



Office of Missouri State Auditor
Nicole Galloway, CPA

**Small Business Regulatory
Fairness Board**

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Missouri State Auditor

CITIZENS SUMMARY

Findings in the audit of the Small Business Regulatory Fairness Board

Background

The Small Business Regulatory Fairness Board (SBRFB) was established in 2004 to help ensure Missouri small business owners have a voice in the development of rules and regulations by Missouri state departments and agencies. The Board is tasked with (1) providing state agencies with input regarding rules that adversely affect small businesses; (2) soliciting input and conducting hearings regarding any rules proposed by a state agency; and (3) issuing an evaluation report to the governor and the general assembly, making recommendations and evaluating regulatory fairness for Missouri's small businesses. State law provides that a nine-member board will consist of four members appointed by the governor; one member each appointed by the president pro tempore of the senate, the minority leader of the senate, the speaker of the house of representatives, and the minority leader of the house of representatives; and one member is the chair of the Minority Business Advocacy Commission. In its fiscal year 2015 evaluation report, Board members cited concerns and inefficiencies within the SBRFB.

Board Operations

The SBRFB is not functional and is not achieving its primary objective of monitoring regulations that impact small businesses. The SBRFB has not provided state agencies with input regarding proposed regulations affecting small businesses. The Board did not review all proposed regulations during the 2 years ended June 30, 2015, and the lack of a full Board has caused higher than normal workloads for each member, becoming a burden for volunteers. The board also lacks any formal systems to monitor which regulations have been reviewed and what action may be necessary.

The SBRFB did not take sufficient steps to solicit input from small businesses and received no comments from small businesses for a two-year period. Board members had been notified of proposed rule and regulation changes by an online subscription service, but the Department of Economic Development (DED) allowed the contract to expire without informing Board members. Small business owners had been allowed to access the service, and the lack of notification negatively impacted input. The Board also has not prepared regular evaluation reports.

The SBRFB has multiple extended vacancies. The Board had four vacancies as of March 2016, although members asked the General Assembly and the governor's office to fill vacancies. Members also reported the former chairperson did not communicate regularly and held limited meetings.

The state budget has not included appropriations for staffing. The fiscal year 2014 budget included an appropriation for one position, but funding was initially withheld by the governor and then released. DED and the SBRFB hired one employee in April 2014, who remained employed for that fiscal

year. Funding was approved the next year but was vetoed by the governor. The DED has not included funding for staffing in budget requests for recent years because officials indicated the work of the SBRFB is redundant with work performed by the Joint Committee on Administrative Rules.

In the areas audited, the overall performance of this entity was **Poor**.*

*The rating(s) cover only audited areas and do not reflect an opinion on the overall operation of the entity. Within that context, the rating scale indicates the following:

- Excellent:** The audit results indicate this entity is very well managed. The report contains no findings. In addition, if applicable, prior recommendations have been implemented.
- Good:** The audit results indicate this entity is well managed. The report contains few findings, and the entity has indicated most or all recommendations have already been, or will be, implemented. In addition, if applicable, many of the prior recommendations have been implemented.
- Fair:** The audit results indicate this entity needs to improve operations in several areas. The report contains several findings, or one or more findings that require management's immediate attention, and/or the entity has indicated several recommendations will not be implemented. In addition, if applicable, several prior recommendations have not been implemented.
- Poor:** The audit results indicate this entity needs to significantly improve operations. The report contains numerous findings that require management's immediate attention, and/or the entity has indicated most recommendations will not be implemented. In addition, if applicable, most prior recommendations have not been implemented.

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NICOLE GALLOWAY, CPA **Missouri State Auditor**

Honorable Jeremiah W. (Jay) Nixon, Governor
and
Mike Downing, Director
Department of Economic Development
and
Members of the Small Business Regulatory Fairness Board
Jefferson City, Missouri

We have audited certain operations of the Small Business Regulatory Fairness Board in fulfillment of our duties under Chapter 29, RSMo. The scope of the audit included, but was not limited to, the 2 years ended June 30, 2015. The objectives of our audit were to:

1. Evaluate the internal controls over significant management and financial functions.
2. Evaluate the compliance with certain legal provisions.
3. Evaluate the economy and efficiency of certain management practices and operations, including certain financial transactions.

We conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform our audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides such a basis.

For the areas audited, we identified (1) deficiencies in internal controls, (2) noncompliance with legal provisions, and (3) deficiencies resulting from certain management practices and procedures. The accompanying Management Advisory Report presents our findings arising from our audit of the Small Business Regulatory Fairness Board.

A handwritten signature in black ink that reads "Nicole R. Galloway".

Nicole R. Galloway, CPA
State Auditor

The following auditors participated in the preparation of this report:

Deputy State Auditor: Keriann Wright, MBA, CPA
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In-Charge Auditor: Joshua Shope, M.Acct.

Small Business Regulatory Fairness Board

Introduction

Background

The Small Business Regulatory Fairness Board (SBRFB) was established in 2004 by Section 536.305, RSMo, to help ensure Missouri small business owners have a voice in the development of rules and regulations by Missouri state departments and agencies.

Under the provisions of Section 536.310.1, RSMo, the SBRFB "shall: (1) provide state agencies with input regarding rules that adversely affect small businesses; (2) solicit input and conduct hearings from small business owners and state agencies regarding any rules proposed by a state agency; and (3) provide an evaluation report to the governor and the general assembly, including any recommendations and evaluations of state agencies regarding regulatory fairness for Missouri's small businesses."

Section 536.305, RSMo, requires the Department of Economic Development (DED) to "provide staff support for the board." In addition to the general staff support, pursuant to Section 536.310, RSMo, the SBRFB, subject to appropriations, may hire one and one-half full-time equivalent employees to perform the following duties:

1. Conduct internet website additions, corrections, and deletions;
2. Develop training programs for agencies;
3. Send regulatory alerts to interested small business subscribers;
4. Track small business comments regarding agencies and review and respond to the agency and small business accordingly;
5. Prepare for Board meetings and hearings, including outreach, travel, agendas, and minutes;
6. Prepare member maintenance expense reports and appointments;
7. Analyze small business impact statements. After such analysis, the employee shall review such statements, offer suggestions, and work with agencies to meet the statute requirements;
8. Analyze biannual report reviews;
9. Conduct agency correspondence and training;
10. Conduct small business outreach by speaking at chamber and association events; and
11. Review the Missouri Register and other sources to look for proposed rules that may affect small business.

Section 536.305, RSMo, states the SBRFB shall consist of nine voting members; four members appointed by the governor; one member each appointed by the president pro tempore of the senate, the minority leader of the senate, the speaker of the house of representatives, and the minority leader of the house of representatives; and one member is the chair of the Minority Business Advocacy Commission. Each member shall be current or former owners or officers of a small business, except for the four members appointed by the governor and the chair of the Minority Business Advocacy Commission. Each member shall serve a term of 3 years and may be



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reappointed at the conclusion of the term to serve no more than 3 consecutive terms. The members serve on a volunteer basis.

On June 30, 2015, the SBRFB had 6 members and 3 vacancies, as follows:

| Member | Appointed By | Term Expires |
|------------------------------|--|--------------------|
| Nancy Zurbuchen, Chair (1) | Senate Majority Leader | June 14, 2015 |
| Scott George, Vice-Chair (1) | House Majority Leader | September 15, 2013 |
| Shelia Forrest (1) | Minority Business Advocacy Commission Chair | September 2, 2012 |
| Representative Alan Green | House Minority Leader | February 24, 2018 |
| William Jenks (1) (2) | Governor | April 30, 2014 |
| Jim Seigfreid (1) | Governor | April 30, 2012 |
| Vacant | Governor | |
| Vacant | Governor | |
| Vacant | Senate Minority Leader | |

(1) Members whose terms have expired continue to serve until a new member is appointed.

(2) Resigned effective March 8, 2016.

Scope and Methodology

To gain an understanding of the SBRFB, we reviewed minutes of meetings, written policies and procedures, and other pertinent documents and interviewed various personnel of the Board, as well as DED personnel responsible for performing staff support and administrative functions for the Board.

We obtained an understanding of the internal controls that are significant within the context of the audit objectives and assessed whether such controls have been properly designed and placed in operation. We obtained an understanding of legal provisions that are significant with the context of the audit objectives, and we assessed the risk that illegal acts, including fraud, and violations of legal provisions could occur. Based on that risk assessment, we designed and performed procedures to provide reasonable assurance of detecting instances of noncompliance significant to those provisions.

Small Business Regulatory Fairness Board

Management Advisory Report

State Auditor's Findings

1. Board Operations

The Small Business Regulatory Fairness Board (SBRFB) is not functional and is not achieving its primary objective of monitoring regulations that impact small businesses in the state. This condition has been caused by multiple long-term Board vacancies, Board members who have not taken an active role in the functions of the Board, and a lack of funding for staffing.

1.1 Board not meeting objectives

During the 2 years ended June 30, 2015, the SBRFB has not achieved its statutory objectives of providing state agencies with input regarding proposed regulations, soliciting input from small businesses, and providing evaluation reports to the governor and general assembly.

Inadequate review of regulations

The SBRFB has not provided state agencies with input regarding proposed regulations affecting small businesses, as required by Section 536.310.1(1), RSMo. To achieve the objective set forth by law, the SBRFB must review the regulations and identify concerns. According to a Board member, the SBRFB did not review all proposed regulations affecting small businesses during the 2 years ended June 30, 2015; therefore, they did not provide sufficient input to state agencies regarding the proposed regulations. Board members also indicated the lack of a full Board caused higher than normal workloads for each member, further limiting their ability to review all necessary proposed regulations.

In addition, the SBRFB lacks any formal systems or processes to monitor which regulations have been reviewed, and what action may or may not be necessary as a result. According to discussions with Board members, each member is expected to review all the proposed regulations, but there is no process to ensure every regulation is reviewed. Documenting reviews performed and actions needed holds members accountable and would help ensure evaluation of all proposed regulations occurs. Without a system to monitor the reviews performed, the Board increases the risk of not identifying proposed changes that may adversely affect small businesses.

No solicitation of input from small business owners

The SBRFB did not take sufficient steps to solicit input from small businesses regarding proposed regulations, as required by Section 536.310.1(2), RSMo, and received no comments from small businesses during the 2 years ended June 30, 2015. The SBRFB uses an online subscription service to receive notification of proposed rule and regulation changes; and allows small business owners access to this service to review and provide feedback on the impact of proposed changes; however, the Department of Economic Development (DED) and the Board did not ensure this system was functioning throughout the audit period.

Due to a management decision by the DED, Board members and small business owners were not notified of proposed rule and regulation changes that may affect small businesses for over a year during the audit period. The SBRFB used an online subscription service, contracted by the DED, to be



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provided notification regarding proposed changes. DED management allowed this contract to expire in June 2013; however, the vendor continued to provide services until April 2014. The DED did not have a new provider in place and did not inform the Board the service was expiring. When the Board notified DED officials about a lack of regulatory notifications, Board meeting minutes indicate DED officials informed Board members they could sign up with the Secretary of State's Office administrative rules notification system until implementation of a new contract. Board members stated that system was not specific to small business, and was therefore of limited use. The contract for the new regulatory alert system was effective August 2015 and provides regulatory alerts for proposed regulations affecting small businesses. The system had 201 subscribers as of March 2016.

Without a fully functioning alert system dedicated to small business needs, the SBRFB was not effective in soliciting input regarding regulation changes affecting small businesses.

Annual evaluation reports

The SBRFB has not prepared evaluation reports on a regular basis. While state law does not specify the frequency of the evaluation reports, the Board has historically prepared them on an annual basis. However, the Board issued the fiscal year 2013 evaluation report in May 2014, and failed to issue a fiscal year 2014 report. The fiscal year 2015 evaluation report, issued in January 2016, cited concerns and inefficiencies within the SBRFB. The report also noted concerns about the lack of adequate administrative support, missing Board documents and archives, DED personnel turnover, inept Board leadership, and ongoing Board vacancies.

1.2 Board membership

Issues with the SBRFB have contributed to the Board being ineffective in achieving its objectives. The Board has had multiple vacancies for an extended period and suffered from inactive and ineffective leadership.

Board vacancies

The SBRFB has had multiple vacancies for an extended period. Section 536.305, RSMo, requires the Board be composed of 9 members. As of June 30, 2015, the SBRFB had three vacancies, as shown on page 4. The positions became vacant in May 2012, February 2013, and March 2015. In addition, a fourth position became vacant in March 2016.

In addition to the vacancies, members have continued serving after their term expiration. As of June 30, 2015, 5 of the 6 appointed Board members had served between 1 and 39 months past the expiration date of their first term and had not been officially reappointed to second terms. According to Board members, the SBRFB has asked the General Assembly and the Governor's office to fill vacancies, but has not received a response.



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To have a quorum and hold meetings, five Board members must be present. Board members indicated the lack of a full Board has made it difficult to schedule meetings because all or almost all members must be present to conduct business.

Ineffective leadership

The SBRFB's chairperson speaks on behalf of the Board, communicates with the DED, and calls meetings. The former chairperson did not communicate with other Board members or the DED from September 2014 until the end of her term in March 2015, according to Board members. The SBRFB held five meetings during the 2 years ended June 30, 2015, but none between June 2014 and March 2015. As a result of ineffective leadership and limited meetings, the Board's ability to meet its statutory requirements has been impacted.

1.3 Lack of staff support

The state budget has not included appropriations for staffing, which has limited the Board's ability to function. While the fiscal year 2014 budget included an appropriation for one position, the funding was initially withheld by the Governor and eventually released in December 2013. The DED and the Board hired an employee in April 2014. The employee provided services to the SBRFB for the remainder of fiscal year 2014. The funding for the position was again approved and included in the 2015 budget; however, it was line item vetoed by the Governor and no staff was provided for fiscal year 2015. For fiscal year 2016, the DED did not include funding for staffing in the department's budget request. The Board requested funding for fiscal year 2017, but the DED did not include the request in the budget submitted because DED officials indicated they believe the work of the SBRFB is redundant since review of proposed regulations is already being performed by the Joint Committee on Administrative Rules.

In the absence of an appropriation, the DED provides the required staff support to the Board pursuant to Section 536.305, RSMo, in the form of legal counsel and logistical and clerical support. However, the addition of Board staff would allow the SBRFB to take a more active role in monitoring regulations, communicating and coordinating with small businesses, addressing any concerns with state agencies, and meeting its overall objectives. Without an appropriation for additional staffing, Board members are required to perform these additional duties.

Conclusion

The SBRFB has been ineffective in monitoring regulations that impact small businesses, has not developed adequate processes and procedures to track regulations being reviewed, has been ineffective soliciting comments from small business owners regarding regulations that impact them, and has failed to submit annual evaluation reports. These issues are a result of the Board not being at full capacity, ineffective Board leadership, and a lack of funding for support staff. To achieve its stated objectives, the SBRFB needs the support of the DED, the General Assembly, and the Governor's office.



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Recommendations

The SBRFB:

- 1.1 Develop a process to document and track proposed regulations provided to the Board, increase efforts to solicit input from small business owners, and ensure evaluation reports are completed on a regular basis.
- 1.2 Continue to work with the General Assembly and the Governor's office to ensure all Board vacancies are filled.
- 1.3 Continue to work with the DED and the General Assembly to ensure the Board has funding for staff support to allow the Board to function effectively and comply with state law.

Auditee's Response

The SBRFB provided the following written response:

Since the inception of the SBRFB, the Board has worked directly with small business owners and state agencies to minimize the impact of regulations on small businesses. During the initial years, the SBRFB met with great success as agencies began to consistently obtain input from small business owners who would be affected by new rules as the regulations were being written. Also, agencies learned the importance of taking business size into account during inspections. Small business complaints plummeted. Recently, SBRFB members have noticed some back-sliding during rule promulgation as agencies are not always seeking out affected small businesses during rule promulgation. This raises concerns regarding support for small business growth and development in Missouri. Implementing all of the recommendations in this response will certainly help get all parties back on track.

Generally, the SBRFB agrees with the audit recommendations. Each of these issues -- lost internal processes, Board vacancies, and lack of funding -- was raised in our 2015 Annual Report. We are delighted that the State Auditor agreed that these were important issues.

Response to Audit Recommendations

1.1 Audit Recommendation:

- a) *"Develop a process to document and track proposed regulations provided to the Board"*
 - a. *During the audit exit conference, the auditors stated that "general staff support" meant nothing more than setting up meetings and conference calls and keeping minutes. Also, that DED did not have to keep any records other than meeting minutes and news releases. (Note. Subsequently, the Audit Manager defined "general staff support to mean "logistical, clerical, and legal support.")*



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- b. *The auditors stated that the individual Board members were responsible for all administrative duties and records retention associated with meeting statutory responsibilities.*
- c. *As small business owners volunteering their time, the SBRFB board members simply do not have the time available to undertake such an effort. This would hold true for all volunteer boards.*
- d. *In the early years of SBRFB, DED did many administrative functions (see background) including: website maintenance, sending out regulatory alerts, tracking small business comments, helping members with expense reports, conducting agency correspondence and training, and records retention.*
- e. *Additionally, DED's failure to follow Section 536.310.3, RSMo, when hiring support staff should be included in the audit report.*
- f. *During the exit conference with the state auditors and DED, SBRFB members pointed out that Section 536.310.3, RSMo "Subject to appropriations, by a majority vote of the board, the board may hire ... a full-time equivalent employee..." required the SBRFB to hire their support staff.*
- g. *Yet, DED hired a full-time person without SBRFB approval or formal involvement. Current SBRFB members recall being told, while DED legal counsel was present, that DED would never allow the board to hire their own staff.*
- h. *At the exit conference, both DED and the auditors stated that the prior Chair verbally indicated she was involved in the hiring. However, neither DED, nor the prior chair, were able to produce any written documentation to support that claim.*
- i. *According to the auditors, DED's failure to follow the statute was noted by the auditors in the pre-exit conference with DED.*
- j. *In a subsequent email, dated April 6, 2016, from the Audit Manager, "The finding did not rise to the level of a written finding, so it was not included in the audit report. According to auditing standards, auditors use professional judgement to determine the significance of an audit finding. Because a prior Board member told us she was involved in the hiring process, our judgement was that this was of low significance and did not rise to the level of a written finding."*
- k. *The Audit Manager stated that the auditors made a verbal recommendation that DED follow the statute during the pre-exit conference. And, that DED verbally responded they would comply with the statute. According to the Audit Manager, "The only documentation we have would be notes and audit workpapers, which are not subject to disclosure."*



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- l. The SBRFB recommends that DED's failure to meet this statutory requirement, or document any such attempts, should rise to the level of a written finding; and, should be included in the audit. This would be similar to the SBRFB's failure to meet statutory requirements being included in the audit report.*
 - m. The audit should formally recommend that DED work directly with the SBRFB to hire any future employees in support of the SBRFB.*
 - n. As noted in the report, DED allowed the previous regulatory alert system to expire leaving the SBRFB members with no way to effectively track regulation changes.*
 - o. Recently, DED implemented a new regulatory alert system that is much better than the old one. Thus, the Board members are receiving notices of proposed regulations.*
 - p. Additionally, DED lost or misplaced all prior processes for tracking Board action on reviewing regulations.*
 - q. The SBRFB will work with DED to re-create the internal process for tracking the board's activity in reviewing and final disposition of the rules.*
 - r. However, fulfilling the audit finding that SBRFB members, all of whom are busy small business owners, review ALL proposed regulations is simply impossible without adequate Board administration support and with so many vacant Board seats.*
 - s. The SBRFB urges the Legislature and/or Governor to better define "general staff support" to enable all boards and commissions to function without undo impact on their non-paid members.*
- b) "Increase efforts to solicit input from small business owners"*
 - a. The SBRFB members have, in a limited manner, solicited input from small businesses on proposed regulations. These contacts were not well documented.*
 - b. This outreach can be better documented with the tracking processes described above.*
 - c. Lack of administrative support and board vacancies will limit outreach.*
 - c) "Ensure evaluation reports are completed on a regular basis."*
 - a. The Board agrees that the agency evaluation reports are of paramount importance.*
 - b. The internal processes outlined above are essential to preparing the report.*

1.2 Audit Recommendation: "Continue to work with the General Assembly and the Governor's office to ensure all Board vacancies are filled."



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- a) *The SBRFB agrees that the long term, systemic vacancies on the Board severely impact the Board's ability to meet its statutory responsibilities.*
- b) *The SBRFB members have contacted the Governor and Legislature numerous times before regarding these vacancies. Most of these contacts were not documented in writing; but, will be in the future.*
- c) *The SBRFB hereby urges both the Governor and the Legislative leaders to fill vacant Board seats.*

1.3 Audit Recommendation: "Continue to work with DED and the General Assembly to ensure the Board has funding for staff support to allow the Board to function effectively and be in compliance with state law."

- a) *The SBRFB was very disappointed to learn that DED did not request funding because DED "believe(s) the work of the SBRFB is redundant ... (to) the Joint Committee on Administrative Rules." In addition to reviewing regulations, the SBRFB efforts include: ensuring impacted small businesses are included in rule promulgation, reviewing enforcement actions against small businesses, taking comments from small businesses on the impact of rules, and evaluating state agencies regarding their implementation of the Small Business Regulatory Fairness Act.*
- b) *DED failed to request funding because the Governor vetoed it in the prior year. SBRFB members recall this statement. DED appears not to.*
- c) *DED's failure to request funding because they believe SBRFB is redundant to the Joint Committee on Administrative Rules. This demonstrates DED's lack of understanding of the function and benefits of the SBRFB to Missouri small businesses.*
- d) *The SBRFB agrees that without adequate staff support, the Board is unable to meet its statutory responsibilities supporting small businesses.*
- e) *DED is one of the agencies evaluated by SBRFB in its annual evaluation report.*
- f) *DED in the past has lobbied against the SBRFB's use of grades in the evaluation report.*
- g) *DED's repeated assertions that all records were lost and unrecoverable, demonstrates a lack of seriousness in support of small business regulatory fairness. Only when the state auditors asked for the records, did DED make sufficient efforts to recover the hard copy files. Many of the electronic files are still missing.*
- h) *Some other states house their small business regulatory fairness boards, with adequate funding, under the Secretary of State or the Lieutenant Governor. Neither of these entities are part of the annual agency evaluation by the SBRFB. Therefore, moving the SBRFB to either place would eliminate the conflict of interest.*
- i) *The SBRFB urges the Legislature and Governor work together to determine if the SBRFB should even be housed in DED.*



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- j) *The SBRFB hereby urges DED to include adequate funding for staff support in all future budget requests, the Legislature to retain this funding in the budget bills, and the Governor to make small businesses a priority by leaving the funding intact.*

The DED provided the following written response:

The Missouri Department of Economic Development agrees with and accepts the findings and recommendations in the audit. The purposes of the SBRFB are redundant with duties performed by the Joint Committee on Administrative Rules and by the Secretary of State. The professional boards and associations representing small business provide access to information and notification of new rules. The duplicative work is evidenced by the average of only one case per year handled by the SBRFB.

Auditor's Comment

In responding to finding 1.1 the SBRFB stated a particular issue should have been made a written finding. As noted in the report letter, we conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards (GAS)*, issued by the Comptroller General of the United States. According to GAS, para. 6.04, auditors should consider significance when developing the report and related findings and should use professional judgment when evaluating the significance of matters within the context of the audit objectives. We exercised professional judgment in determining the issue in question was not significant within the context of the audit objectives and made a verbal recommendation to the DED to consider in the future.

The SBRFB's response to finding 1.3 states the Board is responsible for "reviewing enforcement actions against small businesses." The objectives of the Board, as defined at Section 536.310.1, RSMo, do not include this responsibility.