

ACT 168

S.B. NO. 2803

A Bill for an Act Relating to Hawaii Small Business Regulatory Flexibility Act.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that small business is the backbone of our State's economy. The legislature further finds that administrative rules adopted by state agencies can have an unduly burdensome impact on the growth and vitality of small business. The legislature therefore, declares that it is the policy of this State to address the disproportionate impact administrative rules may have on small business by requiring agencies to consult with the small business community affected to better assess the impacts and consider alternatives for easing those impacts when drafting rules.

The legislature further finds that an agency's interpretation or application of its rules may also have a disproportionately burdensome impact on a small business 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. This has contributed to a general feeling of mistrust of, and frustration with, these regulating agencies. Improving the public's perception of government, particularly with regard to its regulatory and rulemaking functions, is inherent to improving the State's business climate. Despite the oftentimes burdensome regulatory requirements on businesses by government, regulations are also necessary for businesses to operate.

This Act provides for a petition process to an agency for regulatory review, periodic administrative review of rules with small business impacts, and an independent regulatory review board to consider concerns of small businesses and make recommendations to adopt, amend, or repeal rules. This Act also requires agencies to provide an opportunity for compliance to rules and regulations affecting small business without the assessment of monetary fines.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

"CHAPTER HAWAII SMALL BUSINESS REGULATORY FLEXIBILITY ACT

§ -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 -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.

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

§ -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 small business regulatory review board prior to providing notice for a 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) 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 which affords the agency no discretion to consider less restrictive alternatives.

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

- (1) A description of how opinions or comments from affected small business were solicited, a summary of the public and small business comments, and a summary of the agency's response to those comments;
- (2) The number of persons who:
 - (A) Attended the public hearing;
 - (B) Testified at the hearing; and

- (C) Submitted written comments; and
- (3) If there was a request to change the proposed rule at the hearing in a way that affected small business, a statement of the reasons for adopting the proposed rule without the requested change.

§ -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.

§ -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 consider any request from small business owners for review of any rule adopted by a state agency and to make recommendations to the agency or the legislature regarding the need for a rule change or legislation. For requests regarding county ordinances, the board may make recommendations to the county council or the mayor for appropriate action.

(b) The board shall consist of eleven members, who shall be appointed by the governor pursuant to section 26-34. Selection for the initial board shall come from a list of nominees submitted by the small business task force on regulatory relief. Thereafter, the nominations shall be made from names submitted by any and all of the departmental advisory committees on small business. The appointments shall reflect representation of a variety of small businesses in the State; provided that no more than two members shall be representatives from the same type of small business, and that there shall be at least two small business representatives from each county.

(c) All members of the board shall be either a current or former owner or officer of a small business and shall not be an officer or employee of the federal, state, or county government. The governor shall appoint the initial chairperson of the board, and a majority of the board shall elect subsequent chairpersons. 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.

§ -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; or
- (3) These impacts were not previously considered at the public hearing on the rules.

(b) For rules adopted prior to the effective date of this chapter, an affected small business may file a written petition with the agency that adopted the rules objecting to all or part of any rules affecting small business on any of the following grounds:

- (1) The rules created an undue barrier to the formation, operation, and expansion of small businesses in a manner that significantly outweighs its benefit to the public;
- (2) The rules duplicate, overlap, or conflict with rules adopted by another agency or violate the substantive authority under which the rules were adopted; or
- (3) The technology, economic conditions, or other relevant factors justifying the purpose for the rules have changed or no longer exist.

(c) 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.

(d) 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 small business regulatory review 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. For rules adopted after the effective date of this chapter, 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; or

(3) These impacts were not previously considered at the public hearing on the rules.

(e) For rules adopted prior to the effective date of this chapter, the regulatory review board may base its recommendation to the agency on any of the following reasons:

(1) The rules created 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;

(2) The rules duplicate, overlap, or conflict with rules adopted by another agency or violate the substantive authority under which the rules were adopted; or

(3) The technology, economic conditions, or other relevant factors justifying the purpose for the rules have changed or no longer exist.

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

(g) Nothing in this section shall entitle an affected small business to a contested case hearing under chapter 91.

§ -7 Periodic review; evaluation report. (a) Each agency having rules that affect small business in effect on the effective date of this chapter 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 small business regulatory review board shall submit an evaluation report to each regular session of the legislature in even-numbered years. 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 such action in response to the report as it finds appropriate.

§ -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 when:
- (1) A small business fails to exercise good faith in complying with the statute or rules;
 - (2) A violation involves wilful or criminal conduct; and
 - (3) A violation results in serious health, safety, or environmental impact.
- (c) An agency may adopt rules to implement the requirements of this section.

§ -9 **Executive order.** The governor may execute any executive order, memorandum, or directive necessary to implement any provision of this chapter."

SECTION 3. The Hawaii Revised Statutes is amended by adding a new chapter to title 3 to be appropriately designated and to read as follows:

**"CHAPTER
SMALL BUSINESS DEFENDER**

§ -1 **Small business defender.** (a) There is established within the legislature a small business defender. The small business defender shall be appointed by the senate president and speaker of the house of representatives. The senate president and speaker of the house of representatives shall determine the salary of the small business defender. The senate president and speaker of the house of representatives may also appoint administrative support personnel who shall assist and support the small business defender.

(b) Unless otherwise specifically provided by law, and upon written request by a small business, the small business defender may represent, defend, and provide legal representation to any small business, during any adjudicatory or contested proceeding involving any civil citation issued by a state or county agency in which the small business is a party; provided that the small business shall seek its own legal representation whenever the potential remedies against the small business may include fines or penalties that exceed \$25,000 or may result in the suspension or revocation of a license. The small business defender shall have the discretion to accept or refuse any case for good cause. The small business defender may also engage in the following activities:

- (1) Advocate and negotiate, upon consultation with the small business regulatory review board, with federal, state, and county agencies and officials on any matter relating to and promoting the interests of small business;
 - (2) Conduct investigations to secure information useful in the lawful administration of any provision in this chapter;
 - (3) Refer any appropriate matter to the auditor or ombudsman for examination or investigation; and
 - (4) Do any and all things necessary to effectuate the purposes of this chapter.
- (c) Each small business shall waive and release any and all claims, damages, causes of action, and any request for relief made against the small business defender or staff, the State or counties, their officers, employees, or agents, and arising from the legal representation of the small business by the

small business defender provided under this section.

§ -2 **Annual report.** The small business defender shall submit an annual report to the legislature detailing its activities and expenditures no later than twenty days prior to convening of the regular session."

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. This Act shall take effect on July 1, 1998, and shall be repealed as of June 30, 2002.

(Approved July 14, 1998.)