



**DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT & TOURISM**

DEPT. COMM. NO. 113

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December 16, 2019

The Honorable Ronald D. Kouchi,
President and Members
of the Senate
Thirtieth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Scott K. Saiki,
Speaker and Members of the
House of Representatives
Thirtieth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

For your information and consideration, I am transmitting a copy of the 2019 Small Business Regulatory Review Board Annual Report, as required by Section 201M, Hawaii Revised Statutes. In accordance with Section 93-16, Hawaii Revised Statutes, I am also informing you that the report may be viewed electronically at:
<http://dbedt.hawaii.gov/overview/annual-reports-reports-to-the-legislature/>.

With aloha,

Mike McCartney

Enclosure

c: Legislative Reference Bureau



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

Results for Calendar Year 2019

**Recommendations and Review
of Administrative Rules, Legislation
and**

**Requests from Small Business Owners for Review
of Any Rule Adopted by a State Agency**

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

HAWAII SMALL BUSINESS REGULATORY REVIEW BOARD
ANNUAL REPORT SUMMARY 2019

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SECTION I



SMALL BUSINESS REGULATORY REVIEW BOARD

Department of Business, Economic Development & Tourism (DBEDT)
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David Y. Ige
Governor

MESSAGE FROM THE CHAIR

Michael McCartney
DBEDT Director

Members

Robert Cundiff
Chairperson
O'ahu

Garth Yamanaka
Vice Chairperson
Hawai'i

William Lydgate
2nd Vice Chairperson
Hawai'i
Kaua'i

Harris Nakamoto
O'ahu

Dr. Nancy
Atmospera-Walch
O'ahu

Mary Albitz
Maui

James (Kimo) Lee
Hawai'i

Jonathan Shick
O'ahu

Director, DBEDT
Voting Ex Officio



Robert Cundiff, Chair, 2019

We continue to have an outstanding team of volunteer board members who persevere toward our mission of enabling a regulatory environment that encourages and supports the vitality of small business in Hawaii. This year, we welcomed two new members on our team, Mr. James (Kimo) Lee from Hawaii County and Mr. Jonathan Shick from Oahu. In addition, member Garth Yamanaka was re-appointed for another four-year term.

On a more somber note, in June the board said good-bye to long-time member Anthony (Tony) Borge. Tony served on the board eight years and was the board's chair the last four of those years. I want to personally thank Tony for his energy and passion in leading Board discussion on a wide variety of business concerns, his attendance at the legislative hearings, and his dedicated commitment to the small business community.

On behalf of all the board members, I extend a big Mahalo to Governor David Ige, DBEDT's Director Mike McCartney and Deputy Director Randall Tanaka for their steadfast support of this Board. I also cannot miss out in thanking the State Legislature for its support, and to all those State and County Agencies that come before us each month to discuss proposed and amended regulations that have a potential to negatively impact small business.

Finally, a big Mahalo goes out to each board member who continues to donate unselfish hours and time away from their families and businesses to share their invaluable business knowledge to improve and enhance the growth and success of small businesses throughout the State of Hawaii.

OVERVIEW

The Small Business Regulatory Review Board is pleased to provide the Annual Report Summary for the period covering January through December 2019. Pursuant to the Hawaii Small Business Regulatory Flexibility Act, Chapter 201M, Hawaii Revised Statutes, the annual summary is based on the following:

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

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

ANNUAL SUMMARY

SMALL BUSINESS REGULATORY FLEXIBILITY ACT

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

(Appendix 1)

Statutorily, the Board is comprised of eleven members, ten current or former owners or officers of businesses from across the State, and the Director of Business, Economic Development, and Tourism (DBEDT), or the Director's designated representative who serves as an "ex officio" voting member. The Board is administratively attached to DBEDT and has responsibility for providing recommendations to State agencies on new and amended administrative rules that directly impact small business. The Board may also consider any request from small business owners for review of any rule proposed, amended, or adopted by a state agency and to make recommendations to the agency or the legislature regarding the need for a rule change or legislation. For requests regarding county rules, the board may make recommendations to the county council or the mayor for appropriate action.

Members volunteer their time performing outreach activities to small business organizations, such as the local Chambers of Commerce, and testifying on legislation. Statutorily, the Board may also solicit testimony from the public regarding any reports submitted to the Board by State departments.

As an effective means of rule review, each board member is assigned to one or more State department as a "discussion leader" and each neighbor island member is assigned to his or her own respective island.

Members are responsible for the initial review of the administrative rules of these departments and counties prior to consideration by the full Board. As of December 2019, the Board was operating with nine members.

ADMINISTRATIVE RULE REVIEW

During 2019, the Board reviewed and made recommendations on 47 new and amended rules to State and County Agencies, both pre- and post-public hearing.

Since its inception, the Board reviewed a total of 910 sets of proposed new and amended administrative rules. (Appendix 2)

Department / County	Chapter / Section Number	Title	Proceed to Public Hearing (Pre-Public Hearing)	Proceed to Adoption (Post Public Hearing)	Other Recommendation(s)
<i>Department of Agriculture – Title 4</i>	66	Pesticides		X	Prior to going to public hearing, the Board agreed to encourage the Department of Agriculture and the stakeholders to arrive at a mutually acceptable timeframe for the submission of a speaker’s biography and break-out presentation, under Section 4-66-60(c)(1), HRS, regarding continuing education requirements. After public hearing the board recommended that the rules be adopted.
<i>Department of Business, Economic Development & Tourism – Title 15</i>	37	Solar Water Heater Variance	X		
	120	Community-Based Economic Development Loan and Grants Program	X		
<i>Department of Commerce and Consumer Affairs – Title 16</i>	TBD	Corporate Governance Annual Disclosure	X		
	185	Annual Audited Financial Reporting	X		
<i>Department of Health – Title 11</i>	Repeal 200; New 200.1	Environmental Impact Statement Rules		X	
	5	Environmentally-Related Illness and Injury Reporting	X	X	
	218	Communication Access Services for Persons who are Deaf, Hard of Hearing, and Deaf/Blind	X		

	148.1	Certification of Adult Foster Homes	X		
	186	Certificate of Need Program		X	
	157	Examination and Immunization		X	
<i>Department of Labor & Industrial Relations – Title 12</i>	Subtitle 8, Part 10	Adoption: <ul style="list-style-type: none"> - Chapter 221.1 Existing Pressure Retaining Items - Chapter 222.1 Power Boilers - Chapter 223.1 Heating Boilers – Steam Heating Boilers, Hot Water Heating Boilers, Hot Water Supply boilers, and Potable Water Heater Amendment & Compilation: <ul style="list-style-type: none"> - Chapter 220 General Administrative and Legal Provisions Deletion: <ul style="list-style-type: none"> - Chapter 221 Existing and New Boilers and Pressure Vessels - Chapter 222 Power Boilers - Chapter 223 Heating Boilers - Chapter 224 Pressure Vessels Chapter 225 Pressure Systems	X	X	
<i>Department of Land & Natural Resources – Title 13</i>	Chapter 234	Ocean Recreation and Coastal Areas Part I Small Boat Harbors Section 26 Fees and Charges	X	X	
	Chapter 253	Part III Ocean Waters, Navigable Streams and Beaches Catamaran Registration Certificate, Other Registration, and Commercial Use Permit Fees	X	X	
	Chapter 256	Section 73, Kaneohe Bay Ocean Waters	X		
	Chapter 146	Section 6, Fees	X		
<i>Department of Taxation – Title 18</i>	Chapter 235	Income Tax Law Section 98, Returns; form, verification and authentication, time of filing		X	
		Section 1.14 (d) “Substantial gainful business or occupation”, defined		X	
	Chapter 237	General Excise Tax Section 29.57-01 Exemption for Intangible Property Used Outside the State		X	
	Chapter 231	Administration of Taxes Section 3-14.17, Revocation of licenses because of abandonment	X	X	
	Chapter 235	Income Tax Law Section 3-01, Distribution of credit for partnerships, S corporations, estates, and trusts	X	X	

	Chapter 235	Section 17-01 through 17-19, Motion picture digital media, and film production income tax credit	X	X	It was acknowledged that the rules were signed and adopted by the time they came in front of the Board. Therefore, timing concerns were voice by the Board along a request to delay the implementation of the rules and to address some of the concerns voiced by the stakeholders.
	Chapter 243	Fuel Tax Law Section 4-01, Refund of fuel taxes in excess of 1 cent per gallon for certain fuels used for operating agricultural equipment in areas other than upon the public highways of the State	X	X	
		Section 4-02, Refund of fuel tax on diesel oil and liquefied petroleum gas used for operating motor vehicles in areas other than upon the public highways of the State	X	X	
<i>University of Hawaii</i>		Rules of Practice and Procedure of the Kauai Historic Preservation Review Commission: I. General Provisions II. Organization & Parliamentary Rules Public Records, Inspection and Availability		X	
<i>County of Kauai</i>	Kauai County Code Section 18-65.3 Department of Public Works	New Revocable Permits to Vend within County Right-of-Ways		X	The Board accepted the rules as presented.
	Part IV	Rules and Regulations Governing Commercial Boating Activities at County Beach Parks	X	X	The Board moved the proposed administrative rule amendments onto the Mayor for adoption subject to any subsequent changes made by the County of Kauai's Planning Department.
<i>County of Maui</i>	Title 8 Chapter 101	Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui		X	
	Title 8 Chapter 101	Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui	X	X	
	Chapter 102	Rules Governing the Administrative Practices and Procedures of the Liquor Commission and Liquor Control Adjudication Board of the County of Maui	X	X	

LEGISLATIVE ACTIVITY

Since its inception, the Board has supported legislation by submitting testimony on bills of interest to small business. See “Legislative Review” at the end of the report for legislation the Board followed in 2019.

SMALL BUSINESS IMPACT STATEMENT *and* GOVERNOR’S ADMINISTRATIVE DIRECTIVE (AD) NO. 18-02

AD 18-02 was issued in 2018 to update the policy and procedures by which State departments and agencies request Governor’s approval for a public hearing of any proposed adoption, amendment, or repeal of administrative rules developed under Chapter 91, HRS. (Appendix 3).

Under Section 201M-2, HRS, State agencies wanting to adopt new or modified administrative rules that have an impact on small business are required to submit to the Board a small business impact statement showing the economic impact on those businesses.

CHAIRPERSON / BOARD MEMBERS

During 2019, members bid a fond farewell to Mr. Anthony (Tony) Borge, representing Oahu, and welcomed two new board members, Mr. Jonathan Shick and Mr. James (Kimo) Lee. In addition, Mr. Garth Yamanaka from Hawaii was re-appointed for another four-year term.

Under Section 201M-5 (c), “a majority of the board shall elect the chairperson. The chairperson shall serve a term of not more than one year, unless removed earlier by a two-thirds vote of all members to which the board is entitled.” The following elections were held at the June meeting:

- Chair - Robert Cundiff
- Vice Chair - Garth Yamanaka

- Second Vice Chair - William Lydgate

The Board member nomination process, under Section 201M-5, HRS, provides that “the Board shall consist of eleven members, who shall be appointed by the governor pursuant to section 26-34; provided that:

(1) Three members shall be appointed from a list of nominees submitted by the president of the senate;

(2) Three members shall be appointed from a list of nominees submitted by the speaker of the house of representatives;

(3) Two members shall be appointed from a list of nominees submitted by the board;

(4) Two members shall be appointed by the governor;

(5) The director of business, economic development, and tourism, or the director’s designated representative, shall serve as an ex officio voting member of the board;

(6) The appointments shall reflect representation of a variety of businesses in the State;

(7) No more than two members shall be representatives from the same type of business;

and

(8) There shall be at least one representative from each county.”

In addition, nominations shall be solicited from small business organizations, state and county chambers of commerce and other interested business and trade organizations. With the exception of the ex officio member, all members are either a current or former owner or officer of a business and shall not be an officer or employee of the federal, state, or county government.”

At the end of December 2019, the Board was comprised of the following nine (9) members:

- 1) Mary Albitz, Aloha Business Bitz, Inc. DBA Island Art Party, representing County of Maui
- 2) Dr. Nancy Atmospera-Walch, Advantage Health Care Provider, Inc., and AIM Health Institute, representing City and County of Honolulu
- 3) Robert Cundiff, representing City and County of Honolulu
- 4) James (Kimo) Lee, representing Hawaii County
- 5) William Lydgate, Steelgrass Farm, representing County of Kauai
- 6) Harris Nakamoto, representing City and County of Honolulu
- 7) Jonathan Shick, representing City and County of Honolulu
- 8) Garth Yamanaka, Yamanaka Enterprises, Inc., representing Hawaii County
- 9) Mark Ritchie, Business Support Program Manager, Business Development & Support Division, DBEDT, Voting Ex Officio Member

ACTIVITIES AND PROJECTS

The following activities and projects were accomplished in 2019:

- **Hawaii Small Business Conference** - sponsored by Maui Economic Development Board, on May 8 and 9, member Mary Albitz and DBEDT staff attended this well-received small business conference for outreach and educational purposes.
- **e-Newsletter** – The Board continues to send out monthly e-Newsletters to small business organizations, chambers of commerce, trade organizations and State Legislators.
- **Facebook, Twitter, Instagram** – In 2019, an Instagram account was created where, in addition to regularly sending out notices on Facebook and Twitter, board photographs and notices are sent out to enhance its outreach efforts. Effective December 31, 2019, the Board can proudly boast 12 Facebook Friends and 77 Followers on Twitter.

- **Website Development** – Approximately two years ago, the Board created an investigative taskforce to research revamping the Board’s website; subsequently, a budget was approved by DBEDT. Phases I and II of the website were completed, resulting in a brand, new “look and feel” to enhance upon the site’s user-friendly approach to assisting the small business community as well as the State and County departments. Go to sbrrb.hawaii.gov.

- **SBA Regulatory and Advocacy Introduction** – In June, Ms. Jane Sawyer, District Director, Hawaii District Office, U.S. Small Business Administration (SBA), introduced Ms. Marina De Wit, SBA’s Regional Advocate from the Office of Advocacy, to the Board. Office of Advocacy serves as an independent voice for small business within the federal government, as the watchdog for the Regulatory Flexibility Act, and as the source for small business statistics. Advocacy advances the views and concerns of small business before Congress, the White House, the federal agencies, the federal courts, and state policy makers.

- **Office Assistant III** – In 2019, the Board members welcomed Ms. Jet’aime Alcos as the new, permanent Office Assistant.

- **Articles and Press Releases**

- 1) On June 26, 2019, DBEDT distributed a press release entitled “*Small Business Regulatory Review Board Elects 2019 – 2020 Officers.*”
- 2) On July 1, 2019, *Pacific Business News* picked up the Board’s press release announcing the 2019 -2020 officers and published, “*Three Questions with the New Chairs of the Small Business Regulatory Review Board.*”
- 3) On September 20, 2019, DBEDT distributed a press release entitled “*Small Business Regulatory Review Board Launches New Website.*”

- 4) On September 21, 2019, *Pacific Business News* picked up the Board's press release announcing, "*Hawaii's Small Business Regulatory Review Board Launches New Website.*"
- 5) On September 29, 2019, *Hawaii Free Press* picked up the press release, "*Small Business Regulatory Review Board Launches New Website.*"

REQUESTS FROM SMALL BUSINESS FOR REVIEW
OF ANY RULE ADOPTED BY A STATE AGENCY
“REGULATION FOR REVIEW”

Under Section 201M-5, HRS, the following represents requests from small business owners for review of any rule adopted by a state agency and recommendations made by the Board to an agency.

1. In October 2018, Mr. Wesley Moore submitted a “regulation for review” for Section 13-231-50 through 70, regarding the existing permitting process and the limited number of permits for small businesses to grow and thrive in Hawaii.

Action: The board requested DLNR’s Division of Boating and Outdoor Recreation (DOBOR) to report back with any changes that may apply to satisfy Mr. Moore’s request such as: 1) A written response about the existing permitting process, and potential steps to undertake; a) Submitting a formal request to the Land Board for a change to the current Statute to provide for a “equitable, level playing field” for all new and existing small businesses desiring to obtain the limited permits issued per location; b) Steps to take if a current permit holder is “sitting” on the permit and not fulfilling the performance requirements set forth in the existing rules; and 2) Additional options Mr. Moore may have to obtain a permit;

Result: On January 9, 2019, DLNR’s DOBOR responded that the concern of the permitting process and the steps to take towards amending HAR provisions and increasing or removing CUP limits will require an amendment to Hawaii Administrative Rules (HAR). DLNR suggested that pursuant to HAR§ 13-1-26(a), Mr. Moore may petition the Board of Land and Natural Resources (BLNR) to begin the amendment

process for HAR Chapter 13-231, the HAR chapter containing the CUP limits. Further, it if Mr. Moore submits a rule amendment petition, he must comply with the requirements of HAR § 13-1-26(b), as follows:

Petitions for proposed rulemaking shall set forth the text of any proposed rule or amendment desired or specifying the rule the repeal of which is desired and stating concisely the nature of the petitioner's interest in the subject matter and the reasons for seeking the adoption, amendment, or repeal of the rule and shall include any facts, views, arguments, and data deemed relevant by petitioner. The board may require the petitioner to notify persons or governmental agencies known to be interested in the proposed rulemaking of the existence of the filed petitions. No request for the issuance, amendment, or repeal of a rule which does not conform to the requirements set forth above shall be considered by the board.

Additionally, DOBOR staff will consider potential natural resource impacts and testimony from all stakeholder groups. The current permit count for the Keauhou boat launching ramp is already higher than HAR limits, and therefore already over capacity, as some operators obtained their CUPs before the limits were implemented. Commercial operators must renew their CUPs once per year, at which time DOBOR staff will evaluate the operator for any violations. Pursuant to HAR§ 13-231-61 (a), commercial operators must maintain a minimum level of gross revenues derived from the vessel named in a CUP to remain eligible to renew their CUP. CUPs also specify the accepted method for reporting gross revenues to DOBOR. Any operators who may be "sitting on" a CUP would likely improperly report gross revenues and not meet the gross revenue minimum, in turn losing their permit.

Further, DOBOR's Auditor conducts random audits of commercial operators to ensure compliance with gross revenue requirements. If an operator commits violations, including state law and/or administrative rules, DOBOR staff will take one of two options, both of which result in the operator losing their CUP: 1) DOBOR staff will not renew the operator's CUP and the permit expires; and/or 2) DOBOR staff will request DLNR to immediately revoke the operator's CUP.

Mr. Moore's additional options are to: 1) sign up on the CUP waitlist or 2) purchase a company holding a CUP. If a commercial operator is suspected of "sitting on" a permit or is otherwise violating HRS or HAR restrictions, DOBOR will recommend the Division of Conservation and Resources Enforcement be contacted immediately.

2. In February 2019, Mr. Keller Laros from Manta Pacific Research Foundation, submitted a "regulation for review" requesting proposed new rules and regulations for "crafting safe and sustainable, commercial manta ray viewing procedures for manta ray snorkel and dive sites, under DLNR's DOBOR."

Action: In March, the Board met with DOBOR representatives and discussed limitations on commercial operators, safety and accessibility of ocean guests, and reasons for the delay in promulgating the administrative rules. The Board encouraged Mr. Laros to continue providing input to DOBOR and requested DOBOR work with Mr. Laros and others to amend and clarify the draft rules to allow for protection of manta rays and guests.

Result: It was agreed that this Board will monitor DOBOR's progress on these rules with the knowledge that absent receiving sufficient funding from the State Legislature,

DOBOR is subject to approvals from the State's Attorney General's Office and BLNR prior to bringing the rules back to the Board and prior to public hearings.

3. In May 2019, Mr. Alton Miyasaka, submitted a "regulation for review" requesting the Board review whether all bottomfish restricted fishing areas should be opened and/or disestablished under HAR Title 13 Chapter 94, Bottomfish Management.

Action: The Board sent a letter to DLNR/BLNR suggesting that a periodic review be performed for HAR Section 13-94(8)(d), Bottomfish restricted fishing areas and for the conservation areas under "Exhibit A: Bottomfish Restricted Fishing Areas (BRFAs) 4-8-2010" to determine how the restrictions may be less burdensome on small business.

Result: Correspondence from DLNR was received by the Board stating, "pending careful monitoring over time of the impact of opening up four BRFAs on bottomfish stocks, both site-based and fisher-based, and the economics of the deep-7 bottomfish fisher, the judicious approach is to open these four, not all twelve, BRFAs at this time." In August, the Board reviewed DLNR's response and in September a letter was sent to Mr. Miyasaka describing DLNR's response, suggesting that Mr. Miyasaka continue to gather additional facts and data to support discussions with DLNR.

SECTION II

LEGISLATIVE REVIEW

The Board submitted testimony on the following measures during the 2019 legislative session.

1. House Bill 539 – Related to the Small Business Regulatory Review Board

Background: This measure appropriates for staffing, commissioner inter-island travel, and other related operating expenses associated with the small business regulatory review board under the Department of Business, Economic Development and Tourism.

Recommendation: The Board supported this measure.

Result: The measure was deferred.

2. Senate Bill 1348 SD1 HD1 CD1– Relating to the Small Business Regulatory Review Board

Background: This measure clarifies the intent of the small business regulatory review board’s powers when reviewing state and county administrative rules that impact small business by changing “ordinance” to “rules” when making recommendations to the county council or the mayor for appropriate action. SD1 version modified the section by adding, “For requests regarding county ordinances or rules, the board may make recommendations to the county council or the mayor for appropriate action.”

SD1 HD1 added an appropriation for an undisclosed amount “or so much there of as may be necessary for fiscal year 2019-2020 for the operations and administration of the small business regulatory review board.”

Recommendation: Throughout the legislative session, the Board supported this measure but preferred the original House version, which deleted “ordinances” from the statute.

Result: The final version, which excluded an appropriation, was passed under Act 247, Sessions Law Hawaii 2019.

3. Governor’s Message 559 – Submitting for Consideration for the Gubernatorial Nomination of Mr. Jonathan Shick to the Small Business Regulatory Review Board for a term to expire June 30, 2020

Background: This measure was submitted for consideration of Mr. Jonathan Shick to the Small Business Regulatory Review Board for a term to expire June 30, 2022.

Recommendation: The Board strongly supported the measure.

Result: On April 12, 2019, the Senate’s “advise and consent” was affirmed.

4. Governor’s Message 624 – Submitting for Consideration for the Gubernatorial Nomination of Mr. James Lee to the Small Business Regulatory Review Board for a term to expire June 30, 2020

Background: This measure was submitted for consideration of Mr. James Lee to the Small Business Regulatory Review Board for a term to expire June 30, 2023.

Recommendation: The Board strongly supported the measure.

Result: On April 12, 2019, the Senate’s “advise and consent” was affirmed.

5. Governor’s Message 625 – Submitting for Consideration for the Gubernatorial Nomination of Mr. Garth Yamanaka to the Small Business Regulatory Review Board for a term to expire June 30, 2023

Background: This measure was submitted for consideration of Mr. Garth Yamanaka to the Small Business Regulatory Review Board for a term to expire June 30, 2023.

Recommendation: The Board strongly supported this measure.

Result: On April 12, 2019, the Senate’s “advise and consent” was affirmed.

Appendix

1. Chapter 201M, Hawaii Revised Statutes
2. Administrative Rules Reviewed Matrix
3. Administrative Directive No. 18-02

1. Chapter 201M, Hawaii Revised Statutes

CHAPTER 201M

SMALL BUSINESS REGULATORY FLEXIBILITY ACT

Section

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

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

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

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

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

"Board" means the small business regulatory review board.

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

"Small business" means a for-profit corporation, limited liability company, partnership, limited partnership, sole proprietorship, or other legal entity that:

- (1) Is domiciled and authorized to do business in Hawaii;
- (2) Is independently owned and operated; and
- (3) Employs fewer than one hundred full-time or part-time employees in Hawaii. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §§2, 5; am L 2007, c 217, §2]

§201M-2 Determination of small business impact; small business impact statement. (a) Prior to submitting proposed rules for adoption, amendment, or repeal under section 91-3, the agency shall determine whether the proposed rules affect small business, and if so, the availability and practicability of less

restrictive alternatives that could be implemented. This section shall not apply to emergency rulemaking.

(b) If the proposed rules affect small business, the agency shall consider creative, innovative, or flexible methods of compliance for small businesses and prepare a small business impact statement to be submitted with the proposed rules to the departmental advisory committee on small business and the board when the rules are essentially complete and before the rules are submitted to the governor for approval for public hearing. The statement shall provide a reasonable determination of the following:

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

(c) When a proposed rule includes provisions that are more stringent than those mandated by any comparable or related federal, state, or county standards, the agency shall, in

addition to the information required by subsection (b), include in the small business impact statement information comparing the costs and benefits of the standard set by the proposed rule to the costs and benefits of the standard under the comparable or related federal, state or county law. The agency shall also include an explanation of its decision to impose the higher standard. The agency's comparison and justification shall include:

- (1) A description of the public purposes to be served by imposing the standard under the proposed rule;
- (2) The text of the related federal, state, or county law, including information about the purposes and applicability of the law;
- (3) A comparison between the proposed rule and the related federal, state, or county law, including a comparison of their purposes and of the standards and their application and administration;
- (4) A comparison of the monetary costs and benefits to the implementing agency and other agencies directly affected, of imposing the proposed standard, with the costs and benefits of imposing or deferring to the related federal, state or county standard, as well as a description of the manner in which any additional fees derived from imposition of the proposed standard are to be used; and
- (5) A comparison of the adverse effects on small businesses of the standard imposed by the proposed rule, with the adverse effects on small business of the related federal, state, or county standard.

(d) This chapter shall not apply to proposed rules adopted by an agency to implement a statute or ordinance that does not require an agency to interpret or describe the requirements of the statute or ordinance, such as federally-mandated regulations that afford the agency no discretion to consider less restrictive alternatives. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5; am L 2007, c 217, §3; am L 2008, c230, §3]

§201M-3 Small business statement after public hearing. (a) For any proposed rule that affects small business, the agency shall also submit a small business statement to the small business regulatory review board and the departmental advisory committee on small business after the public hearing is held. This section shall not apply to emergency rules. The small business statement required by this section shall provide the following information:

- (1) A description of how opinions or comments from affected small business were solicited, a summary of the public and small business comments, and a summary of the agency's response to those comments;
- (2) The number of persons who:
 - (A) Attended the public hearing;
 - (B) Testified at the hearing; and
 - (C) Submitted written comments; and
- (3) If there was a request to change the proposed rule at the hearing in a way that affected small business, a statement of the reasons for adopting the proposed rule, the reason why a requested change was not made, and the problems or negative result the change would provide if adopted.

(b) If the small business regulatory review board finds that a statement provided pursuant to subsection (a) (3):

- (1) Indicates inconsistency with any of the agency's determinations under section 201M-2(b); or
- (2) Does not address the concerns of public input, the board with good cause may request a written response from the agency explaining the rationale used to deny the public concerns within ten working days of receipt of the small business statement after public hearing. The agency shall respond in writing to the board's concerns within ten working days.

(c) The written response from an agency required in subsection (b), at a minimum, shall:

- (1) Specifically address each issue and concern raised in the board's request for a written response; and
- (2) Affirmatively state that the agency has considered all written and oral testimony received at the agency's public hearing and has addressed all issues or concerns raised in the written or oral testimony. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5; am L 2012, c 241, §2]

[\$201M-4] Advisory committee on small business; consultation process for proposed rules. (a) There may be established within and administratively attached to every department of the State or county whose rules affect small business activities, an advisory committee on small business. The advisory committee shall consist of three or more odd number of members appointed by the department and may advise more than one department. The department shall have the authority to appoint members to the advisory committee and to fill any vacancies. The members shall serve on a volunteer basis and have experience or knowledge of the effect of

regulation by those departments on the formation, operation, or expansion of a small business. No person shall serve on the small business regulatory review board and an advisory committee on small business concurrently. The advisory committees shall not be subject to the requirements of chapter 91.

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

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

§201M-5 Small business regulatory review board; powers. (a) There shall be established within the department of business, economic development, and tourism, for administrative purposes, a small business regulatory review board to review any proposed new or amended rule. If the board determines that a proposed rule will not have a significant economic impact on a substantial number of small businesses, the board shall submit a statement to that effect to the agency that sets forth the reason for the board's decision. If the board determines that the proposed rule will have a significant economic impact on a substantial number of small businesses, the board may submit to the agency suggested changes in the proposed rule to minimize the economic impact of the proposed rule, or may recommend the withdrawal of the proposed rule. The board may also consider any request from small business owners for review of any rule proposed, amended or adopted by a state agency and to make recommendations to the agency or the legislature regarding the need for a rule change or legislation. For requests regarding county rules, the board may make recommendations to the county council or the mayor for appropriate action.

(b) The board shall consist of eleven members, who shall be appointed by the governor pursuant to section 26-34; provided that:

- (1) Three members shall be appointed from a list of nominees submitted by the president of the senate;
- (2) Three members shall be appointed from a list of nominees submitted by the speaker of the house of representatives;
- (3) Two members shall be appointed from a list of nominees submitted by the board;
- (4) Two members shall be appointed by the governor;
- (5) The director of business, economic development, and tourism, or the director's designated representative, shall serve as an ex officio voting members of the board;
- (6) The appointments shall reflect representation of a variety of businesses in the State;
- (6) No more than two members shall be representative from the same type of business; and
- (8) There shall be at least one representative from each county. For purposes of paragraphs (1) and (2),

nominations shall be solicited from small business organizations, state and county chambers of commerce, and other interested business organizations.

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

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

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

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

(f) The board shall submit an annual report to the legislature twenty days prior to each regular session detailing any requests from small business owners for review of any rule

adopted by a state agency, and any recommendations made by the board to an agency or the legislature regarding the need for a rule change or legislation. The report shall also contain a summary of the comments made by the board to agencies regarding its review of proposed new or amended rules. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §§3, 5; am L 2007, c 217, §4; am L 2012, c 241, §3]

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

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

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

the adoption, amendment, or repeal of a rule, it may initiate proceedings in accordance with section 91-3.

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

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

(d) If the board recommends that an agency initiate rulemaking proceedings for any reason provided in subsection (c), it shall submit to the legislature an evaluation report and the agency's response as provided in subsection (b). The legislature may subsequently take any action in response to the evaluation report and the agency's response as it finds appropriate.

(e) If the board does not recommend that an agency initiate rulemaking proceedings, the board shall notify the small business of its decision and inform the small business that the small business may submit a complaint to the ombudsman pursuant to chapter 96 regarding the decision of the agency or board.

(f) Nothing in this section shall entitle an affected small business to a contested case hearing under chapter 91. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5; am L 2007, c 217, §5]

§201M-7 Periodic review; evaluation report. (a) Each agency having rules that affect small business shall submit to the board by June 30 of each odd-numbered year, a list of those rules and a report describing the specific public purpose or interest for adopting the respective rules that affect small business and any other reasons to justify continue implementation of the rules; provided that, by June 30 of each year, each agency shall submit to the board a list of any rules to be amended or repealed, based upon any new, amended, or repealed statute that impacts small business.

(b) The 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 legislature each even-numbered year. The evaluation report shall include an assessment as to whether the public interest significantly outweighs a rule's effect on small business and any legislative proposal to eliminate or reduce the effect on small business. The legislature may take any action in response to the report as it finds appropriate. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5; am L 2007, c 217, §6; am L 2012, c 241, §4]

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

- (1) The small business corrects the violation within a minimum of thirty days after receipt of a notice of violation or citation; and
 - (2) The violation was unintentional or the result of excusable neglect; or
 - (3) The violation was the result of an excusable misunderstanding of an agency's interpretation of a rule.
- (b) Subsection (a) shall not apply:
- (1) When a small business fails to exercise good faith in complying with the statute or rules;
 - (2) When a violation involves willful or criminal conduct;
 - (3) When a violation results in serious health and safety impacts;
 - (4) To violations of chapters 6E, 180, 180C, 181, 182, 183, 183C, 183D, 186, 187A, 188, 188F, 189, 190, 190D, 195, 195D, 195F, 205, 205A, 340A, 340E, 341, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P;
 - (5) To violations of sections 200-9(b) and (c), 200-24(4), 200-37, and 200-38; or
 - (6) To violations of administrative rules promulgated pursuant to section 200-4(6); except for rules pertaining to matters listed in section 200-4(6) (A), (B), (C), and (D).
- (c) An agency may adopt rules to implement the requirements of this section. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5; am L 2004, c 206, §1]

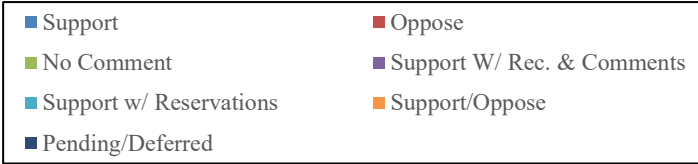
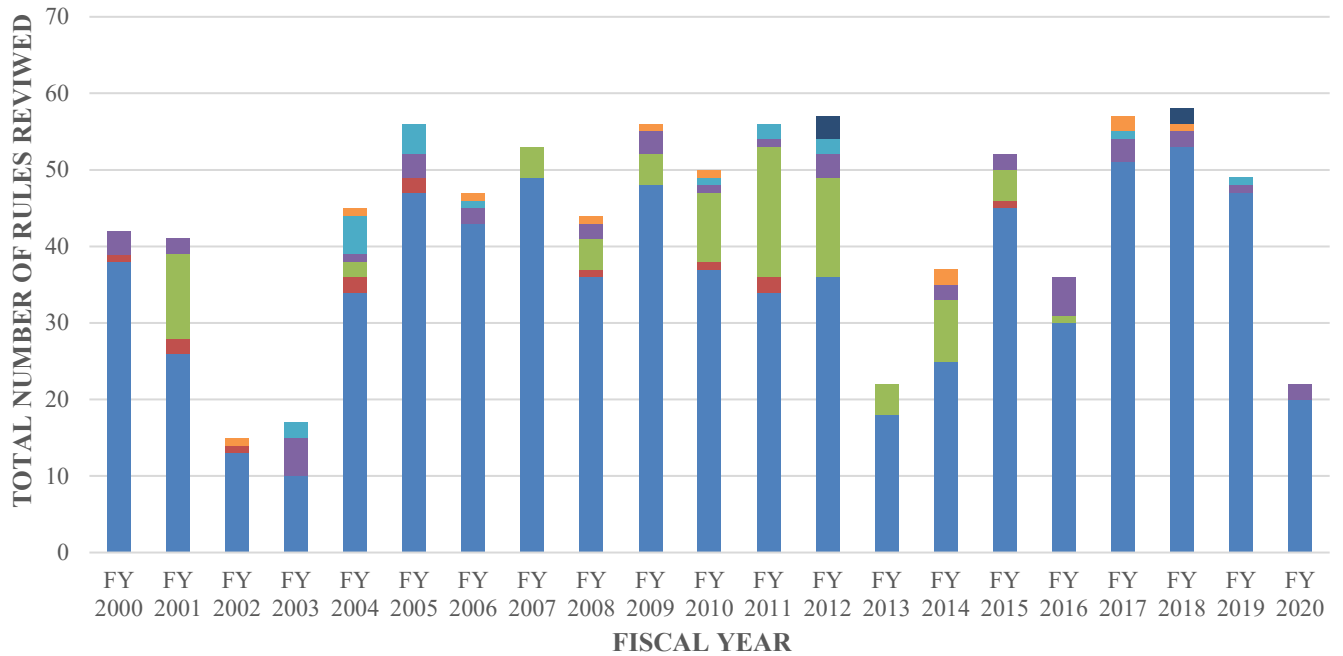
[\$201M-9] Executive order. The governor may execute any executive order, memorandum, or directive necessary to implement any provision of this chapter. [L 1998, c 168, pt of §2, §5; am L 2002, c 202, §5]

2. Administrative Rule Review

2019 Administrative Rule Review

	Month/Year	Support	Oppose	No Comment/ No Action	Support W/ Rec. & Comments	Support w/ Reservations	Support/ Oppose	Pending/ Deferred
FY 2000 to FY 2018		673	13	81	41	20	11	5
FY 2019	Jul-18	3						
	Aug-18	3						
	Sep-18	3						
	Oct-18	6						
	Nov-18	NA						
	Dec-18	5			1	1		
FY 2019	Jan-19	3						
	Feb-19	0						
	Mar-19	4						
	Apr-19	5						
	May-19	5						
	Jun-19	10						
FY 2020	Jul -19	3						
	Aug-19	4						
	Sep-19	4						
	Oct-19	2			1			
	Nov-19	7			1			
	Dec-19	NA						
	Total	910	13	81	44	21	11	0

Administrative Rule Review Matrix



3. Administrative Directive No. 18-02



EXECUTIVE CHAMBERS
HONOLULU

DAVID IGE
GOVERNOR

January 1, 2018

ADMINISTRATIVE DIRECTIVE NO. 18-02

To: Department Directors

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

This administrative directive updates the policy and procedure by which departments or agencies shall request executive approval of any proposed adoption, amendment, or repeal of administrative rules. It replaces Administrative Directive No. 09-01, Policy and Procedure for the Adoption, Amendment, or Repeal of Administrative Rules, dated October 29, 2009.

Legal References:

1. Hawaii Revised Statutes Chapter 91
2. Hawaii Revised Statutes Chapter 201M, the "Hawaii Small Business Regulatory Flexibility Act," requires that if a proposed rule "affects small business," the department or agency shall submit a "small business impact statement" and a "small business statement" to the Small Business Regulatory Review Board. Chapter 201M does not apply to emergency rulemaking or rules adopted to comply with a federal requirement.

Policy:

1. All requests regarding Hawaii Administrative Rules must be submitted through Hawaii Administrative Rules Processing Site (HARPS).

<https://hawaiiomt.sharepoint.com/sites/gov/adminrules/>

Prior to all submittals, the department must obtain the Attorney General's approval "as to form".

2. Small Business Regulatory Flexibility Act

In accordance with Chapter 201M, the department must complete the following steps before submitting a request to conduct public hearing if the proposed rule affects small business:

- a. Complete Small Business Impact Statement
 - i. See HRS Section 201M-2
- b. Submit Small Business Impact Statement and proposed rules to the Small Business Regulatory Review Board

3. Public Hearing Approval

In the request to conduct public hearing, the department will provide response to the following:

- a. Summary of changes
 - i. Why is this section of Hawaii Administrative Rules being amended?
 - ii. What problem is the rule change meant to solve?
 - iii. List all changes that are being made.
- b. Impact of changes
 - i. How does this rule change address the problem?
 - ii. Who are the stakeholders? Positive and negative.
 - iii. What are the potential problems with the rule change?
 - iv. What is the fiscal impact?
 - v. What is the economic impact to the State?
- c. Consequences if changes are not made
 - i. What are the consequences if the rule change does not get adopted, amended or repealed?

4. Public Hearings

Upon approval of public hearing request, the department must enter all public hearing dates, times, and locations into HARPS.

- a. The department must be considerate of all parties being affected and schedule public hearings to allow for adequate feedback.
- b. The department must accept written testimony from all parties who are unable to attend the public hearing.
- c. The department will be responsible for transcribing the testimony from the public hearing into a public hearing summary document that will be required upon submittal of Final Rule.

5. Final Rule

In the request for approval of Final Rule, the department will provide response to the following:

- a. Changes in Final Rule
 - i. What changes were made in the Final Rule?
 - ii. Why were these changes made?
- b. Other
 - i. Describe how the department has worked with stakeholders to gain support for the rule?
 - ii. Have potential problems been addressed? Do the same problems exist with the Final Rule?
 - iii. Does the Office of the Governor staff need to meet with any people/organizations before the Governor signs this Final Rule?

6. Filing of Final Rule

Upon approval of Final Rule through HARPS, the Department will send 3 hard copies to Office of the Governor. When approved, these copies will be filed with the Office of the Lieutenant Governor. Rule will take effect 10 days after filing.

7. Department of Budget and Finance (BUF) and Department of Business, Economic Development and Tourism (BED)

BUF and BED will receive electronic notification upon submittal of public hearing request. Both departments will have the ability to submit comments and concerns through HARPS. Response will be due 10 business days after Final Rule is submitted. Comments will be optional unless the following applies:

- a. BUF will be required to provide response if the proposed rule has fees or other fiscal impacts.
- b. BED will be required to provide response if the proposed rule has economic impact or affects small business.



Department of Business, Economic Development & Tourism
Small Business Regulatory Review Board

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