75
106.68	121.92	350	400	\$158.13	\$96.25
121.92	137.16	400	450	\$192.50	\$123.75
137.16	152.40	450	500	\$268.13	\$165.00
152.40	167.64	500	550	\$309.38	\$192.50
167.64	182.88	550	600	\$357.50	\$220.00
182.88	198.12	600	650	\$398.75	\$247.50
198.12	213.36	650	700	\$446.88	\$275.00
213.36	228.60	700	750	\$481.25	\$295.63
228.60	243.84	750	800	\$515.63	\$316.25
243.84	259.08	800	850	\$570.63	\$350.63
259.08	274.32	850	900	\$611.88	\$378.13
274.32	289.56	900	950	\$660.00	\$398.75

# DRAFT

289.56	and over	950	and over	\$701.25	\$419.38
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] For the purpose of computing port entry fee only, a tug and one barge will be considered two vessels. Each additional barge under tow will be considered an additional vessel." [Eff 5/20/82; am 12/20/85; am 11/7/91; am and comp 2/26/96; am 3/10/97; am and comp 2/1/10; am ] (Auth: HRS §266-2, 266-17) (Imp: HRS §266-2, 266-17)

7. Material, except source notes, to be repealed is bracketed. New material is underscored.

8. Additions to update source notes to reflect these amendments and compilation are not underscored.

9. The amendments to chapter 19-44, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on \_\_\_\_\_, and filed with the Office of the Lieutenant Governor.

\_\_\_\_\_  
Ford N. Fuchigami  
Director of Transportation

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy Attorney General

**EXHIBIT – DOCKAGE RATES (July 1, 2018)**

State of Hawaii Department of Transportation - Harbors Division  
 Full Dockage Rate (\$19-44-20)

**DRAFT**

Vessel Length			
Greater than (feet)	Less than (feet)	Greater than (meters)	Less than (meters)
0	40	0.00	12.19
40	50	12.19	15.24
50	65	15.24	19.81
65	75	19.81	22.86
75	85	22.86	25.91
85	100	25.91	30.48
100	120	30.48	36.58
120	140	36.58	42.67
140	160	42.67	48.77
160	180	48.77	54.86
180	200	54.86	60.96
200	225	60.96	68.58
225	250	68.58	76.20
250	275	76.20	83.82
275	300	83.82	91.44
300	325	91.44	99.06
325	350	99.06	106.68
350	375	106.68	114.30
375	400	114.30	121.92
400	425	121.92	129.54
425	450	129.54	137.16
450	475	137.16	144.78
475	500	144.78	152.40
500	525	152.40	160.02
525	550	160.02	167.64
550	575	167.64	175.26
575	600	175.26	182.88
600	625	182.88	190.50
625	650	190.50	198.12
650	675	198.12	205.74
675	700	205.74	213.36
700	725	213.36	220.98
725	750	220.98	228.60
750	775	228.60	236.22
775	800	236.22	243.84
800	850	243.84	259.08
850	900	259.08	274.32
900+*		274.32+*	

Effective July 1, 2018			
COLUMN 1	COLUMN 2 Smaller Commercial Vessels	COLUMN 3 Inter- or Intra-island Vessels	COLUMN 4 Other Vessels
N/A	9.24	N/A	N/A
N/A	10.56	N/A	N/A
N/A	14.52	N/A	N/A
5.50	17.16	17.88	34.38
5.67	23.76	24.75	41.25
5.78	33.00	34.38	55.00
5.94	39.60	41.25	61.88
6.05	46.20	48.13	68.75
6.16	52.80	55.00	82.50
6.33	59.40	61.88	96.25
6.44	66.00	68.75	116.88
6.60	79.20	82.50	130.63
6.93	92.40	96.25	158.13
7.26	105.60	110.00	178.75
7.59	118.80	123.75	206.25
N/A	N/A	151.25	247.50
N/A	N/A	178.75	295.63
N/A	N/A	206.25	343.75
N/A	N/A	247.50	412.50
N/A	N/A	288.75	481.25
N/A	N/A	330.00	550.00
N/A	N/A	371.25	618.75
N/A	N/A	412.50	687.50
N/A	N/A	474.38	790.63
N/A	N/A	536.25	893.75
N/A	N/A	618.75	1,031.25
N/A	N/A	701.25	1,168.75
N/A	N/A	783.75	1,306.25
N/A	N/A	866.25	1,443.75
N/A	N/A	948.75	1,581.25
N/A	N/A	1,031.25	1,718.75
N/A	N/A	1,113.75	1,856.25
N/A	N/A	1,237.50	2,062.50
N/A	N/A	1,402.50	2,337.50
N/A	N/A	1,567.50	2,612.50
N/A	N/A	1,732.50	2,887.50
N/A	N/A	1,897.50	3,162.50
N/A	N/A	N/A	3,162.50

For vessels longer than 900 linear feet or 274.32 meters, the dockage rate is \$3,162.50 plus an additional \$9.15 per additional linear foot or fraction thereof (or \$30.00 per additional linear meter or fraction thereof).

Effective July 1, 2019			
COLUMN 1	COLUMN 2 Smaller Commercial Vessels	COLUMN 3 Inter- or Intra-island Vessels	COLUMN 4 Other Vessels
N/A	11.00	N/A	N/A
N/A	12.75	N/A	N/A
N/A	17.50	N/A	N/A
6.60	20.50	21.50	41.25
6.80	28.50	29.75	49.50
6.94	39.50	41.25	66.00
7.13	47.50	49.50	74.25
7.26	55.50	57.75	82.50
7.39	63.25	66.00	99.00
7.60	71.25	74.25	115.50
7.73	79.25	82.50	140.25
7.92	95.00	99.00	156.75
8.32	111.00	115.50	189.75
8.71	126.75	132.00	214.50
9.11	142.50	148.50	247.50
N/A	N/A	181.50	297.00
N/A	N/A	214.50	354.75
N/A	N/A	247.50	412.50
N/A	N/A	297.00	495.00
N/A	N/A	346.50	577.50
N/A	N/A	396.00	660.00
N/A	N/A	445.50	742.50
N/A	N/A	495.00	825.00
N/A	N/A	569.25	948.75
N/A	N/A	643.50	1,072.50
N/A	N/A	742.50	1,237.50
N/A	N/A	841.50	1,402.50
N/A	N/A	940.50	1,567.50
N/A	N/A	1,039.50	1,732.50
N/A	N/A	1,138.50	1,897.50
N/A	N/A	1,237.50	2,062.50
N/A	N/A	1,336.50	2,227.50
N/A	N/A	1,485.00	2,475.00
N/A	N/A	1,683.00	2,805.00
N/A	N/A	1,881.00	3,135.00
N/A	N/A	2,079.00	3,465.00
N/A	N/A	2,277.00	3,795.00
N/A	N/A	N/A	3,795.00

For vessels longer than 900 linear feet or 274.32 meters, the dockage rate is \$3,795.00 plus an additional \$10.52 per additional linear foot or fraction thereof (or \$34.50 per additional linear meter or fraction thereof).

**EXHIBIT – DOCKAGE RATES (July 1, 2018)**

State of Hawaii Department of Transportation - Harbors Division  
 Full Dockage Rate (\$19-44-20)

**DRAFT**

Vessel Length			
Greater than (feet)	Less than (feet)	Greater than (meters)	Less than (meters)
0	40	0.00	12.19
40	50	12.19	15.24
50	65	15.24	19.81
65	75	19.81	22.86
75	85	22.86	25.91
85	100	25.91	30.48
100	120	30.48	36.58
120	140	36.58	42.67
140	160	42.67	48.77
160	180	48.77	54.86
180	200	54.86	60.96
200	225	60.96	68.58
225	250	68.58	76.20
250	275	76.20	83.82
275	300	83.82	91.44
300	325	91.44	99.06
325	350	99.06	106.68
350	375	106.68	114.30
375	400	114.30	121.92
400	425	121.92	129.54
425	450	129.54	137.16
450	475	137.16	144.78
475	500	144.78	152.40
500	525	152.40	160.02
525	550	160.02	167.64
550	575	167.64	175.26
575	600	175.26	182.88
600	625	182.88	190.50
625	650	190.50	198.12
650	675	198.12	205.74
675	700	205.74	213.36
700	725	213.36	220.98
725	750	220.98	228.60
750	775	228.60	236.22
775	800	236.22	243.84
800	850	243.84	259.08
850	900	259.08	274.32
900+*		274.32+*	

Effective July 1, 2020			
COLUMN 1	COLUMN 2 Smaller Commercial Vessels	COLUMN 3 Inter- or Intra- island Vessels	COLUMN 4 Other Vessels
N/A	12.75	N/A	N/A
N/A	14.75	N/A	N/A
N/A	20.25	N/A	N/A
7.50	23.50	24.75	47.50
7.75	32.75	34.25	57.00
8.00	45.50	47.50	76.00
8.25	54.75	57.00	85.50
8.25	63.75	66.50	95.00
8.50	72.75	76.00	113.75
8.75	82.00	85.50	132.75
9.00	91.25	95.00	161.25
9.00	109.25	113.75	180.25
9.50	127.75	132.75	218.25
10.00	145.75	151.75	246.75
10.50	164.00	170.75	284.75
N/A	N/A	208.75	341.50
N/A	N/A	246.75	408.00
N/A	N/A	284.75	474.50
N/A	N/A	341.50	569.25
N/A	N/A	398.50	664.25
N/A	N/A	455.50	759.00
N/A	N/A	512.25	854.00
N/A	N/A	569.25	948.75
N/A	N/A	654.75	1,091.00
N/A	N/A	740.00	1,233.50
N/A	N/A	854.00	1,423.25
N/A	N/A	967.75	1,613.00
N/A	N/A	1,081.50	1,802.75
N/A	N/A	1,195.50	1,992.50
N/A	N/A	1,309.25	2,182.25
N/A	N/A	1,423.25	2,372.00
N/A	N/A	1,537.00	2,561.75
N/A	N/A	1,707.75	2,846.25
N/A	N/A	1,935.50	3,225.75
N/A	N/A	2,163.25	3,605.25
N/A	N/A	2,390.75	3,984.75
N/A	N/A	2,618.50	4,364.25
N/A	N/A	N/A	4,364.25

For vessels longer than 900 linear feet or 274.32 meters, the dockage rate is \$4,364.25 plus an additional \$12.20 per additional linear foot or fraction thereof (or \$40.00 per additional linear meter or fraction thereof).

Effective July 1, 2021			
COLUMN 1	COLUMN 2 Smaller Commercial Vessels	COLUMN 3 Inter- or Intra- island Vessels	COLUMN 4 Other Vessels
N/A	11.00	N/A	N/A
N/A	12.75	N/A	N/A
N/A	17.50	N/A	N/A
6.60	20.50	21.50	41.25
6.80	28.50	29.75	49.50
6.94	39.50	41.25	66.00
7.13	47.50	49.50	74.25
7.26	55.50	57.75	82.50
7.39	63.25	66.00	99.00
7.60	71.25	74.25	115.50
7.73	79.25	82.50	140.25
7.92	95.00	99.00	156.75
8.32	111.00	115.50	189.75
8.71	126.75	132.00	214.50
9.11	142.50	148.50	247.50
N/A	N/A	181.50	297.00
N/A	N/A	214.50	354.75
N/A	N/A	247.50	412.50
N/A	N/A	297.00	495.00
N/A	N/A	346.50	577.50
N/A	N/A	396.00	660.00
N/A	N/A	445.50	742.50
N/A	N/A	495.00	825.00
N/A	N/A	569.25	948.75
N/A	N/A	643.50	1,072.50
N/A	N/A	742.50	1,237.50
N/A	N/A	841.50	1,402.50
N/A	N/A	940.50	1,567.50
N/A	N/A	1,039.50	1,732.50
N/A	N/A	1,138.50	1,897.50
N/A	N/A	1,237.50	2,062.50
N/A	N/A	1,336.50	2,227.50
N/A	N/A	1,485.00	2,475.00
N/A	N/A	1,683.00	2,805.00
N/A	N/A	1,881.00	3,135.00
N/A	N/A	2,079.00	3,465.00
N/A	N/A	2,277.00	3,795.00
N/A	N/A	N/A	3,795.00

For vessels longer than 900 linear feet or 274.32 meters, the dockage rate is \$4,364.25 plus an additional \$12.20 per additional linear foot or fraction thereof (or \$40.00 per additional linear meter or fraction thereof).

**EXHIBIT – WHARFAGE RATES (July 1, 2018)**

**DRAFT**

State of Hawaii Department of Transportation - Harbors Division

Tariff Rates for Cargo Wharfage (§19-44-66), Surcharge-Reefer (§19-44-12), and Surcharge-Container Freight Station (§19-44-13)

Overseas includes Foreign & Domestic Cargo		Rates effective 2/1/2017			Rates effective 10/1/2017			Rates effective 7/1/2018 <sup>2</sup>		
		Overseas IN/OUT (\$)	Interisland IN/OUT (\$)	Interisland TRANS (\$)	Overseas IN/OUT (\$)	Interisland IN/OUT (\$)	Interisland TRANS (\$)	Overseas IN/OUT (\$)	Interisland IN/OUT (\$)	Interisland TRANS (\$)
<b>Cargo</b>	<b>UNIT</b>									
Autos & trucks under 6500# in Shipping Device	Each	40.60	24.35	24.35	46.69	28.00	28.00	53.69	32.20	32.20
Autos & trucks under 6500#, Other	Each	40.60	24.35	24.35	46.69	28.00	28.00	53.69	32.20	32.20
Unit Load, as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	Each, 24' and under	104.34	57.97	57.97	119.99	66.67	66.67	137.99	76.67	76.67
Unit Load, as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	Each, Over 24' to 45'	208.69	115.93	115.93	239.99	133.32	133.32	275.99	153.32	153.32
Unit Load, as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	Each, Over 45'	313.04	173.90	173.90	360.00	199.99	199.99	353.27	196.25	196.25
Unit Load Inter-Island Transshipment as described in §19-44-65(b) & (c) and as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	Each, 24' and under	N/A	N/A	57.97	N/A	N/A	66.67	N/A	N/A	76.67
Unit Load Inter-Island Transshipment as described in §19-44-65(b) & (c) and as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	Each, Over 24' to 45'	N/A	N/A	115.93	N/A	N/A	133.32	N/A	N/A	153.32
Unit Load Inter-Island Transshipment as described in §19-44-65(b) & (c) and as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	Each, Over 45'	N/A	N/A	173.90	N/A	N/A	199.99	N/A	N/A	229.99
Unit Load Inter-Island/Intra-Island Transshipment Cargo as described in §19-44-	Each,	N/A	N/A	34.78	N/A	N/A	40.00	N/A	N/A	46.00



EXHIBIT – WHARFAGE RATES (July 1, 2018)

DRAFT

Overseas includes Foreign & Domestic Cargo		Rates effective 2/1/2017			Rates effective 10/1/2017			Rates effective 7/1/2018 <sup>2</sup>		
		Overseas IN/OUT	Interisland IN/OUT	Interisland TRANS	Overseas IN/OUT	Interisland IN/OUT	Interisland TRANS	Overseas IN/OUT	Interisland IN/OUT	Interisland TRANS
Cargo	UNIT	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)
65(d) and as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	24' and under									
Unit Load Inter-Island/Intra-Island Transshipment Cargo as described in §19-44-65(d) and as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	Each, Over 24' to 45'	N/A	N/A	69.56	N/A	N/A	79.99	N/A	N/A	91.99
Unit Load Inter-Island/Intra-Island Transshipment Cargo as described in §19-44-65(d) and as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	Each, Over 45'	N/A	N/A	104.35	N/A	N/A	120.00	N/A	N/A	138.00
Additional charge on Unit Load, as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units (FOREIGN ONLY)	Each, 24' and under	5.28	N/A	N/A	6.07	N/A	N/A	6.98	N/A	N/A
Additional charge on Unit Load, as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units (FOREIGN ONLY)	Each, Over 24' to 45'	9.49	N/A	N/A	10.91	N/A	N/A	12.55	N/A	N/A
Additional charge on Unit Load, as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units (FOREIGN ONLY)	Each, Over 45'	14.24	N/A	N/A	16.38	N/A	N/A	18.84	N/A	N/A
Facilities Security Charge on Unit Load, as defined in §19-41-2 (excluding passenger automobiles and explosives), assembled home/office modules and mobile home/office units	Each	15.00	3.75	3.75	17.25	4.31	4.31	19.84	4.96	4.96
Unit Load, as defined in §19-41-2, empty	Each	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

EXHIBIT – WHARFAGE RATES (July 1, 2018)

DRAFT

Overseas includes Foreign & Domestic Cargo		Rates effective 2/1/2017			Rates effective 10/1/2017			Rates effective 7/1/2018 <sup>2</sup>		
		Overseas IN/OUT	Interisland IN/OUT	Interisland TRANS	Overseas IN/OUT	Interisland IN/OUT	Interisland TRANS	Overseas IN/OUT	Interisland IN/OUT	Interisland TRANS
Cargo	UNIT	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)
Unit Load, Island Agricultural Products	Each, 24' and under	30.59 <sup>1</sup>	30.59	30.59	35.18 <sup>1</sup>	35.18	35.18	40.46 <sup>1</sup>	40.46	40.46
Unit Load, Island Agricultural Products	Each, Over 24' to 45'	61.24 <sup>1</sup>	61.24	61.24	70.43 <sup>1</sup>	70.43	70.43	80.99 <sup>1</sup>	80.99	80.99
Unit Load, Island Agricultural Products	Each, Over 45'	91.85 <sup>1</sup>	91.85	91.85	105.63 <sup>1</sup>	105.63	105.63	121.47 <sup>1</sup>	121.47	121.47
Dry Bulk Cargo, NOS, Not Otherwise Specified	Ton	2.59	1.76	1.76	2.98	2.02	2.02	3.43	2.32	2.32
Dry Bulk Cargo, utilizing approved conveyors including bins and hoppers where cargo does not touch the surface of the wharf	Ton	2.02	1.18	1.18	2.32	1.36	1.36	2.67	1.56	1.56
Dry Bulk Cargo, utilizing approved high speed conveyors greater than 600 tons per hour where cargo does not touch the surface of the wharf	Ton	1.76	0.97	0.97	2.02	1.12	1.12	2.32	1.29	1.29
Aggregate/sand materials	Ton	2.59	1.76	1.76	2.98	2.02	2.02	3.43	2.32	2.32
Scrap metal	Ton	3.31 <sup>1</sup>	2.33	2.33	3.81 <sup>1</sup>	2.68	2.68	4.38 <sup>1</sup>	3.08	3.08
Explosives (in shipping devices or otherwise)	Ton	36.80	24.47	24.47	42.32	28.14	28.14	48.67	32.36	32.36
General Merchandise NOS	Ton	4.92	3.18	3.18	5.66	3.66	3.66	6.51	4.21	4.21
Livestock NOS	Head	3.31	2.33	2.33	3.81	2.68	2.68	4.38	3.08	3.08
Recreational Animals	Head	6.67	4.63	4.63	7.67	5.32	5.32	8.82	6.12	6.12
Hogs, sheep, goats	Head	1.55	0.88	0.88	1.78	1.01	1.01	2.05	1.16	1.16
Lumber, (for surfaced lumber, use net board feet)	MBF	7.69	5.04	5.04	8.84	5.80	5.80	10.17	6.67	6.67
Lumber	Ton	4.92	3.18	3.18	5.66	3.66	3.66	6.51	4.21	4.21
Island Ag products-Produce	Ton	1.55 <sup>1</sup>	1.02	1.02	1.78 <sup>1</sup>	1.17	1.17	2.05 <sup>1</sup>	1.35	1.35
Island Ag products-N.O.S.	Ton	1.55 <sup>1</sup>	1.02	1.02	1.78 <sup>1</sup>	1.17	1.17	2.05 <sup>1</sup>	1.35	1.35
Pineapple, fresh in bins, destined for storage, manipulation, or manufacturing for ultimate export	Ton	N/A	0.50	0.50	N/A	0.58	0.58	N/A	0.67	0.67
Sugar, in bulk	Ton	1.06 <sup>1</sup>	N/A	N/A	1.22 <sup>1</sup>	N/A	N/A	1.40 <sup>1</sup>	N/A	N/A
Produce, palleted (island grown vegetables and fruit only) when freight charge is per pallet load of approximately 1/2 ton	Pallet Load	N/A	0.62	0.62	N/A	0.71	0.71	N/A	0.82	0.82

EXHIBIT – WHARFAGE RATES (July 1, 2018)

DRAFT

Overseas includes Foreign & Domestic Cargo		Rates effective 2/1/2017			Rates effective 10/1/2017			Rates effective 7/1/2018 <sup>2</sup>		
		Overseas IN/OUT	Interisland IN/OUT	Interisland TRANS	Overseas IN/OUT	Interisland IN/OUT	Interisland TRANS	Overseas IN/OUT	Interisland IN/OUT	Interisland TRANS
Cargo	UNIT	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)	(\$)
Returnable empty bins, pallets and drums; NOS, per unit of 300 cu. ft. or fraction thereof	Each	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Returnable empty pineapple crates up to 1/2 ton	Each	N/A	0.00	0.00	N/A	0.00	0.00	N/A	0.00	0.00
Vehicles, empty, NOS including trucks and trailer trucks over 6,500 pounds, all tracked vehicles, all agricultural, construction, road- making and materials-handling equipment. Also include trailers and semi-trailers when manifested as cargo	Ton	4.63	3.90	3.90	5.32	4.49	4.49	6.12	5.16	5.16
Surcharge-Reefer	Each	3.85	3.85	3.85	3.85	3.85	3.85	3.85	3.85	3.85
Surcharge-CFS	Ton	1.76	N/A	N/A	1.76	N/A	N/A	1.76	N/A	N/A

<sup>1</sup> Rate applies only to outgoing overseas cargo

<sup>2</sup> The rates effective 7/1/2019 and thereafter, annual increases shall be 3% of the then prevailing rate or at the annual percentage increase of the Consumer Price Index (CPI), whichever is greater.

## EXHIBIT – PASSENGER FEES (July 1, 2018)

State of Hawaii Department of Transportation - Harbors Division  
Passenger Fees (§19-44-70)

# DRAFT

Port	Passenger Fee
Honolulu	15.00
Kalaeloa Barbers Point	8.00
Hilo	8.00
Kawaihae	8.00
Kahului	8.00
Kaunakakai	8.00
Kaumalapau	8.00
Nawiliwili	8.00
Port Allen	8.00

Passenger fees are charged per passenger upon port entry into each state commercial harbor. Passenger fees are charges on a per voyage or per itinerary basis, and will not be charged more than once if a vessel uses a state commercial harbor property or facility more than once on a single voyage or itinerary.

Effective July 1, 2018, facility cleaning costs will be covered by passenger fees and will not be separately charged to passenger vessels.

Each passenger vessel shall file a report with the department on a form provided by the department within fifteen days after the departure of the passenger vessel from the last state commercial harbor used by the vessel on that voyage or itinerary. All charges due shall be remitted along with the report.

**EXHIBIT – PORT ENTRY FEE SCHEDULE (July 1, 2018)**

State of Hawaii Department of Transportation - Harbors Division  
 Port Entry Fee Schedule (§19-44-92)

**DRAFT**

Vessel Length				Effective July 1, 2018		Effective July 1, 2019		Effective July 1, 2020		Effective July 1, 2021	
Greater than (feet)	Less than (feet)	Greater than (meters)	Less than (meters)	Honolulu or Kalaeloa Barbers Point Harbors	All Other Harbors	Honolulu or Kalaeloa Barbers Point Harbors	All Other Harbors	Honolulu or Kalaeloa Barbers Point Harbors	All Other Harbors	Honolulu or Kalaeloa Barbers Point Harbors	All Other Harbors
0	200	0.00	60.96	34.38	27.50	41.25	33.00	47.50	38.00	54.75	43.75
200	300	60.96	91.44	68.75	48.13	82.50	57.75	95.00	66.50	109.25	76.50
300	350	91.44	106.68	103.13	68.75	123.75	82.50	142.25	95.00	163.50	109.25
350	400	106.68	121.92	158.13	96.25	189.75	115.50	218.25	132.75	251.00	152.75
400	450	121.92	137.16	192.50	123.75	231.00	148.50	265.75	170.75	305.50	196.25
450	500	137.16	152.40	268.13	165.00	321.75	198.00	370.00	227.75	425.50	262.00
500	550	152.40	167.64	309.38	192.50	371.25	231.00	427.00	265.75	491.00	305.50
550	600	167.64	182.88	357.50	220.00	429.00	264.00	493.25	303.50	567.25	349.00
600	650	182.88	198.12	398.75	247.50	478.50	297.00	550.25	341.50	632.75	392.75
650	700	198.12	213.36	446.88	275.00	536.25	330.00	616.75	379.50	709.25	436.50
700	750	213.36	228.60	481.25	295.63	577.50	354.75	664.25	408.00	764.00	469.25
750	800	228.60	243.84	515.63	316.25	618.75	379.50	711.50	436.50	818.25	502.00
800	850	243.84	259.08	570.63	350.63	684.75	420.75	787.50	483.75	905.75	556.25
850	900	259.08	274.32	611.88	378.13	734.25	453.75	844.50	521.75	971.25	600.00
900+*		274.32+*		611.88+*	378.13+	734.25+	453.75+	844.50+	521.75+	971.25+*	600.00+*
				* - For vessels longer than 900 linear feet or 274.32 meters, the port entry rate for Honolulu and Kalaeloa Barbers Point Harbors is \$611.88 plus an additional \$2.13 per additional linear foot or fraction thereof (or \$7.00 per additional linear meter or fraction thereof), and the port entry rate for all other harbors is \$378.13 plus an additional \$1.52 per additional linear foot or fraction thereof (or \$5.00 per additional linear meter or fraction thereof).		* - For vessels longer than 900 linear feet or 274.32 meters, the port entry rate for Honolulu and Kalaeloa Barbers Point Harbors is \$734.25 plus an additional \$2.45 per additional linear foot or fraction thereof (or \$8.05 per additional linear meter or fraction thereof), and the port entry rate for all other harbors is \$453.75 plus an additional \$1.75 per additional linear foot or fraction thereof (or \$5.75 per additional linear meter or fraction thereof).		* - For vessels longer than 900 linear feet or 274.32 meters, the port entry rate for Honolulu and Kalaeloa Barbers Point Harbors is \$844.50 plus an additional \$2.82 per additional linear foot or fraction thereof (or \$9.25 per additional linear meter or fraction thereof), and the port entry rate for all other harbors is \$521.75 plus an additional \$2.01 per additional linear foot or fraction thereof (or \$6.60 per additional linear meter or fraction thereof).		* - For vessels longer than 900 linear feet or 274.32 meters, the port entry rate for Honolulu and Kalaeloa Barbers Point Harbors is \$844.50 plus an additional \$2.82 per additional linear foot or fraction thereof (or \$9.25 per additional linear meter or fraction thereof), and the port entry rate for all other harbors is \$521.75 plus an additional \$2.01 per additional linear foot or fraction thereof (or \$6.60 per additional linear meter or fraction thereof).	