



GOV. MSG. NO. 1332

EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

July 13, 2015

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

The Honorable Joseph M. Souki,
Speaker
and Members of the House
Twenty-Eighth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

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

I am transmitting herewith SB349 SD2 HD2 CD1, without my approval, and with the statement of objections relating to the measure.

SB349 SD2 HD2 CD1

RELATING TO TAXATION

Sincerely,

DAVID Y. IGE
Governor, State of Hawaii

EXECUTIVE CHAMBERS

HONOLULU

July 13, 2015

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 349

Honorable Members
Twenty-Eighth Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, Senate Bill No. 349, entitled "A Bill for an Act Relating to Taxation."

The purposes of this bill are to establish a five-year renewable fuels production tax credit and to repeal the ethanol facility tax credit. This bill allows qualifying taxpayers to claim a refundable income tax credit equal to 20 cents per seventy-six thousand British thermal units of qualifying renewable fuel produced and sold in the State. The credit in this bill is capped at \$3,000,000 per taxpayer per year and the total credits for all taxpayers is capped at \$3,000,000 per year. This bill also: (1) requires the Department of Business and Economic Development and Tourism to certify all tax credits and submit a report regarding the production and sale of qualifying renewable fuels to the governor and legislature each year; (2) applies to taxable years beginning after December 31, 2015; and (3) repeals the tax credit on July 1, 2020.

This bill is objectionable because the provisions in this bill on page 2, lines 8-11, and page 4, lines 1-6, that restrict the income tax credit for renewable fuels to only renewable fuels produced and sold in the State may be subject to challenge as violating the Commerce Clause of the United States Constitution. The United States Supreme Court has stated that a cardinal rule of Commerce Clause jurisprudence is that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984), *citing* Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977). In Bacchus the United States Supreme Court struck down a Hawaii law that provided an

STATEMENT OF OBJECTIONS
SENATE BILL NO. 349
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exemption from the liquor tax for liquor produced in the State. While the credit in this bill provides an income tax credit as opposed to an exemption from the liquor tax, I believe that a similar result would occur if this income tax credit is challenged.

In addition, although the "credit period" defined on page 2, lines 1-5, sets the maximum period to claim the credit at five consecutive years, section 6 of the bill on page 19, lines 19-21, provides for the repeal of the credit only four and one-half years after the income tax credit becomes available.

For the foregoing reasons, I am returning Senate Bill No. 349 without my approval.

Respectfully,

A handwritten signature in black ink, appearing to read "David Ige", with a stylized flourish at the end.

DAVID IGE
Governor of Hawaii

A BILL FOR AN ACT

RELATING TO TAXATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Hawaii is vulnerable to soaring prices or
2 disruptions of its energy imports, which can hinder, cripple, or
3 even devastate the State's economy and the well-being of its
4 inhabitants. As the most isolated land mass on earth, Hawaii
5 imports nearly ninety per cent of its energy and almost one
6 hundred per cent of its transportation resources. The
7 legislature finds that it is critical for Hawaii to ensure
8 greater energy security by becoming more self-sufficient in its
9 energy supply.

10 The purpose of this Act is to:

- 11 (1) Establish a renewable fuels production tax credit to
12 achieve greater energy security for Hawaii; and
13 (2) Repeal the ethanol facility tax credit.

14 SECTION 2. Chapter 235, Hawaii Revised Statutes, is
15 amended by adding a new section to be appropriately designated
16 and to read as follows:

17 "§235- Renewable fuels production tax credit. (a) As
18 used in this section:



1 "Credit period" means a maximum period of five consecutive
2 years beginning from the first taxable year in which a taxpayer
3 begins qualifying renewable fuels production at a level of at
4 least fifteen billion British thermal units of qualifying
5 renewable fuels per year.

6 "Net income tax liability" means net income tax liability
7 reduced by all other credits allowed under this chapter.

8 "Qualifying renewable fuels" means fuels produced within
9 the State from renewable feedstocks at a production facility
10 located within the State; provided that:

11 (1) The fuels shall be sold in the State as a fuel; and

12 (2) The qualifying renewable fuels meet the relevant ASTM
13 International specifications for the particular fuel
14 or other industry specifications for liquid or gaseous
15 fuels, including but not limited to:

16 (A) Methanol, ethanol, or other alcohols;

17 (B) Hydrogen;

18 (C) Biodiesel or renewable diesel;

19 (D) Biogas;

20 (E) Other biofuels; or

21 (F) Renewable jet fuel or renewable gasoline.



- 1 "Renewable feedstocks" means:
- 2 (1) Biomass crops;
- 3 (2) Agricultural residues;
- 4 (3) Oil crops, including but not limited to algae, canola,
- 5 jatropha, palm, soybean, and sunflower;
- 6 (4) Sugar and starch crops, including but not limited to
- 7 sugar cane and cassava;
- 8 (5) Other agricultural crops;
- 9 (6) Grease and waste cooking oil;
- 10 (7) Food wastes;
- 11 (8) Municipal solid wastes and industrial wastes;
- 12 (9) Water; and
- 13 (10) Animal residues and wastes,
- 14 that can be used to generate energy.
- 15 (b) Each year during the credit period, there shall be
- 16 allowed to each taxpayer subject to the taxes imposed by this
- 17 chapter, a renewable fuels production tax credit that shall be
- 18 applied to the taxpayer's net income tax liability, if any,
- 19 imposed by this chapter for the taxable year in which the credit
- 20 is properly claimed.



1 For each taxpayer producing qualifying renewable fuels, the
2 annual dollar amount of the renewable fuels production tax
3 credit during the five-year period shall be equal to 20 cents
4 per seventy-six thousand British thermal units of qualifying
5 renewable fuels using the lower heating value produced and sold
6 for distribution in Hawaii; provided that the taxpayer's
7 production of qualifying renewable fuels is not less than
8 fifteen billion British thermal units of qualifying renewable
9 fuels per year; provided further that the amount of the tax
10 credit claimed under this section by a taxpayer shall not exceed
11 \$3,000,000 per taxable year. No other tax credit may be claimed
12 under this chapter for the costs related to qualifying renewable
13 fuels production that are used to properly claim a tax credit
14 under this section for the taxable year.

15 (c) The department of business, economic development, and
16 tourism shall:

17 (1) Verify the amount and type of qualifying renewable
18 fuels produced and sold, including the purpose for
19 which the fuel was produced;



1 (2) Total all qualifying renewable fuels production that
2 the department of business, economic development, and
3 tourism certifies for purposes of paragraph (3); and

4 (3) Certify the total amount of the tax credit for each
5 taxable year and the cumulative amount of the tax
6 credit during the credit period.

7 Upon each determination, the department of business, economic
8 development, and tourism shall issue a certificate to the
9 taxpayer verifying the amount of qualifying renewable fuels
10 production, the credit amount certified for each taxable year,
11 and the cumulative amount of the tax credit during the credit
12 period. The taxpayer shall file the certificate with the
13 taxpayer's tax return with the department of taxation.

14 Notwithstanding the department of business, economic
15 development, and tourism's certification authority under this
16 section, the director of taxation may audit and adjust the
17 certification process as is necessary.

18 If in any year, the annual amount of certified credits
19 reaches \$3,000,000 in the aggregate, the department of business,
20 economic development, and tourism shall immediately discontinue
21 certifying credits and notify the department of taxation. In no



1 instance shall the total amount of certified credits exceed
2 \$3,000,000 per year. Notwithstanding any other law to the
3 contrary, the verification and certification information
4 compiled by the department of business, economic development,
5 and tourism shall be available for public inspection and
6 dissemination under chapter 92F.

7 (d) If the credit under this section exceeds the
8 taxpayer's income tax liability, the excess of credit over
9 liability shall be refunded to the taxpayer; provided that no
10 refunds or payments on account of the tax credit allowed by this
11 section shall be made for amounts less than \$1. All claims for
12 a credit under this section shall be properly filed on or before
13 the end of the twelfth month following the close of the taxable
14 year for which the credit may be claimed. Failure to comply
15 with the foregoing provision shall constitute a waiver of the
16 right to claim the credit.

17 (e) Prior to production of any qualifying renewable fuels
18 for the year, the taxpayer shall provide written notice of the
19 taxpayer's intention to begin production of qualifying renewable
20 fuels. The information shall be provided to the department of
21 taxation and the department of business, economic development,



1 and tourism on forms provided by the department of business,
2 economic development, and tourism, and shall include information
3 on the taxpayer, facility location, facility production
4 capacity, anticipated production start date, and taxpayer's
5 contact information. Notwithstanding any other law to the
6 contrary, this taxpayer and facility information shall be
7 available for public inspection and dissemination under chapter
8 92F.

9 (f) The taxpayer shall provide written notice to the
10 director of taxation and the director of business, economic
11 development, and tourism within thirty days following the start
12 of production. The notice shall include the production start
13 date and expected qualifying renewable fuels production for the
14 next twelve months. Notwithstanding any other law to the
15 contrary, this production information shall be available for
16 public inspection and dissemination under chapter 92F.

17 (g) Each calendar year during the credit period, the
18 taxpayer shall provide information to the director of business,
19 economic development, and tourism on the number of British
20 thermal units of qualifying renewable fuels produced and sold
21 during the previous calendar year, the type of fuels, feedstocks



1 used for qualifying renewable fuels production, the number of
2 employees of the facility and each employee's state of
3 residency, and the projected number of British thermal units of
4 qualifying renewable fuels production for the succeeding year.

5 (h) In the case of a partnership, S corporation, estate,
6 or trust, distribution and share of the tax credit for
7 qualifying renewable fuels production shall be determined
8 pursuant to section 704(b) (with respect to partner's
9 distributive share) of the Internal Revenue Code.

10 (i) Following each year in which a credit under this
11 section has been claimed, the director of business, economic
12 development, and tourism shall submit a written report to the
13 governor and legislature regarding the production and sale of
14 renewable fuels. The report shall include:

- 15 (1) The number, location, and production of qualifying
16 renewable fuels production facilities in the State;
17 (2) The total number of British thermal units of
18 qualifying renewable fuels, broken down by type of
19 fuel, produced and sold during the previous year; and



1 (3) The projected number of British thermal units of
2 qualifying renewable fuels production for the
3 succeeding year.

4 (j) The director of taxation shall prepare forms that may
5 be necessary to claim a credit under this section. The director
6 of taxation may require the taxpayer to furnish information to
7 ascertain the validity of the claim for credit made under this
8 section and may adopt rules necessary to effectuate the purposes
9 of this section pursuant to chapter 91."

10 SECTION 3. Section 235-110.3, Hawaii Revised Statutes, is
11 repealed.

12 ~~["§235-110.3 Ethanol facility tax credit. (a) Each year~~
13 ~~during the credit period, there shall be allowed to each~~
14 ~~taxpayer subject to the taxes imposed by this chapter, an~~
15 ~~ethanol facility tax credit that shall be applied to the~~
16 ~~taxpayer's net income tax liability, if any, imposed by this~~
17 ~~chapter for the taxable year in which the credit is properly~~
18 ~~claimed.~~

19 ~~For each qualified ethanol production facility, the annual~~
20 ~~dollar amount of the ethanol facility tax credit during the~~
21 ~~eight year period shall be equal to thirty per cent of its~~



1 ~~nameplate capacity if the nameplate capacity is greater than~~
2 ~~five hundred thousand but less than fifteen million gallons. A~~
3 ~~taxpayer may claim this credit for each qualifying ethanol~~
4 ~~facility; provided that:~~

5 ~~(1) The claim for this credit by any taxpayer of a~~
6 ~~qualifying ethanol production facility shall not~~
7 ~~exceed one hundred per cent of the total of all~~
8 ~~investments made by the taxpayer in the qualifying~~
9 ~~ethanol production facility during the credit period;~~

10 ~~(2) The qualifying ethanol production facility operated at~~
11 ~~a level of production of at least seventy five per~~
12 ~~cent of its nameplate capacity on an annualized basis;~~

13 ~~(3) The qualifying ethanol production facility is in~~
14 ~~production on or before January 1, 2017; and~~

15 ~~(4) No taxpayer that claims the credit under this section~~
16 ~~shall claim any other tax credit under this chapter~~
17 ~~for the same taxable year.~~

18 ~~(b) As used in this section:~~

19 ~~"Credit period" means a maximum period of eight years~~
20 ~~beginning from the first taxable year in which the qualifying~~
21 ~~ethanol production facility begins production even if actual~~



1 ~~production is not at seventy five per cent of nameplate~~
2 ~~capacity.~~

3 ~~"Investment" means a nonrefundable capital expenditure~~
4 ~~related to the development and construction of any qualifying~~
5 ~~ethanol production facility, including processing equipment,~~
6 ~~waste treatment systems, pipelines, and liquid storage tanks at~~
7 ~~the facility or remote locations, including expansions or~~
8 ~~modifications. Capital expenditures shall be those direct and~~
9 ~~certain indirect costs determined in accordance with section~~
10 ~~263A of the Internal Revenue Code, relating to uniform~~
11 ~~capitalization costs, but shall not include expenses for~~
12 ~~compensation paid to officers of the taxpayer, pension and other~~
13 ~~related costs, rent for land, the costs of repairing and~~
14 ~~maintaining the equipment or facilities, training of operating~~
15 ~~personnel, utility costs during construction, property taxes,~~
16 ~~costs relating to negotiation of commercial agreements not~~
17 ~~related to development or construction, or service costs that~~
18 ~~can be identified specifically with a service department or~~
19 ~~function or that directly benefit or are incurred by reason of a~~
20 ~~service department or function. For the purposes of determining~~
21 ~~a capital expenditure under this section, the provisions of~~



1 ~~section 263A of the Internal Revenue Code shall apply as it read~~
2 ~~on March 1, 2004. For purposes of this section, investment~~
3 ~~excludes land costs and includes any investment for which the~~
4 ~~taxpayer is at risk, as that term is used in section 465 of the~~
5 ~~Internal Revenue Code (with respect to deductions limited to~~
6 ~~amount at risk).~~

7 ~~"Nameplate capacity" means the qualifying ethanol~~
8 ~~production facility's production design capacity, in gallons of~~
9 ~~motor fuel grade ethanol per year.~~

10 ~~"Net income tax liability" means net income tax liability~~
11 ~~reduced by all other credits allowed under this chapter.~~

12 ~~"Qualifying ethanol production" means ethanol produced from~~
13 ~~renewable, organic feedstocks, or waste materials, including~~
14 ~~municipal solid waste. All qualifying production shall be~~
15 ~~fermented, distilled, gasified, or produced by physical chemical~~
16 ~~conversion methods such as reformation and catalytic conversion~~
17 ~~and dehydrated at the facility.~~

18 ~~"Qualifying ethanol production facility" or "facility"~~
19 ~~means a facility located in Hawaii which produces motor fuel~~
20 ~~grade ethanol meeting the minimum specifications by the American~~
21 ~~Society of Testing and Materials standard D 4806, as amended.~~



1 ~~(c) In the case of a taxable year in which the cumulative~~
2 ~~claims for the credit by the taxpayer of a qualifying ethanol~~
3 ~~production facility exceeds the cumulative investment made in~~
4 ~~the qualifying ethanol production facility by the taxpayer, only~~
5 ~~that portion that does not exceed the cumulative investment~~
6 ~~shall be claimed and allowed.~~

7 ~~(d) The department of business, economic development, and~~
8 ~~tourism shall:~~

- 9 ~~(1) Maintain records of the total amount of investment~~
10 ~~made by each taxpayer in a facility;~~
11 ~~(2) Verify the amount of the qualifying investment;~~
12 ~~(3) Total all qualifying and cumulative investments that~~
13 ~~the department of business, economic development, and~~
14 ~~tourism certifies; and~~
15 ~~(4) Certify the total amount of the tax credit for each~~
16 ~~taxable year and the cumulative amount of the tax~~
17 ~~credit during the credit period.~~

18 ~~Upon each determination, the department of business,~~
19 ~~economic development, and tourism shall issue a certificate to~~
20 ~~the taxpayer verifying the qualifying investment amounts, the~~
21 ~~credit amount certified for each taxable year, and the~~



1 ~~cumulative amount of the tax credit during the credit period.~~
2 ~~The taxpayer shall file the certificate with the taxpayer's tax~~
3 ~~return with the department of taxation. Notwithstanding the~~
4 ~~department of business, economic development, and tourism's~~
5 ~~certification authority under this section, the director of~~
6 ~~taxation may audit and adjust certification to conform to the~~
7 ~~facts.~~

8 ~~If in any year, the annual amount of certified credits~~
9 ~~reaches \$12,000,000 in the aggregate, the department of~~
10 ~~business, economic development, and tourism shall immediately~~
11 ~~discontinue certifying credits and notify the department of~~
12 ~~taxation. In no instance shall the total amount of certified~~
13 ~~credits exceed \$12,000,000 per year. Notwithstanding any other~~
14 ~~law to the contrary, this information shall be available for~~
15 ~~public inspection and dissemination under chapter 92F.~~

16 ~~(e) If the credit under this section exceeds the~~
17 ~~taxpayer's income tax liability, the excess of credit over~~
18 ~~liability shall be refunded to the taxpayer, provided that no~~
19 ~~refunds or payments on account of the tax credit allowed by this~~
20 ~~section shall be made for amounts less than \$1. All claims for~~
21 ~~a credit under this section must be properly filed on or before~~



1 ~~the end of the twelfth month following the close of the taxable~~
2 ~~year for which the credit may be claimed. Failure to comply~~
3 ~~with the foregoing provision shall constitute a waiver of the~~
4 ~~right to claim the credit.~~

5 ~~(f) If a qualifying ethanol production facility or an~~
6 ~~interest therein is acquired by a taxpayer prior to the~~
7 ~~expiration of the credit period, the credit allowable under~~
8 ~~subsection (a) for any period after such acquisition shall be~~
9 ~~equal to the credit that would have been allowable under~~
10 ~~subsection (a) to the prior taxpayer had the taxpayer not~~
11 ~~disposed of the interest. If an interest is disposed of during~~
12 ~~any year for which the credit is allowable under subsection (a),~~
13 ~~the credit shall be allowable between the parties on the basis~~
14 ~~of the number of days during the year the interest was held by~~
15 ~~each taxpayer. In no case shall the credit allowed under~~
16 ~~subsection (a) be allowed after the expiration of the credit~~
17 ~~period.~~

18 ~~(g) Once the total nameplate capacities of qualifying~~
19 ~~ethanol production facilities built within the State reaches or~~
20 ~~exceeds a level of forty million gallons per year, credits under~~
21 ~~this section shall not be allowed for new ethanol production~~



1 ~~facilities. If a new facility's production capacity would cause~~
2 ~~the statewide ethanol production capacity to exceed forty~~
3 ~~million gallons per year, only the ethanol production capacity~~
4 ~~that does not exceed the statewide forty million gallon per year~~
5 ~~level shall be eligible for the credit.~~

6 ~~(h) Prior to construction of any new qualifying ethanol~~
7 ~~production facility, the taxpayer shall provide written notice~~
8 ~~of the taxpayer's intention to begin construction of a~~
9 ~~qualifying ethanol production facility. The information shall~~
10 ~~be provided to the department of taxation and the department of~~
11 ~~business, economic development, and tourism on forms provided by~~
12 ~~the department of business, economic development, and tourism,~~
13 ~~and shall include information on the taxpayer, facility~~
14 ~~location, facility production capacity, anticipated production~~
15 ~~start date, and the taxpayer's contact information.~~

16 ~~Notwithstanding any other law to the contrary, this information~~
17 ~~shall be available for public inspection and dissemination under~~
18 ~~chapter 92F.~~

19 ~~(i) The taxpayer shall provide written notice to the~~
20 ~~director of taxation and the director of business, economic~~
21 ~~development, and tourism within thirty days following the start~~



1 ~~of production. The notice shall include the production start~~
2 ~~date and expected ethanol fuel production for the next twenty~~
3 ~~four months. Notwithstanding any other law to the contrary,~~
4 ~~this information shall be available for public inspection and~~
5 ~~dissemination under chapter 92F.~~

6 ~~(j) If a qualifying ethanol production facility fails to~~
7 ~~achieve an average annual production of at least seventy five~~
8 ~~per cent of its nameplate capacity for two consecutive years,~~
9 ~~the stated capacity of that facility may be revised by the~~
10 ~~director of business, economic development, and tourism to~~
11 ~~reflect actual production for the purposes of determining~~
12 ~~statewide production capacity under subsection (g) and allowable~~
13 ~~credits for that facility under subsection (a). Notwithstanding~~
14 ~~any other law to the contrary, this information shall be~~
15 ~~available for public inspection and dissemination under chapter~~
16 ~~92F.~~

17 ~~(k) Each calendar year during the credit period, the~~
18 ~~taxpayer shall provide information to the director of business,~~
19 ~~economic development, and tourism on the number of gallons of~~
20 ~~ethanol produced and sold during the previous calendar year, how~~
21 ~~much was sold in Hawaii versus overseas, feedstocks used for~~



1 ~~ethanol production, the number of employees of the facility, and~~
2 ~~the projected number of gallons of ethanol production for the~~
3 ~~succeeding year.~~

4 ~~(l) In the case of a partnership, S corporation, estate,~~
5 ~~or trust, the tax credit allowable is for every qualifying~~
6 ~~ethanol production facility. The cost upon which the tax credit~~
7 ~~is computed shall be determined at the entity level.~~

8 ~~Distribution and share of credit shall be determined pursuant to~~
9 ~~section 235-110.7(a).~~

10 ~~(m) Following each year in which a credit under this~~
11 ~~section has been claimed, the director of business, economic~~
12 ~~development, and tourism shall submit a written report to the~~
13 ~~governor and legislature regarding the production and sale of~~
14 ~~ethanol. The report shall include:~~

15 ~~(1) The number, location, and nameplate capacities of~~
16 ~~qualifying ethanol production facilities in the State,~~

17 ~~(2) The total number of gallons of ethanol produced and~~
18 ~~sold during the previous year, and~~

19 ~~(3) The projected number of gallons of ethanol production~~
20 ~~for the succeeding year.~~



1 ~~(n) The director of taxation shall prepare forms that may~~
2 ~~be necessary to claim a credit under this section.~~
3 ~~Notwithstanding the department of business, economic~~
4 ~~development, and tourism's certification authority under this~~
5 ~~section, the director may audit and adjust certification to~~
6 ~~conform to the facts. The director may also require the~~
7 ~~taxpayer to furnish information to ascertain the validity of the~~
8 ~~claim for credit made under this section and may adopt rules~~
9 ~~necessary to effectuate the purposes of this section pursuant to~~
10 ~~chapter 91."]~~

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

17 SECTION 5. Statutory material to be repealed is bracketed
18 and stricken. New statutory material is underscored.

19 SECTION 6. This Act shall take effect on July 1, 2015, and
20 shall apply to taxable years beginning after December 31, 2015;
21 provided that section 2 shall be repealed on June 30, 2020.

S.B. NO. 349
S.D. 2
H.D. 2
C.D. 1

APPROVED this day of , 2015

GOVERNOR OF THE STATE OF HAWAII