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Testimony of the Department of Commerce and Consumer Affairs

Before the
Senate Committee on Commerce and Consumer Protection
Monday, February 10, 2025
9:35 a.m.
Via Videoconference

On the following measure:
S.B. 1213, RELATING TO ELECTRONIC SERVICE OF PROCESS

Chair Keohokalole and Members of the Committee:

My name is Ty Nohara, and I am the Commissioner of Securities and head of the Department of Commerce and Consumer Affairs' Business Registration Division (BREG). BREG offers comments on this bill.

The purpose of this bill is to allow certain business entities that are required to continuously maintain a registered agent in the State to instead designate a registered email address to accept service of process in lieu of a registered agent. This bill adds new sections to Hawaii Revised Statutes (HRS) chapters 414, 414D, 425, 425E, and 428 that state that a registered email address designated by an entity may serve as the entity's registered agent.

BREG has the following comments and concerns:

1. As an initial matter, service of process is not limited to a registered agent.

Depending on the type of business entity, process may be served upon an officer, director, manager, partner, general partner, member, superintendent,

- or any person in the State who is found in charge of the entity's property, business, or office.
2. HRS chapter 425R sets forth the requirements for, and the duties of, registered agents. Under this chapter, an entity may appoint as its registered agent any person, including one who holds any of the foregoing offices or titles with that entity, as long as the individual resides in and has a physical address in the State.
 3. Hawaii court rules and the HRS require service of process through personal service upon an individual, which includes an agent of a business entity. Where personal service is shown to be unsuccessful, a court may allow alternative means of service, such as by registered or certified mail, and if that is unsuccessful, then by publication of a legal notice in a newspaper having a general circulation in the State. This bill would create an exception to the court rules and statutes that currently apply to all defendants and respondents, by allowing only corporations, partnerships, and limited liability companies to be served with process by email, as a matter of course, and without first obtaining court authorization.
 4. Consequently, the Hawaii court rules may need to be amended to reflect this exception to the service of process requirements. The HRS will also need to be amended, which would include the current provisions in HRS chapters 414, 414D, 425, 425E, and 428 pertaining to service of process on business entities, as well as HRS chapters 425R and 634.
 5. S.B. 1213 also raises practical considerations:
 - a. This bill does not define "successful transmission," and without a definition, it is unclear as to how that may be determined and confirmed. For example, is a delivery receipt required? Or is the absence of an "undeliverable" email in response sufficient?
 - b. Will an email that is delivered to a registered email address' spam or junk folder, without the knowledge of the sender or the recipient, be deemed a "successful transmission"? Such a situation may lead to

untimely notice to the recipient, which may raise due process concerns, and also create disputes as to whether and when service of process was properly effected.

- c. Would the email and/or any documents attached to the email need to be encrypted or otherwise secured?
 - d. What information will the courts, or agencies in an administrative proceeding, require to be submitted as evidence that proper and timely service was made to the entity's registered email address?
6. There are no states that currently allow a business entity to be served with process by email in the regular course, and in lieu of a registered agent.
7. Finally, while the express purpose of this bill is simply to permit service of process upon certain entities by email, the bill, as currently worded, does not limit the registered email address' role to such, but provides that a registered email address can serve as the entity's registered agent. Such a broad statement may mislead and create confusion.

Thank you for the opportunity to testify on this bill.



National Public Record Research Association

183 Wind Chime Court, Suite 203
Raleigh, North Carolina 27615

Submitted Electronically

Greetings Senator Jarrett Keohokalole and committee members,

Thank you for the opportunity to submit written testimony on Senate Bill 1213, the Electronic Service of Process Bill.

I submit this written testimony on behalf of the National Public Records Research Association (NPRRA), of which I am the current Chair of its Government Affairs Committee. NPRRA is the premier industry association for businesses engaged in the public record and corporate services industry, comprised of 135 member companies, including several commercial registered agent service companies and other companies engaged in public record filing and retrieval services. Together, NPRRA's members provide millions of business entities with registered agent services and/or assistance with submitting business entity filings to the offices of the secretaries of state and other similar offices in the 50 states and the District of Columbia.

NPRRA strongly opposes Senate Bill 1213 for the following reasons:

1). A method of service of process must comport with constitutional notions of due process and must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950) (Jackson, J.). If Hawaii's entities consent to being served by this method, they will be waiving the due process rights they are entitled to, and may be doing so without even realizing they are waiving these important rights. Email is not a secure, reliable method for service of process and does not meet the requirements set forth in *Mullane*. Regular email does not provide for encryption or any protection from phishing and other malware. Emails from unfamiliar senders are often ignored or deleted by recipients. Frequently, such emails are trapped in spam filters where the recipient may never see them or will not see them until days after they were sent. Further, regular email does not provide any method to confirm that a human being opened and read the email.

2). Federal and state courts throughout the nation generally only allow for electronic service of initial process (such as summonses and complaints) via court order, typically because the defendant is evading service. (See, *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007 (9th Cir. 2002)). Additionally, the E-Filing Committee of the American Bar Association emphasizes in its Best Practices for Electronic Service of Process that regular email is not a reliable method for service of process.

3). Allowing businesses to provide an email address for service of process in lieu of appointing and maintaining a registered agent within the State of Hawaii puts business defendants at a significant risk for increased default judgments due to service getting stuck in spam filters, being inadvertently deleted, not going to the right contact person or the correct email address, or simply sitting in an in-box and never being read. A substantial increase in default judgments will result in the courts becoming inundated with motions to overturn them. Courts favor judgments on the merits over default judgments for public policy reasons, but will likely have no choice but to uphold many default judgments if the law is changed to allow for service of process via email.

4). The email address given by a business for receiving email service of process will be on the public record, making the business a target for both viruses and spam. In addition to being vulnerable to security risks from opening attachments posing as service, email recipients will also likely be bombarded with ads, solicitations, and complaints. Assuming the email happens to make it through the spam filter, this will waste time and cause confusion, increasing the likelihood that actual service will be missed, resulting in default judgments.

5). The Hawaii Department of Commerce and Consumer Affairs (DCCA) will almost certainly be flooded with calls and complaints. Plaintiffs will likely call the DCCA each time they encounter an invalid email address hindering their ability to serve process, which will likely happen often. And defendants will likely call the DCCA to complain that they never received the process. Additionally, businesses will be at much greater risk of not receiving important tax and other official notices, which will also increase calls to the DCCA.

Such added burdens to the courts and the DCCA will be detrimental to businesses and consumers, as it will drain time and resources unnecessarily.

6). Moreover, consumers will have less protection from unscrupulous business practices. Allowing businesses to provide an email address for service of process would make it easy for businesses to evade service of process by frequently changing their email address.

7). Finally, commercial registered agents (i.e., those that are in the business of offering registered agent services) play a vital role for businesses. They are required by law to have offices within the State that are open within prescribed times to receive service of process on behalf of the businesses they represent. They timely forward process to those businesses according to specific delivery instructions and confirm delivery to ensure that process gets to the right person within the company to avoid default judgments. Additionally, they assist in keeping businesses compliant and in good standing by forwarding important tax notices, annual report reminders and other official documents. These agents also participate in Hawaii commerce as employers of local Hawaii residents. If a business does not wish to pay for registered agent services, it can appoint certain individuals within the company as its registered agent. This is a safer and more reliable alternative than allowing for an email address for service in lieu of requiring a business to appoint and maintain a registered agent within the State.

For the foregoing reasons, NPRRA urges this committee to vote against Senate Bill 1213. Better and much safer alternatives already exist under current law as described in #2 (alternative service via court order) and #7 (appointing an authorized individual within the company as its registered agent if the company does not wish to pay for a commercial registered agent's services).

Respectfully,

A handwritten signature in black ink, appearing to read "Alan Stachura", with a long horizontal flourish extending to the right.

Alan Stachura
Chair – Government Affairs Committee
(ON BEHALF OF THE MEMBERSHIP)
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Opposition Statement to Legislation Permitting Electronic Service of Process in Hawaii

Chairman Keohokalole, Vice Chair Fukunaga, and members of the Senate Committee on Commerce and Consumer Protection, thank you for the opportunity to submit written testimony in opposition of Senate Bill 1213.

I respectfully submit this opposition to the proposed legislation that seeks to permit businesses in the state to designate an email address to accept service of process in lieu of continuously maintaining a registered agent in the state. I believe this legislation could lead to significant complications, especially concerning the reliability and security of electronic communication as compared to traditional service methods.

I am the Director of Product Counsel at LegalZoom, an online legal services company that offers a variety of services, including in the areas of business formations, estate planning and intellectual property protection. Additionally, we have helped our customers form over 4 million businesses in the United States, serving as the registered agent for many of those entities. We currently serve as the registered agent for 4,464 active entities in Hawaii.

I joined LegalZoom last year after spending 16 years at the Ohio Secretary of State's office. I began my career there as an attorney for the Business Services Division and most recently served as the Assistant Secretary of State and Director of Business Services. With my background and experience, I have a deep understanding of the critical role registered agents play in ensuring government offices can rely on them to effectively communicate important information to business entities within the state.

Role of a Registered Agent

A registered agent plays a vital role in ensuring the success and compliance of a business. Acting as an official point of contact within a state, a registered agent is either an individual or a company designated by the business to handle important communications. The registered agent is responsible for receiving service of process, government correspondence, and official notices on behalf of the business, then forwarding these documents promptly to the company.

By managing these critical communications, a registered agent helps businesses remain in compliance with state regulations, preventing penalties due to missed notices. In the event of a lawsuit, the registered agent receives legal documents on behalf of the business, ensuring timely notification and preventing default judgments.

Hawaii has adopted similar requirements for registered agents as described in the Model Registered Agents Act (MoRAA). These standards ensure that registered agents are fulfilling their duties effectively and responsibly.

Lack of Reliability and Security of Electronic Communications

While email and other forms of electronic communication have become a common way to interact in business and personal use, they do not offer the same level of reliability as in-person delivery or certified mail. The service of process is a fundamental step in legal procedures, ensuring that individuals and businesses are notified of legal actions against.

Emails can be lost in spam filters, overlooked by recipients, or caught up in technical failures. Furthermore, relying solely on email as a means of service does not ensure that the intended recipient has received or seen the notice. With in-person delivery or certified mail, there are clear mechanisms for tracking and confirming receipt, reducing the potential for disputes regarding proper service. Electronic service, on the other hand, does not guarantee that the recipient is aware of the service, which could delay important legal proceedings or result in unintentional forfeiture of rights due to lack of proper notice.

Potential for Fraudulent Practices

In today's digital age, cyber security risks and phishing attempts pose significant threats to individuals and business entities. Unlike in-person service of process or certified mail, electronic communication can be intercepted or altered by malicious actors, creating opportunities for fraud. This could result in important legal notices never reaching their intended recipients or being falsified to mislead parties about whether proper service has been made.

Allowing service of process by email opens up another avenue for phishing attacks. If an email address is used as a registered agent, business owners may be forced to open every incoming email, even suspicious ones. Phishers can target registered agent email addresses, putting business owners—many of whom lack the technical resources or sophisticated security systems—in a more vulnerable position. Small business owners, in particular, may lack the knowledge or expertise to assess the security risks of using an email address as a registered agent compared to traditional services.

Although this is a topic that has been discussed for years, phishing emails continue to harm individuals and organizations. "Phishing is one of the most dangerous attacks targeting individuals, organizations, and nations."¹ As phishing attackers become more sophisticated, small business owners are at risk of data breaches, financial loss and disruption to the operations of their business.

The 2020 *Phishing Attack Landscape Report* (Greathorn, 2020) found that phishing attacks have significantly increased since the COVID-19 pandemic.² The study revealed that many participants found modern phishing attacks difficult to detect, and those with lower cybersecurity

¹ Altwaijry N, Al-Turaiki I, Alotaibi R, Alakeel F. Advancing Phishing Email Detection: A Comparative Study of Deep Learning Models. *Sensors* (Basel). 2024 Mar 24;24(7):2077. doi: 10.3390/s24072077. PMID: 38610289; PMCID: PMC11013960.

² Carroll F, Adejobi JA, Montasari R. How Good Are We at Detecting a Phishing Attack? Investigating the Evolving Phishing Attack Email and Why It Continues to Successfully Deceive Society. *SN Comput Sci*. 2022;3(2):170. doi: 10.1007/s42979-022-01069-1. Epub 2022 Feb 23. PMID: 35224514; PMCID: PMC8864450.

awareness, more trusting personalities, or those under stress were more likely to fall victim to such attacks. This makes certain business owners more susceptible than others.

Many businesses may be unaware of or ill-equipped to fully protect against these vulnerabilities, leading to potential costly legal consequences. Relying on electronic service without sufficient safeguards could undermine the legal process and further erode public trust in the system.

Conclusion

Service of process is a fundamental part of due process, ensuring the defendant is given an opportunity to respond. The current practice of using registered agents and physical methods for service of process offers greater assurance that legal notices are properly received, ensuring that businesses and individuals are afforded their rights under the law.

I urge you to reconsider this proposed legislation and ensure that any changes to service of process continue to prioritize the fundamental principles of fairness, security, and due process. Thank you for your time and consideration.

Sincerely,



Allison DeSantis
Director, Product Counsel
LegalZoom



February 10, 2025

Senator Jarrett Keohokalole, Chair
Senator Carol Fukunaga, Vice Chair
SENATE COMMITTEE ON COMMERCE AND
CONSUMER PROTECTION

RE: SB 1213 - RELATING TO ELECTRONIC SERVICE OF PROCESS

Dear Chair Keohokalole, Vice Chair Fukunaga, and members of the Committee,

Thank you for this opportunity to submit testimony in **opposition to SB 1213** – Relating to Electronic Service of Process.

My name is Jo Kamae Byrne and I am President of Honolulu Information Service, Inc. dba HonInfo, a Hawaii public records research company established in 1982 by my late husband, Desmond J. Byrne. Among the many services we provide businesses in Hawaii and nationwide is Registered Agent (RA) representation, both directly as Honolulu Information Service, Inc. and as the Hawaii office for mainland clients who provide coverage in multiple states. Given our experience in providing this service, we have serious concerns about the impact of this bill on proper service of process (SOP). Briefly:

Delivery concerns:

1. Consistent technical reliability for delivery of SOPs
2. Verification of proper acceptance of SOPs
3. Impact of SPAM blockers

Impact on the entity:

4. Need for constant monitoring of e.mail correspondence
5. Increased phishing scams and malware vulnerability
6. Missing an SOP could result in a default judgment

Other potential impacts:

7. Increased burden on courts for handling default judgment challenges
8. Impact on DCCA for undeliverable SOPs – ie. verification/update inquiries etc.

From a practical human perspective, and given the volume of e-mails most of us deal with daily, I believe allowing electronic service of process would be burdensome for a business, especially small businesses, and potentially place them at risk of negative consequences.

Thank you for this opportunity to testify.

Respectfully,

A handwritten signature in blue ink that reads 'Jo Kamae Byrne'. The signature is fluid and cursive, with the first name 'Jo' being particularly prominent.

Jo Kamae Byrne