

SECOND REGULAR SESSION

HOUSE BILL NO. 978

92ND GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES BAKER (Sponsor), ST. ONGE, SKAGGS, JETTON, MUNZLINGER, SANDER, PHILLIPS, MOORE, GUEST, BYRD, CROWELL, DUSENBERG, HANAWAY, KELLY (36), ANGST, YATES, STEFANICK, SUTHERLAND, DEMPSEY, QUINN, COOPER (120), CUNNINGHAM (145), WALLACE, ERVIN, EMERY, GOODMAN, PORTWOOD, SMITH (118), LIPKE, SCHAAF, BEHNEN, HUNTER, RUPP, PEARCE, NIEVES, PURGASON, JACKSON, HOBBS, PARKER, LUETKEMEYER, COOPER (155), BROWN, McKENNA, PRATT, ICET, FARES, SEIGFREID AND DOUGHERTY (Co-sponsors).

Read 1st time January 8, 2004, and copies ordered printed.

STEPHEN S. DAVIS, Chief Clerk

3116L.011

AN ACT

To repeal sections 536.010 and 536.050, RSMo, and to enact in lieu thereof eight new sections relating to small businesses.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Sections 536.010 and 536.050, RSMo, are repealed and eight new sections enacted in lieu thereof, to be known as sections 536.010, 536.050, 536.300, 536.305, 536.310, 536.315, 536.320, and 536.325, to read as follows:

536.010. For the purpose of this chapter:

(1) **"Affected small business" or "affects small business", any requirement imposed upon a small business through a state agency's proposed or adopted rule that will cause direct and significant economic burden upon a small business, or is directly related to the formation, operation, or expansion of a small business;**

(2) "Agency" means any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases;

(3) **"Board", the small business regulatory fairness board;**

[2] (4) "Contested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing;

EXPLANATION — Matter enclosed in bold faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law. Matter in boldface type in the above law is proposed language.

12 [(3)] (5) The term "decision" includes decisions and orders whether negative or
13 affirmative in form;

14 [(4)] (6) "Rule" means each agency statement of general applicability that implements,
15 interprets, or prescribes law or policy, or that describes the organization, procedure, or practice
16 requirements of any agency. The term includes the amendment or repeal of an existing rule, but
17 does not include:

18 (a) A statement concerning only the internal management of an agency and which does
19 not substantially affect the legal rights of, or procedures available to, the public or any segment
20 thereof;

21 (b) A declaratory ruling issued pursuant to section 536.050, or an interpretation issued
22 by an agency with respect to a specific set of facts and intended to apply only to that specific set
23 of facts;

24 (c) An intergovernmental, interagency, or intraagency memorandum, directive, manual
25 or other communication which does not substantially affect the legal rights of, or procedures
26 available to, the public or any segment thereof;

27 (d) A determination, decision, or order in a contested case;

28 (e) An opinion of the attorney general;

29 (f) Those portions of staff manuals, instructions or other statements issued by an agency
30 which set forth criteria or guidelines to be used by its staff in auditing, in making inspections,
31 in settling commercial disputes or negotiating commercial arrangements, or in the selection or
32 handling of cases, such as operational tactics or allowable tolerances or criteria for the defense,
33 prosecution, or settlement of cases, when the disclosure of such statements would enable law
34 violators to avoid detection, facilitate disregard of requirements imposed by law, or give a clearly
35 improper advantage to persons who are in an adverse position to the state;

36 (g) A specification of the prices to be charged for goods or services sold by an agency
37 as distinguished from a license fee, or other fees;

38 (h) A statement concerning only the physical servicing, maintenance or care of publicly
39 owned or operated facilities or property;

40 (i) A statement relating to the use of a particular publicly owned or operated facility or
41 property, the substance of which is indicated to the public by means of signs or signals;

42 (j) A decision by an agency not to exercise a discretionary power;

43 (k) A statement concerning only inmates of an institution under the control of the
44 department of corrections and human resources or the division of youth services, students
45 enrolled in an educational institution, or clients of a health care facility, when issued by such an
46 agency;

47 (l) Statements or requirements establishing the conditions under which persons may

48 participate in exhibitions, fairs or similar activities, managed by the state or an agency of the
49 state;

50 (m) Income tax or sales forms, returns and instruction booklets prepared by the state
51 department of revenue for distribution to taxpayers for use in preparing tax returns.

52 **(7) "Small business", a for-profit enterprise consisting of fewer than one hundred**
53 **full or part-time employees;**

54 [(5)] **(8) "State agency"** means each board, commission, department, officer or other
55 administrative office or unit of the state other than the general assembly, the courts, the governor,
56 or a political subdivision of the state, existing under the constitution or statute, and authorized
57 by the constitution or statute to make rules or to adjudicate contested cases.

536.050. 1. The power of the courts of this state to render declaratory judgments shall
2 extend to declaratory judgments respecting the validity of rules, or of threatened applications
3 thereof, and such suits may be maintained against agencies whether or not the plaintiff has first
4 requested the agency to pass upon the question presented. The venue of such suits against
5 agencies shall, at the option of the plaintiff, be in the circuit court of Cole County, or in the
6 county of the plaintiff's residence, or if the plaintiff is a corporation, domestic or foreign, having
7 a registered office or business office in this state, in the county of such registered office or
8 business office. Nothing herein contained shall be construed as a limitation on the declaratory
9 or other relief which the courts might grant in the absence of this section.

10 2. Any person bringing an action under subsection 1 of this section shall not be required
11 to exhaust any administrative remedy if the court determines that:

12 (1) The administrative agency has no authority to grant the relief sought or the
13 administrative remedy is otherwise inadequate; or

14 (2) The only issue presented for adjudication is a constitutional issue or other question
15 of law; or

16 (3) Requiring the person to exhaust any administrative remedy would result in undue
17 prejudice because the person may suffer irreparable harm if unable to secure immediate judicial
18 consideration of the claim. Provided, however, that the provisions of this subsection shall not
19 apply to any matter covered by chapters 288, 302, and 303, RSMo; **or**

20 **(4) The party bringing the action is a small business claiming a material violation**
21 **of section 536.300 by the state agency regarding the small business impact statement for**
22 **the amendment or rule.**

23 3. A nonstate party who prevails in an action brought pursuant to subsection 1 of this
24 section shall be awarded reasonable fees and expenses, as defined in section 536.085, incurred
25 by that party in the action.

26 4. A nonstate party seeking an award of fees and other expenses shall, within thirty days

27 of a final disposition of an action brought pursuant to subsection 1 of this section, submit to the
28 court which rendered the final disposition or judgment an application which shows that the party
29 is a prevailing party and is eligible to receive an award pursuant to this section, and the amount
30 sought, including an itemized statement from any attorney or expert witness representing or
31 appearing in behalf of the party stating the actual time expended and the rate at which fees and
32 other expenses are computed.

33 5. A prevailing nonstate party in an agency proceeding shall submit an application for
34 fees and expenses to the court before which the party prevailed. The filing of an application shall
35 not stay the time for appealing the merits of a case. When the state appeals the underlying merits
36 of an adversary proceeding, no decision on the application for fees and other expenses in
37 connection with that adversary proceeding shall be made pursuant to this section until a final and
38 unreviewable decision is rendered by the court on the appeal or until the underlying merits of the
39 case have been finally determined pursuant to the appeal.

40 6. The court may either reduce the amount to be awarded or deny any award, to the
41 extent that the prevailing nonstate party during the course of the proceedings engaged in conduct
42 which unduly and unreasonably protracted the final resolution of the matter in controversy.

43 7. The decision of a court on the application for reasonable fees and expenses shall be
44 in writing, separate from the judgment or order of the court which determined the prevailing
45 party, and shall include written findings and conclusions and the reason or basis therefor. The
46 decision of a court on the application for fees and other expenses shall be final, subject
47 respectively to appeal or judicial review.

48 8. If a party or the state is dissatisfied with a determination of fees and other expenses
49 made in an action brought pursuant to subsection 1 of this section, that party or the state may,
50 within the time permitted by law, appeal that order or judgment to the appellate court having
51 jurisdiction to review the merits of that order or judgment. The appellate court's determination
52 shall be based solely on the record made before the court below. The court may modify, reverse
53 or reverse and remand the determination of fees and other expenses if the court finds that the
54 award or failure to make an award of fees and other expenses, or the calculation of the amount
55 of the award, was arbitrary and capricious, was unreasonable, was unsupported by competent and
56 substantial evidence, or was made contrary to law or in excess of the court's jurisdiction. Awards
57 made pursuant to this section shall be payable from amounts appropriated therefor. The state
58 agency against which the award was made shall request an appropriation to pay for the award.

59 9. The general assembly or its designee shall have standing, in law or equity, to intervene
60 in any existing action involving such challenge to agency action. Unless otherwise provided by
61 resolution, the general assembly's designee is the joint committee on administrative rules who
62 may, upon a concurrence of a majority of the committee's members, intervene in the name of the

63 members of the committee in their representative capacity. Nothing in this section shall confer
64 upon the committee any duty to so act or intervene.

**536.300. 1. Prior to submitting or filing with the secretary of state any proposed
2 rules for adoption, amendment, revision, or repeal pursuant to this chapter, the state
3 agency shall determine whether the proposed rules affect small business and, if so, the
4 availability and practicability of less restrictive alternatives that could be implemented to
5 achieve the same results of the proposed rule. This section shall not apply to emergency
6 rulemaking pursuant to section 536.025. This section shall be in addition to the fiscal note
7 requirement of sections 536.200 to 536.210.**

**8 2. If the proposed rules affect small business, the state agency shall consider
9 alternative or flexible methods of compliance for small businesses and prepare a small
10 business impact statement to be submitted with the proposed rules to the board on the date
11 the proposed order of rulemaking is filed with the secretary of state's office. The statement
12 shall provide a reasonable determination of the following:**

**13 (1) The type of businesses that will be directly affected by, bear the cost of, or
14 directly benefit from the proposed rules;**

**15 (2) A description of the small businesses that will be required to comply with the
16 proposed rules and how they may be adversely affected;**

**17 (3) In dollar amounts, the increase in the level of direct costs, such as fees or
18 administrative penalties, and indirect costs, such as reporting, record keeping, equipment,
19 construction, labor, professional services, revenue loss, or other costs associated with
20 compliance;**

**21 (4) The probable monetary costs and benefits to the implementing state agency and
22 other state agencies directly affected, including the estimated total amount the state agency
23 expects to collect from any additionally imposed fees and the manner in which the moneys
24 will be used;**

**25 (5) The methods the state agency considered or used to reduce the impact on small
26 business such as consolidation, simplification, differing compliance or reporting
27 requirements, less stringent deadlines, performance rather than design standards,
28 exemption, or any other mitigating techniques;**

**29 (6) How the state agency involved small business in the development of the
30 proposed rules;**

**31 (7) A comparison of the proposed rule to comparable or related federal, state, or
32 county standards, with an explanation of the reason for imposing a different standard; and**

**33 (8) The cost statements referred to in subdivisions (3) and (4) of subsection 2 of this
34 section shall represent the state agency's best reasonable estimates of the cost impact. If**

35 the board disagrees with the cost impact statement, the board may provide a statement of
36 the board's opinion as to the cost impact. The board's statement as to the cost impact shall
37 be filed with the small business impact statement in addition to the state agency's statement
38 of cost impact.

39 3. Sections 536.300 to 536.325 shall not apply to proposed rules adopted by a state
40 agency to implement a statute that does not require a state agency to interpret or describe
41 the requirements of the statute such as federally mandated regulations which afford the
42 state agency no discretion to consider less restrictive alternatives. Notwithstanding such
43 provision, federally mandated regulations are subject to the federal Regulatory Flexibility
44 Act as amended by the Small Business Regulatory and Enforcement Fairness Act of 1996,
45 P.L. 96-354, as amended by P.L. 104.121. Any federally mandated regulations that do not
46 comply with these acts shall be subject to this section.

47 4. The board shall be given such notice as is practicable by the state agency of the
48 filing of any emergency rule affecting small business, pursuant to section 536.025. The
49 provisions of this section shall not otherwise apply to emergency rules.

50 5. In addition to any other requirements for public hearing, the state agency shall,
51 upon written request by the board, conduct a public hearing on the proposed rule. The
52 board shall not request more than twelve hearings per quarter.

53 6. Any proposed rule that is required to have a small business impact statement but
54 does not include such a statement shall be invalid and the secretary of state shall not
55 publish the rule.

536.305. 1. For any proposed rules that affect small business, the state agency shall
2 also submit a small business participation statement to the board within thirty days after
3 a public hearing is held, or if no public hearing is held, then at least thirty days prior to the
4 issuance of any final order of rulemaking. This section shall not apply to emergency rules.
5 The small business participation statement required by this section shall provide the
6 following information:

7 (1) A description of how the opinions or comments from affected small businesses
8 were solicited;

9 (2) A summary of the public and small business comments;

10 (3) A summary of the state agency's response to those comments; and

11 (4) The number of persons who attended a public hearing, the names of the
12 individuals who testified at a public hearing, the business or organization for which they
13 testified, and whether said individual testified in support, opposition, or neutral position
14 to the proposed rule, and submitted written comments.

15 2. If the proposed rule was changed in a way that affected small business, a

16 **statement of the reasons for adopting the proposed rule without the requested change shall**
17 **be included in the small business participation statement.**

18 **3. A final order of rulemaking shall not be filed with the secretary of state until**
19 **thirty days after a final order of rulemaking has been received by the board.**

20 **4. The board may file with the secretary of state any comments or**
21 **recommendations that the board has concerning a proposed or final order of rulemaking.**
22 **Such comments shall be published in the Missouri Register. A copy of the board's**
23 **comments or recommendations shall be submitted to the state agency promulgating the**
24 **rule.**

25 **5. The board may refer comments or recommendations concerning such rule to the**
26 **appropriations and budget committees of the house of representatives and the**
27 **appropriations committee of the senate for further action.**

536.310. 1. There is hereby established the "Small Business Regulatory Fairness
2 **Board". The joint committee on administrative rules shall provide staff support for the**
3 **board.**

4 **2. The board may:**

5 **(1) Provide state agencies with input regarding proposed rules which adversely**
6 **affect small business;**

7 **(2) Consider any request from small business owners for review of any rule adopted**
8 **by a state agency;**

9 **(3) Review any rule promulgated by a state agency, which affects small business**
10 **and consider making recommendations to the state agency and the general assembly**
11 **regarding the need for a rule or legislation;**

12 **(4) Conduct hearings and solicit input from small businesses regarding enforcement**
13 **of regulations by state agencies. The identity of small businesses providing any such input**
14 **shall be kept confidential at such small business' request;**

15 **(5) Annually provide an evaluation report to the governor and the general assembly**
16 **including any recommendations and evaluations of state agencies regarding regulatory**
17 **fairness for Missouri's small businesses.**

18 **3. The board shall consist of:**

19 **(1) Two members appointed by the governor, with the advice and consent of the**
20 **senate;**

21 **(2) One member appointed by the lieutenant governor;**

22 **(3) One member who is the chair of the minority business advocacy commission;**

23 **(4) Two members appointed by the chairperson of the committee of the house of**
24 **representatives having jurisdiction over matters concerning small business;**

25 **(5) Two members appointed by the chairperson of the committee of the senate**
26 **having jurisdiction over matters concerning small business;**

27 **(6) One member appointed by the president pro tempore of the senate; and**

28 **(7) One member appointed by the speaker of the house of representatives.**

29 **4. The appointments to the board shall be representative of a variety of small**
30 **businesses, both rural and urban, and from a variety of geographical areas of this state**
31 **provided that no more than two members shall be representatives from the same type of**
32 **small business.**

33 **5. Members of the board shall serve a term of three years, except that members first**
34 **appointed to the board shall serve staggered terms of one, two, and three years randomly**
35 **chosen at the initial meeting and shall serve until their successor is duly appointed and**
36 **qualified. No member shall serve more than three consecutive terms.**

37 **6. All members of the board, except the chair of the minority business advocacy**
38 **commission, shall be a current or former owner or officer of a small business. No member**
39 **may be an elected official, or an officer or an employee of the federal, state, or county**
40 **government. The governor shall appoint the initial chairperson of the board and a**
41 **majority of the board shall elect subsequent chairpersons. The chairperson shall serve as**
42 **chair a term of not more than one year, unless removed by a two-thirds vote of all members**
43 **of the board.**

44 **7. A majority of all the members of the board shall constitute a quorum to do**
45 **business and the concurrence of a majority of all the members of the board present and**
46 **voting shall be necessary to make any action of the board valid.**

47 **8. Members shall not receive any compensation but shall be eligible for**
48 **reimbursement for necessary expenses.**

49 **9. The board shall meet at least quarterly or more often if necessary, as determined**
50 **by the chairperson of the board.**

51 **10. In addition to any other powers provided by sections 536.300 to 536.325, the**
52 **board may adopt any board procedures necessary to implement sections 536.300 to 536.325**
53 **and take any board action necessary to effectuate the purposes of sections 536.300 to**
54 **536.325.**

55 **11. The board shall not have the authority to:**

56 **(1) Interfere with, modify, prevent, or delay an agency or administrative**
57 **enforcement action;**

58 **(2) Intervene in legal actions; or**

59 **(3) Subpoena witnesses to testify, or to produce documents, in hearings conducted**
60 **by the board, but may request witnesses to voluntarily testify or produce documents.**

61 **12. The board shall have the power to authenticate any copy of any**
62 **recommendation made by the board, and the authenticated copy shall be considered a**
63 **government document for hearsay purposes.**

536.315. 1. For any rule adopted after August 28, 2004, the board may file a
2 **written petition with the state agency that has adopted rules objecting to or requesting the**
3 **adopting, amendment or repeal of all or part of any rule affecting small business on any**
4 **of the following grounds:**

5 **(1) The actual effect on small business was not reflected in or significantly exceeded**
6 **the small business impact statement submitted prior to the adoption of the rules;**

7 **(2) New or significant economic information has created an undue impact on small**
8 **business; or**

9 **(3) The impacts were not previously considered in the adoption of the rules.**

10 **2. For any rule adopted prior to August 28, 2004, the board may file a written**
11 **petition with the state agency that adopted the rule objecting to or requesting the adoption,**
12 **amendment or repeal of all or part of any rule affecting small business on any of the**
13 **following grounds:**

14 **(1) The rule creates an undue barrier to the formation, operation, and expansion**
15 **of small businesses in a manner that significantly outweighs the rule's benefit to the public;**

16 **(2) The rule duplicates, overlaps, or conflicts with rules adopted by the state agency**
17 **or any other state agency or violates the substantive authority under which the rule was**
18 **adopted;**

19 **(3) The technology, economic conditions, or other relevant factors justifying the**
20 **purpose for the rule has changed or no longer exist; or**

21 **(4) New or significant economic information has created an undue impact on small**
22 **business.**

23 **3. Any state agency receiving such a petition or other request in writing to adopt,**
24 **amend or repeal any rule shall forthwith furnish a copy thereof to the joint committee on**
25 **administrative rules and to the commissioner of administration, together with the action,**
26 **if any, taken or contemplated by the state agency as a result of such petition or request, and**
27 **the state agency's reasons therefore.**

28 **4. The state agency shall promptly consider the petition filed pursuant to subsection**
29 **1 or 2 of this section and may seek advice and counsel regarding the petition. Within sixty**
30 **days after the receipt of the petition, the state agency shall determine whether the rule**
31 **should be adopted, amended, or repealed based on the factors set forth in subsection 1 of**
32 **this section for rules adopted after August 28, 2004, and subsection 2 of this section for**
33 **rules adopted prior to August 28, 2004. The state agency shall submit a written response**

34 of the agency's determination to the board within sixty days of the receipt of the petition.
35 If the state agency determines that the petition merits adoption, amendment, or repeal of
36 a rule, it may initiate proceedings in accordance with the applicable requirements of this
37 chapter.

38 **5. Any affected small business may seek the filing of a petition by the board for the**
39 **adoption, amendment, or repeal of a rule. The board may convene a hearing or by other**
40 **means solicit testimony that will assist in its determination of whether to file such a**
41 **petition. For rules adopted after August 28, 2004, the board shall base its decision upon**
42 **the factors stated in subsection 1 of this section. For rules adopted prior to August 28,**
43 **2004, the board shall base its decision on the factors stated in subsection 2 of this section.**

44 **6. The board may make an evaluation report to the governor and the general**
45 **assembly on rulemaking proceedings, comments from small business, and state agency**
46 **response as provided in this section. The governor or general assembly may subsequently**
47 **take such action in response to the evaluation report and state agency response as they find**
48 **appropriate.**

49 **7. This section shall not be interpreted to restrict any affected party's right to relief**
50 **otherwise available under the provisions of this chapter.**

536.320. 1. The board shall provide to the head of each state agency a list of any
2 **rules adopted by the state agency that affect small business and have generated complaints**
3 **or concerns, including any rules that the board determines may duplicate, overlap, or**
4 **conflict with other rules or exceed statutory authority. Within forty-five days after being**
5 **notified by the board of the list, the state agency shall submit a written report to the board**
6 **in response to the complaints or concerns. The state agency shall also state whether the**
7 **state agency has considered the continued need for the rules and the degree to which**
8 **technology, economic conditions, and other relevant factors may have diminished or**
9 **eliminated the need for maintaining the rules, including a statement describing the specific**
10 **public purpose or interest for maintaining the respective rules.**

11 **2. The board may solicit testimony from the public at a public meeting regarding**
12 **any report submitted by the state agency under this section. The board shall submit an**
13 **evaluation report to the governor and the general assembly regarding small business**
14 **comments, state agency response, and public testimony on rules in this section. The**
15 **governor and the general assembly may take such action in response to the report as they**
16 **find appropriate.**

536.325. 1. Any state agency authorized to assess administrative penalties or
2 **administrative fines upon a small business shall consider waiving or reducing any**
3 **administrative penalty or administrative fine for a violation of any statute, ordinance, or**

4 **rules by a small business under the following conditions:**

5 **(1) The small business corrects the violation within thirty days after receipt of a**
6 **notice of violation or citation;**

7 **(2) The violation was unintentional or the result of excusable neglect;**

8 **(3) The violation was the result of an excusable misunderstanding of a state**
9 **agency's interpretation of a rule;**

10 **(4) The small business self-identifies the violation; or**

11 **(5) The state agency takes into account the size of the small business.**

12 **2. Subsection 1 of this section shall not apply when:**

13 **(1) A small business fails to exercise good faith in complying with the statute,**
14 **ordinance, or rule;**

15 **(2) A violation involves willful or criminal conduct;**

16 **(3) The violation is deemed by the state agency to be egregious;**

17 **(4) A violation results in serious health, safety, or environmental impact;**

18 **(5) The penalty or fine is assessed pursuant to a federal law or regulation for which**
19 **no waiver or reduction is authorized by the federal law or regulation; or**

20 **(6) There is a continuing pattern of similar violations by the small business.**