



LINDA LINGLE  
GOVERNOR  
JAMES R. AIONA, JR.  
LT. GOVERNOR

STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
335 MERCHANT STREET, ROOM 310  
P.O. Box 541  
HONOLULU, HAWAII 96809  
Phone Number: 586-2850  
Fax Number: 586-2856  
[www.hawaii.gov/dcca](http://www.hawaii.gov/dcca)

LAWRENCE M. REIFURTH  
DIRECTOR  
RONALD BOYER  
DEPUTY DIRECTOR

TO THE HOUSE COMMITTEES ON  
CONSUMER PROTECTION & COMMERCE and JUDICIARY  
THE TWENTY-FOURTH LEGISLATURE  
REGULAR SESSION OF 2008

Thursday, March 13, 2008  
2:00 pm  
Conference Room 325

**TESTIMONY ON SENATE BILL NO. 3006, SD1  
RELATING TO BUSINESS REGISTRATION**

TO THE HONORABLE ROBERT HERKES AND THE HONORABLE TOMMY WATERS,  
CHAIRS, AND MEMBERS OF THE COMMITTEES:

My name is Tung Chan, Commissioner of Securities of the Business Registration Division, Department of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to testify on Senate Bill No. 3006, SD1, an Administration bill relating to housekeeping measures for business registration. We are proposing amendments to Senate Bill No. 3006, SD1 that include a few technical legal revisions to correct changes made in the last committee that inadvertently would create ambiguity or conflict in the law. Our proposed technical amendments are explained in an attachment to this testimony. We strongly support this measure and respectfully request that the Committee pass it with the proposed amendments.

This bill makes technical, housekeeping amendments to streamline and clarify the business registration laws and correct errors, ambiguities, and inconsistencies in the laws.

First, section 428-810, HRS, is amended to repeal a requirement that the Director of the Department of Commerce and Consumer Affairs deliver a copy of the decrees of termination of all administratively terminated LLCs to the Department of Taxation and to the financial officer of each county. The same requirement has already been repealed for all other entity types in prior legislative sessions. This bill would simply conform the LLC law to those pertaining to other administratively terminated/dissolved entities.

Second, 414D-249(e), HRS, appears to conflict with section 414D-245(b)(3), HRS, regarding who shall have control over the winding-up of affairs when a nonprofit corporation dissolves. This bill clarifies that the trustees of a dissolved nonprofit corporation will be determined by the entity's articles of incorporation, rather than defaulting to the "last directors" of the entity.

The same issues arise for for-profit and professional corporations and sections 414-402 and 415A-18, HRS, are amended accordingly.

Third, in section 425E-811, HRS, a minor amendment is made by deleting the reference to a "dissolved" limited partnership and replacing it with an "administratively canceled" limited partnership. This is to conform the language to the manner in which limited partnerships are terminated.

Finally, sections 414-433 and 414D-273, HRS, include minor amendments to make provisions regarding profit and nonprofit foreign corporations consistent with other entities by removing the requirement of stating a "period of duration" of the corporation.

I respectfully request your support of Senate Bill No. 3006, SD1 with proposed amendments which will help improve the business climate in Hawaii. Thank you for the opportunity to testify. I will be happy to answer any questions the Committees may have and my Division and I would be pleased to work with the Committee members or their staff in reviewing any of our proposed technical amendments.

## PROPOSED TECHNICAL AMENDMENTS

We are proposing the following technical amendments to the SD1 version of SB3006.

The previous committee made changes that appeared to be non-substantive stylistic changes but because business registration provisions are so technical, those changes altered the meaning of the provisions, creating highly technical ambiguities and potential conflicts in the law. In order to correct these inadvertent ambiguities and inconsistencies that would create issues with current procedures for dissolution and corporate existence, we propose the following amendments.

**1. We propose the following amendment:** Section 1 in §415A (a) first sentence: “When any professional corporation organized and authorized to issue shares under the laws of this state ~~will~~ **shall** be or ~~has~~ **shall have** been dissolved or ceases **shall cease or shall have ceased** to exist...”

**Reason for proposed change:** We propose putting the “shall” language back in for several reasons. First, this provision is meant to address situations where the dissolution or cessation of existence shall happen sometime in the future, but may not have already happened or may not be happening. So the language really needs to reflect this “shall” state. This language is identical to parallel existing provisions for other types of corporations (§414-422 (corporations), §414D-245.5 (non-profit corporations)) and is also identical to the Delaware statute on which the legislature originally modeled §414-422 and §414D-245.5.

In fact, the legislature actually removed the “shall be or shall have been or shall cease or shall have ceased” language in §414-422 in Act 124 of 2003, but had to reverse their position and add the “shall” language back in the following year in Act 121

of 2004 because it was found to be incorrect. For these reasons, we strongly recommend restoring the “shall” language.

**2. We propose the following amendment:** Section 1 in §415A (a), line 13 “are not diligently pursuing ~~any necessary~~ **such** obligations...”

**Reason for proposed change:** We propose deleting “any necessary” and replacing it with “such” because a person who is responsible for settling unfinished business or winding up of affairs cannot be permitted to diligently pursue “Any necessary” obligation. That person is supposed to be very limited to only diligently pursue unfinished business or winding up. Our proposed revision to the bill is to change “any necessary” to “such” obligations so that “such” obligations refer only to the previous reference of “settling unfinished business and winding up affairs.” This change is necessary in order to be consistent with the whole structure of continued corporate existence for winding-up purposes. It is also consistent with the Delaware statutes, parallel existing provisions for other corporations (§414-422 (corporations), §414D-245.5 (non-profit corporations)), and a host of other regular dissolution provisions in our laws including §414-385, -402, §414D-245, -249.

**3. We propose the following amendment:** The corporation “~~may~~ continues its corporate existence....”

This error occurs in four places in the bill.

- (i) Section 2 in §414-402 (e) on page 4, line 8.
- (ii) Section 4 in §414D-249 (e) on page 8, line 12.
- (iii) Section 7 in §415A-18 (c) on page 11, line 21.
- (iv) Section 7 in §415A-18 (f) on page 14, line 11.

**Reason for proposed change:** We propose deleting “may continue” and replacing it with “continues.” This is a very important change because under existing Hawaii statutes, a dissolved corporation does not have the option of continuing its corporate existence as the bill currently suggests. Rather, the corporation’s corporate existence continues as a matter of fact. It is not a “may continue” option. It is a “continues” as fact. This is consistent with the Model Business Corporation Act (“MBCA”) as well as the Model Nonprofit Corporation Act. Both Model Acts expressly provide that corporate existence continues and the Official Comment to MBCA Section 14.05 explains that “dissolution does not terminate the corporate existence but simply requires the corporation thereafter to devote itself [expressly] to winding up its affairs...”

**4. We propose the following amendment:** “may not carry on any business except ~~for any activities that are~~ necessary to wind up...”

This error occurs in three places in the bill.

- (i) Section 2 in §414-402 (e) on page 4, line 9.
- (ii) Section 7 in §415A-18 (c) on page 11, line 22.
- (iv) Section 7 in §415A-18 (f) on page 14, line 12.

**Reason for proposed change:** We propose deleting “for any activities” and “are” and replacing it with the pronoun “that.” Again, this is a very important change because the profit and professional corporations upon dissolution or expiration of a period of duration are only supposed to narrowly be allowed to do business to wind up business. (Please note, nonprofits are slightly different – they are permitted to do “activities” but profits are only allowed to do “business” which is why §414D-249 (e)’s language is slightly different than the other corporations). The language “any activities”

for corporate business registration purposes is too broad and would suggest ambiguity and confusion since it differs from the Model Business Corporation Act ("MBCA"). Also, it creates confusion with the nonprofit corporation laws since nonprofits traditionally do "any activities" in our laws, whereas profit and professional corporations throughout our laws and model laws do only "business." We propose deleting the "activities" reference and using the pronoun "that" so that Hawaii tracks the model language that we have originally modeled our laws on and so that the language emphasizes that the corporation can only do business as referenced in the previous clause and only as necessary to wind up affairs.

**5. We propose the following amendment:** In Section 4 in §414D-249 (e) on page 8, line 12, "its **corporate** existence..."

**Reason for proposed change:** We propose inserting "corporate" before the word "existence" because it is necessary to be clear for business registration purposes that the continuation of existence is for the technical "corporate" existence. This change is consistent with the drafted language in other parallel provisions of the law.

March 12, 2008

Representative Robert N. Herkes, Chair  
Committee on Consumer Protection & Commerce  
House of Representatives  
State of Hawaii



Representative Tommy Waters, Chair  
Committee on Judiciary  
House of Representatives  
State of Hawaii

Re: S.B 3006, S.D. 1 Relating to Business Registration

Dear Chair Herkes and Chair Waters, Vice-Chairs McKelvey and Oshiro, and Members of the Committees on Consumer Protection & Commerce and Judiciary:

I am an attorney who has practiced corporate law for over 25 years. I have been involved in the drafting of our corporate and business organizations laws numerous times during this period.

1. In Section 1 of the bill dealing with the dissolution of professional corporations, please do the following to keep consistent the provisions of our business organization laws dealing with various entities.

(a) Please revise the current draft of the bill to restore the “shall be or shall have been dissolved or shall cease or shall have ceased to exist” language used in and consistent with HRS Sections 414-422 and 414D-245.5.

(b) Please revise the current draft of the bill to restore the “pursuing such obligations” language used in HRS Sections 414-422 and 414D-245.5.

2. More importantly, in Sections 2, 5 and 7 of the bill dealing with the consequences of dissolution of a corporation or expiration of its term of existence, the statute should make clear that corporate existence should continue (as opposed to language that such existence may continue). This is consistent with the philosophy of the Model Business Corporation Act which is that the existence of a dissolved corporation continues but its activities should be limited to those dealing with winding up its affairs. If this is not made clear, then the legal consequences of dissolution or expiration of term and how to deal with the corporation’s assets become unclear and there will be difficulties in winding up the affairs of the corporation.

Thank you,

A handwritten signature in black ink, appearing to read "Ronald R. Sakamoto". The signature is fluid and cursive.

Ronald R. Sakamoto



March 13, 2008

HOUSE COMMITTEE ON  
CONSUMER PROTECTION & COMMERCE  
THE HONORABLE REPRESENTATIVE ROBERT N. HERKES, CHAIR  
THE HONORABLE REPRESENTATIVE ANGUS L.K. McKELVEY, VICE-CHAIR

HOUSE COMMITTEE ON JUDICIARY  
THE HONORABLE REPRESENTATIVE TOMMY WATERS, CHAIR  
THE HONORABLE REPRESENTATIVE BLAKE K. OSHIRO, VICE-CHAIR

SB 3006 S.D. 1 RELATING TO BUSINESS REGISTRATION

Testimony of E. Gunner Schull

Chairmen Herkes and Waters, Vice-Chairmen McKelvey and Oshiro, and Members of the House Committees on Consumer Protection & Commerce and Judiciary:

I appreciate this opportunity to testify in support of Senate Bill 3006 S.D. 1 (the "Bill") and to respectfully suggest a few changes as described in the written testimony of Daniel H. Devaney IV and summarized below. My testimony reflects my personal opinions and not necessarily any position of my law firm, any firm clients or any other persons.

As a business lawyer, I have practiced with the Cades Schutte law firm for more than four decades and was the chair of the firm's corporate department for many of those years.

The changes summarized below are desirable and appropriate in that they use language consistent with language used in other Hawaii business entity statutes and, in many cases, in the Model Acts on which the Hawaii business and nonprofit corporation statutes are based.

Under principles of statutory construction, there is a risk that inconsistent language contained in the Bill may not be given the same effect as that contained in the existing statutory provisions. Moreover, the legislature has recognized the importance of uniform laws. For example HRS Section 1-24 provides "All provisions of uniform acts adopted by the State shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them." Changing statutory language without a compelling reason leads to uncertainty and more expense for members of the public who must comply with the statutes.

Working from the PDF on the Legislature's website, I urge further revisions to the Bill as follows (new language is underscored and deleted language is ~~stricken~~):

Page 1, Lines 7 and 8: "shares under the laws of this State ~~will~~ shall be or ~~has~~ shall have been dissolved or ~~ceases~~ shall cease or shall have ceased to exist, the circuit court, upon"

Page 1, Line 13: "corporation either are not diligently pursuing ~~any necessary~~ such"

Testimony of E. Gunner Schull re SB 3006 S.D. 1  
March 13, 2008  
Page 2

Page 4, Lines 8 through 10: “expired, the corporation ~~may continue~~ continues its corporate existence but may not carry on any business except ~~for any activities that~~ necessary to wind up and liquidate its business and affairs”

Page 8, Line 12: “expired, the corporation ~~may continue~~ continues its corporate existence by but may not”

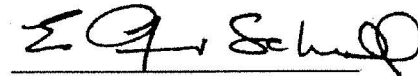
Page 11, Lines 21 and 22: “~~may continue~~ continues its corporate existence but may not carry on any business except ~~for any activities that are~~ necessary to wind up”

Page 14, Lines 11 and 12: “corporation ~~may continue~~ continues its corporate existence but may not carry on any business except ~~for any activities that are~~”

With the foregoing revisions, I would strongly support the Bill.

Thank you for this opportunity to testify on this matter.

Respectfully,



E. Gunner Schull

March 13, 2008

HOUSE COMMITTEE ON  
CONSUMER PROTECTION & COMMERCE  
THE HONORABLE REPRESENTATIVE ROBERT N. HERKES, CHAIR  
THE HONORABLE REPRESENTATIVE ANGUS L.K. McKELVEY, VICE-CHAIR

HOUSE COMMITTEE ON JUDICIARY  
THE HONORABLE REPRESENTATIVE TOMMY WATERS, CHAIR  
THE HONORABLE REPRESENTATIVE BLAKE K. OSHIRO, VICE-CHAIR

SB 3006 S.D. 1 RELATING TO BUSINESS REGISTRATION

Testimony of Daniel H. Devaney IV

Chairmen Herkes and Waters, Vice-Chairmen McKelvey and Oshiro, and Members of the House Committees on Consumer Protection & Commerce and Judiciary:

**1. Introduction**

I appreciate this opportunity to testify in support of Senate Bill 3006 S.D. 1 (the "Bill") and to respectfully suggest making a few changes to the Bill. My testimony reflects my personal opinions and not necessarily any position of my law firm, any firm clients or any other persons.

As a business lawyer, I have practiced with the Cades Schutte law firm since 1991, and have spoken on corporate law matters at Hawaii State Bar Association conventions. My published writings include a chapter of the Corporations Manual published by the Hawaii State Bar Association and a chapter about doing business in Hawaii in a BNA Corporate Practice Portfolio. I have been a member of the DCCA legislative work group for a number of years which has worked on improving and modernizing Hawaii's business entity statutes.

In February 2008 I submitted oral testimony to the Senate Committee on Commerce, Consumer Protection and Affordable Housing in strong support of an earlier version of the Bill. In its current version, the Bill includes several changes that improved the earlier version and several changes that use language inconsistent with existing Hawaii law.

**2. Comments**

With the changes described in this part 2 and summarized in part 3 below, I would strongly support the Bill.

**(a) Trustees or Receivers for Dissolved Professional Corporations.**

Section 1 of the Bill authorizes interested persons to apply to a court for the appointment of trustees or receivers of a dissolved professional corporation when the persons responsible for winding up the corporate affairs are not doing so. This provision makes clear that the authority that exists with respect to a dissolved business corporation, under HRS Section 414-422, and to a dissolved nonprofit corporation, under HRS Section 414D-245.5, also applies to a professional corporation. HRS Section 414-422 was initially enacted in 2002 and was amended in 2003 and

2004. HRS Section 414D-245.5 was initially enacted in 2004 and was clearly based on and is substantially identical to HRS Section 414-422 as amended in 2004.

For reasons that are not clear, Section 1 of the Bill in its current version does not use the same language as the existing statutory provisions dealing with the same issues. Under principles of statutory construction, there is a risk that inconsistent language currently contained in the Bill may not be given the same effect as that contained in the existing statutory provisions. This leads to uncertainty and more expense for members of the public who must comply with the statutes.

There are two aspects to the changes made by the Bill in its current version. The first aspect is the change in language from “shall be or shall have been dissolved or shall cease or shall have ceased to exist” to “will be or has been dissolved or ceases to exist.” When HRS Section 414-422 was enacted in 2002, it used the “shall ... shall have” language. In the 2003 amendment, that language was replaced with language similar to that in the current version of the Bill. In the 2004 amendment, the “shall ... shall have” language was restored. Without a compelling reason for inconsistent language, I urge that the Bill be revised to restore the “shall be or shall have been dissolved or shall cease or shall have ceased to exist” language used in and consistent with HRS Sections 414-422 and 414D-245.5.

The second aspect is the change from “pursuing such obligations” to “pursuing any necessary obligations.” The insertion of the qualifier “necessary” substantially changes the meaning of the provision and it also is inconsistent with the language used in HRS Sections 414-422 and 414D-245.5. Without a compelling reason for inconsistent language, I urge that the Bill be revised to restore the “pursuing such obligations” language used in HRS Sections 414-422 and 414D-245.5.

**(b) Continuation of Corporate Existence After Dissolution or Expiration.**

Sections 2, 5 and 7 of the Bill, among other things, deal with the continuation of corporate existence after dissolution or expiration of a corporation’s period of duration. There are two aspects of the changes contained in the Bill. First, in several provisions, the Bill changed the language “continues its corporate existence” to “may continue its corporate existence” and, in Section 5 of the Bill, deleted the word “corporate.”

Under existing Hawaii statutes, a dissolved corporation’s corporate existence does continue; a dissolved corporation does not have the option of continuing its corporate existence as provided in the current version of the Bill. The Hawaii corporate statutes are based on the Model Business Corporation Act (“MBCA”) and the Model Nonprofit Corporation Act. Both Model Acts expressly provide that corporate existence continues and the Official Comment to MBCA Section 14.05, the counterpart to HRS Section 414-385, explains “dissolution does not terminate the corporate existence but simply requires the corporation thereafter to devote itself to winding up its affairs ....” Although the Model Acts do not deal with corporations whose periods of duration have expired, there appears to be no reason to treat such corporations differently than those that were dissolved. The inclusion of a period of duration can be viewed simply as providing that dissolution shall take place at or about the specified time.

Second, the Bill changed “any [business/activities] except [that/those] necessary” to “any business except for any activities [that are] necessary.” This change creates uncertainty as it is inconsistent with the corresponding provisions in the Model Acts and in the jurisdictions that adopted those Model Act provisions. Inconsistency in statutory language creates uncertainty and expense.

### Summary and Conclusion

The legislature has recognized the importance of uniform laws and consistent laws. For example HRS Section 1-24 provides “All provisions of uniform acts adopted by the State shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them.”

Working from the PDF on the Legislature’s website, I urge further revisions to the Bill as follows (new language is underscoring and deleted language is ~~stricken~~):

Page 1, Lines 7 and 8: “shares under the laws of this State ~~will~~ shall be or ~~has~~ shall have been dissolved or ~~ceases~~ shall cease or shall have ceased to exist, the circuit court, upon”

Page 1, Line 13: “corporation either are not diligently pursuing ~~any necessary~~ such”

Page 4, Lines 8 through 10: “expired, the corporation ~~may continue~~ continues its corporate existence but may not carry on any business except ~~for any activities that~~ necessary to wind up and liquidate its business and affairs”

Page 8, Line 12: “expired, the corporation ~~may continue~~ continues its corporate existence by but may not”

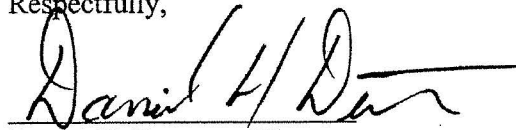
Page 11, Lines 21 and 22: “~~may continue~~ continues its corporate existence but may not carry on any business except ~~for any activities that are~~ necessary to wind up”

Page 14, Lines 11 and 12: “corporation ~~may continue~~ continues its corporate existence but may not carry on any business except ~~for any activities that are~~”

With the foregoing revisions, I would strongly support the Bill. Without the foregoing revisions or similar revisions, the Bill in its current version, if enacted into law, would create numerous interpretation problems leading to unnecessary expense for members of the public who seek to comply with Hawaii’s business entity laws.

Thank you for this opportunity to testify on this matter.

Respectfully,



Daniel H. Devaney IV

March 13, 2008

HOUSE COMMITTEE ON  
CONSUMER PROTECTION & COMMERCE  
THE HONORABLE REPRESENTATIVE ROBERT N. HERKES, CHAIR  
THE HONORABLE REPRESENTATIVE ANGUS L.K. McKELVEY, VICE-CHAIR

HOUSE COMMITTEE ON JUDICIARY  
THE HONORABLE REPRESENTATIVE TOMMY WATERS, CHAIR  
THE HONORABLE REPRESENTATIVE BLAKE K. OSHIRO, VICE-CHAIR

SB 3006 S.D. 1 RELATING TO BUSINESS REGISTRATION

Testimony of Marc E. Rousseau

Chairmen Herkes and Waters, Vice-Chairmen McKelvey and Oshiro, and Members of the House Committees on Consumer Protection & Commerce and Judiciary:

I appreciate this opportunity to testify in support of Senate Bill 3006 S.D. 1 (the "Bill") and to respectfully suggest a few changes as described in the written testimony of Daniel H. Devaney IV and summarized below. My testimony reflects my personal opinions and not necessarily any position of my law firm, any firm clients or any other persons.

As a business lawyer, I have practiced with the Cades Schutte law firm for more than fourteen years and have spoken on corporate law matters at seminars including Hawaii State Bar Association conventions.

The changes summarized below are desirable and appropriate in that they use language consistent with language used in other Hawaii business entity statutes and, in many cases, in the Model Acts on which the Hawaii business and nonprofit corporation statutes are based.

Under principles of statutory construction, there is a risk that inconsistent language contained in the Bill may not be given the same effect as that contained in the existing statutory provisions. Moreover, the legislature has recognized the importance of uniform laws. For example HRS Section 1-24 provides "All provisions of uniform acts adopted by the State shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them." Changing statutory language without a compelling reason leads to uncertainty and more expense for members of the public who must comply with the statutes.

Working from the PDF on the Legislature's website, I urge further revisions to the Bill as follows (new language is underscored and deleted language is ~~stricken~~):

Page 1, Lines 7 and 8: "shares under the laws of this State ~~will~~ shall be or ~~has~~ shall have been dissolved or ~~ceases~~ shall cease or shall have ceased to exist, the circuit court, upon"

Page 1, Line 13: "corporation either are not diligently pursuing ~~any necessary~~ such"

Testimony of Marc E. Rousseau re SB 3006 S.D. 1  
March 13, 2008  
Page 2

Page 4, Lines 8 through 10: “expired, the corporation ~~may continue~~ continues its corporate existence but may not carry on any business except ~~for any activities that~~ necessary to wind up and liquidate its business and affairs”

Page 8, Line 12: “expired, the corporation ~~may continue~~ continues its corporate existence ~~by~~ but may not”

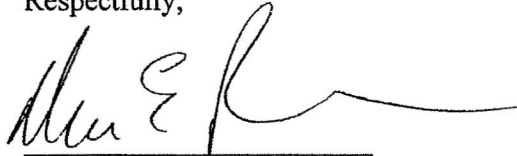
Page 11, Lines 21 and 22: “~~may continue~~ continues its corporate existence but may not carry on any business except ~~for any activities that are~~ necessary to wind up”

Page 14, Lines 11 and 12: “corporation ~~may continue~~ continues its corporate existence but may not carry on any business except ~~for any activities that are~~”

With the foregoing revisions, I would strongly support the Bill.

Thank you for this opportunity to testify on this matter.

Respectfully,

A handwritten signature in black ink, appearing to read 'Marc E. Rousseau', with a long horizontal flourish extending to the right.

Marc E. Rousseau