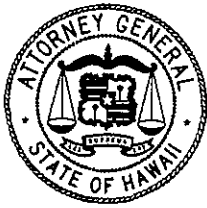


HB 2136



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

H.B. NO. 2136, RELATING TO DISTRIBUTIONS BY NONPROFIT CORPORATIONS.

BEFORE THE:

Senate Committee on Commerce and Consumer Protection

DATE: Friday, March 5, 2010 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Jodi K. Yi, Deputy Attorney General

Chair Baker and Committee members:

The Attorney General supports the passage of this bill with clarifying amendments.

Under Hawaii's nonprofit laws, the Attorney General has regulatory oversight over corporate charities ("public benefit corporations"). Chapter 414D, Hawaii Revised Statutes, is modeled upon the Revised Model Nonprofit Corporation Act. Nonprofit corporations are generally prohibited from distributing any portion of their income or profits to members or officers or directors. The purpose of this bill is to clarify that certain nonprofit "charitable" corporations may make a distribution to an affiliate or member that is also a nonprofit charitable corporation without running afoul of the non-distribution restraint in section 414D-231, Hawaii Revised Statutes.

A careful reading of the Commentary to the Revised Model Nonprofit Corporation Act's definition of "distribution" indicates that it does not "prohibit conferring benefits on members in conformity with its purposes" such that a distribution by a public benefit corporation to another public

benefit corporation in conformity with the distributing corporation's purposes would not be considered a "distribution."

Nevertheless, in an abundance of caution, H.B. No. 2136 would codify what is suggested in the commentary to the Revised Model Nonprofit Corporation Act's definition of "distribution." However, we are requesting that the bill be amended to make the changes shown in the attached proposed Senate Draft 1. These amendments are requested to limit the distribution authorization only to "public benefit corporations" (corporations exempt from Federal Income Tax under section 501(c)(3) of the Internal Revenue Code because they are operated for charitable, educational or religious purposes). Hawaii law should not authorize other nonprofit corporations, such as mutual benefit societies and taxable nonprofits, to distribute their assets in violation of the "non distribution" constraint imposed by section 414D-231, Hawaii Revised Statutes.

Finally, we are requesting this Committee to fix a typographical error in section 414D-245(a)(6), Hawaii Revised Statutes, that resulted from a drafting error in section 10 of Act 171, Session Laws of Hawaii 2004. Specifically the word "or" before "transferring its assets, subject to any contractual or legal requirement" should not have been included before the word "transferring." Paragraph (6) is based on section 14.06 of the Revised Model Nonprofit Corporation Act and this is a significant drafting error that affects the distribution of assets of corporation charities upon dissolution. These amendments are germane to this bill's title.

Provided that these amendments are made, the Attorney General supports the passage of this measure.

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

H.B. NO. 2136

A BILL FOR AN ACT

RELATING TO DISTRIBUTIONS BY NONPROFIT CORPORATIONS.

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

1 SECTION 1. The Hawaii Nonprofit Corporations Act currently
2 prohibits any distributions from nonprofit corporations except upon
3 dissolution. For example, this prohibition bars ~~nonprofit~~ public benefit
4 corporations organized and operated as supporting organizations from
5 making current distributions to their supported organizations. The
6 adoption of the Hawaii Nonprofit Corporations Act was not intended to
7 prohibit such current distributions. Federal law already permits such
8 distributions.

9 Therefore, the purpose of this Act is to permit current
10 distributions by ~~nonprofit~~ public benefit corporations to its ~~nonprofit~~ public benefit corporation members
11 and affiliates; provided that the distributions are in accordance with
12 the distributing ~~nonprofit~~ public benefit corporations' purposes and will not
13 jeopardize their liquidity.

14 SECTION 2. Section 414D-232, Hawaii Revised Statutes, is amended
15 to read as follows:

16 "§414D-232 Authorized distributions. (a) A corporation may
17 purchase its memberships if, after the purchase is completed:

18 (1) The corporation would be able to pay its debts as they
19 become due in the usual course of its activities; and

1 (2) The corporation's total assets would at least equal the sum
2 of its total liabilities.

3 (b) Corporations may make distributions upon dissolution in
4 conformity with part XIII.

5 (c) A public benefit
the corporation, in conformity with its purposes, may make
6 distributions to and confer benefits on a member or an
7 affiliate that is another public benefit
8 corporation if, after any distribution is completed:

9 (1) The public benefit
10 corporation would be able to pay its debts as they
11 become due in the usual course of its activities; and

12 (2) The public benefit
13 corporation's total assets would be at least equal to
14 the sum of its total liabilities.

15 For the purposes of this section, "an affiliate" is an entity that
16 directly or indirectly controls, is controlled by, or is under common
17 control with the public benefit
18 corporation. Control includes the power to select
19 the public benefit
20 corporation's board of directors."

21 SECTION 4. Statutory material to be repealed is bracketed.
22 SECTION 5. New statutory material is underscored.

23 SECTION 5. This Act shall take effect upon its approval.

INSERT

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SECTION 3. Section 414D-245, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) A dissolved corporation continues its corporate existence but may not carry on any activities except those appropriate to wind up and liquidate its affairs, including:

- (1) Preserving and protecting its assets and minimizing its liabilities;
- (2) Discharging or making provision for discharging its liabilities and obligations;
- (3) Disposing of its properties that will not be distributed in kind;
- (4) Returning, transferring, or conveying assets held by the corporation upon a condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution, in accordance with such condition;
- (5) Transferring, subject to any contractual or legal requirements, its assets as provided in or authorized by its articles of incorporation or bylaws;
- (6) If the corporation is a public benefit corporation and no provision has been made in its articles or bylaws for distribution of assets on dissolution, ~~or~~ transferring, subject to any contractual or legal requirement, its assets to one or more persons described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or if the dissolved corporation is not described in section 501(c)(3) of the Internal Revenue Code, to one or more public benefit corporations;
- (7) If the corporation is not a public benefit corporation and no provision has been made in its articles or bylaws for distribution of assets on dissolution, transferring its assets to its members or, if it has no members, to those persons whom the corporation holds itself out as benefiting or serving; and
- (8) Doing every other act necessary to wind up and liquidate its assets and affairs."

Report Title:
Distributions by Nonprofit Corporations

Description:
Permits current distributions by nonprofit corporations to its nonprofit members and affiliates, provided that the distributions are in accordance with the distributing nonprofit corporations' purposes and will not jeopardize their liquidity.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



THE QUEEN'S HEALTH SYSTEMS

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Senator Rosalyn Baker, Chair
Senate Committee on Commerce and Consumer Protection

Friday, March 5, 2010; 9:30 AM
State Capitol, Conference Room 229

Re: **HB 2136 – RELATING TO DISTRIBUTIONS BY NONPROFIT CORPORATIONS**

Chair Baker, Vice Chair Ige, and Members of the Committee:

My name is Sharlene Tsuda, Vice President, Community Development of The Queen's Health Systems (QHS), **testifying in strong support of HB 2136** which permits current distributions by nonprofit corporations to its nonprofit members and affiliates, provided that the distributions are in accordance with the distributing nonprofit corporations' purposes and will not jeopardize their liquidity. QHS is a parent company of a family of companies that includes The Queen's Medical Center (QMC) and Queen Emma Land Company (QEL).

Under federal tax law, a nonprofit corporation that is a supporting organization is permitted to make distributions to another nonprofit corporation that it supports. However, under the Hawaii Nonprofit Corporations Act, it is unclear whether such distributions are permitted.

To address this ambiguity, this bill harmonizes the Hawaii Nonprofit Corporations Act with federal tax law by expressly permitting distributions by a nonprofit corporation to another nonprofit corporation that it supports. The statutory language proposed in this bill is similar to the language found in other state statutes relating to nonprofit corporations, such as Arizona, Oregon, Indiana, and Wisconsin.

QEL is a supporting organization for QMC. Passage of this measure will confirm QEL's ability, as a supporting organization, to make distributions to QMC. These distributions support QMC's mission to fulfill the intent of Queen Emma and King Kamehameha IV to provide in perpetuity quality health care services to improve the well-being of Native Hawaiians and all of the people of Hawaii.

Thank you for the opportunity to support HB 2136.