

SD298,SD2

Testimony



NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
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

KEALI'I S. LOPEZ
DIRECTOR

EVERETT S. KANESHIGE
DEPUTY DIRECTOR

TO THE SENATE JUDICIARY AND LABOR COMMITTEE

THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2011

Date: Thursday, March 3, 2011

Time: 10:00 a.m.

Conference Room: 016

**TESTIMONY ON SENATE BILL NO. 298, SD2
RELATING TO BUSINESS REGULATION**

TO THE HONORABLE CLAYTON HEE & THE HONORABLE MAILE S.L. SHIMABUKURO,
CHAIRS, AND MEMBERS OF THE COMMITTEE:

Thank you for the opportunity to testify. My name is Tung Chan, Commissioner of Securities for the Business Registration Division (BREG), Department of Commerce and Consumer Affairs ("Department"). The Department currently opposes Senate Draft 2 and asks that the bill be held.

In the previous committee, we did reach agreement in principle with the drafters but we have not been able to reach consensus on draft language. The drafters agreed to allow this corporation to be registered as a standard corporation under HRS 414 and to have the designation as a "sustainable business corporation" be conferred through

compliance with other provisions set forth in the current bill, separate and apart from registering with the business registration division. However, we do not believe the current draft fully reflects the needed separation that was agreed.¹

For this reason, the designation continues to impact our registry and we oppose on grounds that this bill is at best premature and legally redundant. At worst, it blurs the line between for-profit and nonprofit entities without offering the public regulatory protection that nonprofits are subject to, causing public confusion and a misuse of the public registry.

We are not alone in our concerns regarding these corporations, also known as “B corporations” or “benefit corporations.” The American Law Institute – American Bar Association has recently expressed similar concerns. Attached to our testimony is an article prepared for the American Law Institute – American Bar Association’s Topical Courses, Choice of Business Entity - 2011 Update by Robert R. Keatinge, *L3Cs and Benefit Corporations*, ALI-ABA (February 17, 2011), http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/VCS0217_chapter_06_thumb.pdf. The article states, in part:

Much of the *sturm und drang* about both L3Cs and benefit corporations has related to the “branding” of the organizations as being socially responsible businesses. ***In other words, the promoters are assuring the supporters that simply by using a particular form of business entity, one can get the reputation of being socially responsible. Under neither of the regimes is there any state enforcement – nor do the states have the resources to engage in***

¹ They did not agree to a critical change to new section -3 by deleting the second sentence: “Its articles shall state that it is a sustainable business corporation.” The change is necessary to be clear that the entity is a chapter 414 corporation and nothing more. The election is made through new section -4.

marketing and verification for the supporters. Thus, the idea that a business that adopts one of these forms has any valid state imprimatur for their social responsibility is simply a sham. (Emphasis added.)

The bill is unnecessary as current corporate law allows for not only a similarly-structured entity, but the corporate philanthropy and social responsibility contemplated by it. While new section -7 of this bill purports to give directors² of SBCs significantly greater flexibility in making socially responsible decisions than traditional corporations, when comparing the language to current law, it is actually quite similar. Under current corporate law, §414-221(b), Haw. Rev. Stat., officers are given broad discretion to make decisions in the best interest of the corporation:

(b) In determining the best interests of the corporation, a director, in addition to considering the interests of the corporation's shareholders, may consider, in the director's discretion, any of the following factors:

- (1) The interests of the corporation's employees, customers, suppliers, and creditors;
- (2) The economy of the State and the nation;
- (3) **Community and societal considerations**, including, **without limitation**, the impact of any action upon the communities in or near which the corporation has offices or operations; and
- (4) The long-term as well as short-term interests of the corporation and its shareholders, including, **without limitation**, the possibility that these interests may be best served by the continued independence of the corporation.

² Officer's conduct is governed by §414-233, Haw. Rev. Stat. While it does not provide officers with the same latitude as directors, however §414-232, Haw. Rev. Stat. describes the duties of officers: "Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers." Thus, officer duties can be prescribed by either the bylaws or board of directors, which is given great latitude to consider community and societal factors.

(Emphasis added.) In short, directors are already given discretion to consider factors other than profit maximization.

Arguably, the added language only works to cause confusion and it is unknown how it will be interpreted. It is not certain how the new SBC provisions will affect interpretation of current standards of conduct for directors of traditional business corporations that are already practicing good corporate citizenship and philanthropy under Hawaii law. Is this new structure meant to dilute shareholders rights so that directors can ultimately prevail? Will this structure allow leadership to be unchecked? These critical corporate questions have not been thoroughly vetted and remain ambiguous.

It should be noted that there is no case law that suggests an SBC or like-entity would have any true advantage in a court of law over a traditional corporation, nor is there any IRS recognized tax advantage. Until the courts or IRS react otherwise, this bill is at best premature.

Furthermore, the language proposed by this bill has not been vetted by professional organizations that normally review uniform business laws. Hawaii has worked to make its business registry one of the best in the nation and has done so with this legislature by adopting model laws, uniform act and best practices. This current bill has not been vetted by any of the uniform act associations, registry associations or bar associations, making it appear premature within the legal corporate business law community as well.

Finally, it is arguable that this bill intentionally works to blur the line between for-profit and nonprofit entities with a high likelihood of confusing the public and creating ambiguity in the corporate law. The New York Council of Nonprofits, an 83 year old membership organization of 2800 nonprofits, has called these kinds of entities that blur the line as part of a “national craze” that is “dangerous” and “misleading” to the public.

We, therefore, respectfully ask the committee to hold this bill until further assessment by the courts, the IRS and the business law community.

Thank you for the opportunity to testify.

Committee on the Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice-Chair

Trever K. Asam
Direct Line: (808) 521-9274
Direct Fax: (808) 540-5023
E-mail: tasam@cades.com

HEARING
Thursday, March 3, 2011
10:00 am
Conference Room 016

Re: SB 298, Relating to Business Regulation
STRONG SUPPORT

Dear Chair Hee, Vice-Chair Shimabukuro, and Members of the Committee,

My name is Trever Asam and I am an attorney at Cades Schutte, here in Honolulu. Over the past two months, I have been working with a group of individuals, businesses, and organizations to draft and support the legislation now before this committee.

The legislation creates a new category of corporations that expressly agree to pursue both profit and the creation of public benefits. The legislation fills gaps in existing laws, clarifying the ability of for-profit corporations to commit to the creation of public benefits and affirming the ability of shareholders to enforce these types of non-financial corporate purposes.

Addressing the mechanics of the legislation, to become a "Sustainable Business Corporation," a corporation must do three things:

1. Include in its Articles of Incorporation the corporate purpose of creating a general public benefit;
2. Include on its Board of Directors a "Benefit Director" whose role on the Board of Directors is to monitor the creation of general public benefits; and
3. Annually publish a "Benefit Report" made available to the public in which the benefits created by the corporation are measured against a third-party standard.

Through the annual benefit report, investors, shareholders, and customers can monitor the activities of a Sustainable Business Corporation and determine for themselves whether the corporation is worthy of support. The legislation thus accomplishes its goal of encouraging positive social behavior by corporations without the need for additional regulation. Through

discussions with the DCCA and amendments reflected in the current Senate Draft 2, we have also minimized the impact of the legislation on Hawaii's State Government by clarifying the role of the DCCA in registering Sustainable Business Corporations as corporations.

The legislation helps businesses who want the opportunity to share -- and be recognized for -- the positive contributions that they make to society. The legislation is wanted by investors and shareholders seeking clarity with respect to the enforceability of non-financial corporate purposes. And the legislation is important for consumers wishing to support sustainable businesses and seeking standards by which these entities can be measured.

For these reasons, I strongly encourage the committee's support for this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Trever" followed by a stylized monogram "TK" and a flourish.

Trever K. Asam

1000 Bishop Street, Suite 1500, Honolulu, Hawaii 96813 P.O. Box 939, Honolulu, Hawaii 96808
Telephone: (808) 521-9200 Facsimile: (808) 521-9210

COMMITTEE ON THE JUDICIARY AND LABOR

Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair

HEARING

Thursday, March 3, 2011
10:00 a.m.
Conference Room 016

Re: SB 298 Relating to Business Regulation.
STRONG SUPPORT

Dear Chair Hee, Vice Chair Shimabukuro, and Members of the Committee:

My name is Roger Epstein. I am the chairman of the tax department at the Cades Schutte law firm and have been a member of the Hawaii Bar Association for 38 years.

I strongly support passage of SB 298. I believe it is important that Hawaii join in the national effort to support and encourage business conducted with a commitment to serve its community, employees, suppliers, customers, and other constituents, as well as make a profit. Hawaii has long suffered from a reputation that it is an anti-business state. This bill will demonstrate that we are clearly in favor of businesses which operate in accordance with our aloha spirit.

I have been active with the World Business Academy for many years and am a founding member of its Hawaii branch, whose mission is to bring more community mindedness to business. I have personally met hundreds of CEO's and senior executives throughout the country, read business consultant books, and represented clients who want to operate their business as a good citizen and have created numerous working models. Now that there will be an entity that facilitates and denotes this approach, I believe it will see substantial use.

Hawaii was the last state in the country to provide for limited liability companies (LLCs), and I remember how businesses in Hawaii could not take advantage of this new vehicle for businesses (which are now more regularly used than corporations) during the years they could be used for business in other states, but not in Hawaii. I do not know the reasons for this, but I'd hate to see our community minded entrepreneurs and long-time business people similarly unable to use a sustainable business corporation to help our community.

In summary, a sustainable business corporation statute is an important element in fostering the movement for better business models. Certification from outside reputable organizations will allow our community to know who has organized themselves in this fashion, perhaps utilizing

their services more, and in the long run, perhaps changing our model of all business to be more community minded. This will greatly benefit us all.

Thank you for considering my testimony.

Sincerely,

A handwritten signature in black ink that reads "Roger H. Epstein". The signature is written in a cursive style with a large, prominent "R" at the beginning.

Roger H. Epstein

Attachment: Washington Post article on Benefit Corporation

The Washington Post

'Benefit corporations' sign up

By Danielle Douglas
Capital Business Staff Writer
Monday, January 24, 2011; A11

It was not enough for Pennye Jones-Napier to sell eco-friendly chew toys or fair-trade collars at her Takoma Park pet store, the Big Bad Woof. She wanted to make sure her customers could hold her accountable to the sustainable practices she preached.

That is why she jumped at the chance to incorporate her business as a "benefit corporation," a legal designation binding her to the socially conscious commitments written into her charter. Jones-Napier was one of 12 business owners to apply for the status on the day Maryland, the first state in the country to recognize this new class of company, opened registration in October.

"Your mission sets the tone for what you do every day in your business," she said. "If your mission is aligned with social ideals, which our company is, then this is a terrific fit."

Fifteen benefit corporations have been created in the three months since new legislation, signed into law in April, took effect. If the Maryland Small Business Development Center (MSBDC) has its way, dozens more soon will join those ranks. The organization, a partnership of the U.S. Small Business Administration and the University of Maryland at College Park, is hosting a free

workshop Wednesday on the new corporate structure.

"It's new ground, but it can play a more important role in compelling entrepreneurs to do social good while they make a profit," said Casey Wilson, retail industry and sustainability programs manager at the MSBDC.

At its core, benefit corporations blend the altruism of nonprofits with the business sensibilities of for-profit companies. These hybrid entities pay taxes and can have shareholders, without the risk of being sued for not maximizing profits. Companies can consider the needs of customers, workers, the community or environment and be well within their legal right.

A benefit corporation, for instance, could

Advertisement

Kodak

Bring in any old printer to
 **and save an additional**
\$50 off any new Kodak Printer

478 Alakawa Street
Honolulu, 808-525-7182
98-051 Kamenhameha Highway
Aiea, 808-485-6940

OFFER EXPIRES 2/19/2011

http://www.washingtonpost.com/wp-dyn/content/article/2011/01/23/AR2011012303690_pf.html

Print Powered By 

The Washington Post

'Benefit corporations' sign up

choose to buy from local vendors at a higher cost to reduce its carbon footprint, much as the Big Bad Woof does. The company, as a part of the incorporation, is required to file an annual report on contributions to the goals set forth in the charter and submit to an audit by an independent third party.

Laura E. Jordan, a lawyer with Capital Law Firm in the District, advises companies to seek out organizations with established standards to conduct the third-party review. The law does not specify acceptable auditors, but Jordan suggests that a company such as B-Lab, a Berwyn, Pa., outfit that certifies socially responsible businesses, would be a good choice. The nonprofit has awarded 371 private companies in 54 industries its B Corporation moniker — akin to a Good Housekeeping seal of approval.

There are no tax breaks or procurement incentives for benefit corporations in Maryland, but the classification offers a competitive advantage, said Jordan, who is helping more than 20 companies become benefit corporations. She pointed to a 2010 Cone study in which 61 percent of consumers surveyed had purchased a product because of the company's long-term commitment to a cause or issue.

"If you're feeding back into your customers goodwill, social justice, making sure your employees have sustainable wages, people

understand that and in turn will support you for it," Jones-Napier said.

Shortly after Maryland passed the benefit corporation legislation last year, Vermont got in on the act. Several other states, including New York and California, are considering similar bills. New York is one of 31 states with a "corporate constituency statute," which allows for the consideration of non-financial interests but lacks the full protection of the new law.

The workshop at MSBDC is part of a larger push by the organization to educate small businesses on socially and environmentally conscious practices. Wilson noted that next month the center will kick off a 16-part online training course on sustainability.

Advertisement

DIRECTV has more of what you want to watch!

Switch today!

1-888-778-0985

NO EQUIPMENT TO BUY!
NO STARTUP COSTS!

http://www.washingtonpost.com/wp-dyn/content/article/2011/01/23/AR2011012303690_pf.html

Print Powered by FormatDynamics

TESTIMONY

Committee: JDL Room #016
Hearing Date: 3/03/2011 10:00AM
SB298SD2

Testimony in Strong Support of SB298SD2

Testifier: Gary Hooser, speaking as an individual

Honorable Committee Chair Senator Hee, Vice Chair Shimabukuro and members of the Senate Judiciary Committee

As a former business owner who has also been actively involved in broad-based community, environmental and sustainability organizations – I am in strong support of the passage of SB298SD2 establishing benefit corporations. The establishment of a Benefit Corporation category provides a uniform legal framework that will attract and support new businesses in Hawaii seeking to grow enterprises focused on supporting clear social, environmental and other important public benefits to our community.

Please review the attached Washington Post article that describes the State of Maryland's experience and explains further the economic development potential supporting the passage of Benefit Corporation legislation in Hawaii.

There are few legislative initiatives that come before the legislature that offer forward thinking proposals that meld both good business practices and good social policy – SB298SD2 is such a proposal and while the upside potential of supporting new and positive business enterprise in Hawaii is significant, the cost to the State budget itself is zero.

For these reasons and others, I strongly encourage the Committee to please pass out SB298SD2.

Gary Hooser
808-652-4279
garylhooser@hotmail.com
5685 Ohelo Road, Kapaa Hawaii 96746

From: [Tyler Mongan](#)
To: [JDLTestimony](#)
Subject: I Support SB298 SD2
Date: Tuesday, March 01, 2011 2:46:45 PM

TO: COMMITTEE ON JUDICIARY AND LABOR

Senator Clayton Hee, Chair, Committee on Judiciary and Labor
Senator Maile S.L. Shimabukuro, Vice Chair

RE: HEARING on SB298 SD2

DATE: Thursday, March 3, 2011
TIME: 10:00 a.m. Conference Room 016

Senators Hee and Shimabukuro and Members of the Committee,

I am writing in support of SB298 SD2, the bill that establishes a framework for the establishment of the Sustainable Business Corporation in Hawaii. There are many reasons why this type of corporate structure is good for Hawaii and good for business. Businesses that benefit the community by operating in a socially and environmentally responsible manner increase customer loyalty, which makes good business sense as they prove their worthiness to the public beyond merely the products and services they provide. Such entities will formally agree to operate for the public benefit as follows:

- (1) Providing low-income or underserved individuals or communities with beneficial products or services;
- (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- (3) Preserving the environment;
- (4) Improving human health;
- (5) Promoting the arts, sciences, or advancement of knowledge;
- (6) Increasing the flow of capital to entities with a public benefit purpose; and
- (7) The accomplishment of any other particular benefit for society or the environment.

Sustainable business corporations exist to serve the interests of multiple stakeholders: shareholders, employees, customers, communities, and the environment. In demonstrating care for these stakeholders, I believe that public benefit corporations will be more successful businesses, which will encourage the entire business community to consider similar practices.

As this is a voluntary standard, obviously it is meant for those conscientious businesses that wish to embrace this high level of transparency and accountability. I urge the Committee to enable such businesses to strive for this level of integrity, and as such I urge you to support SB298 SD2 to raise the bar for business standards here in Hawaii.

Mahalo,

Tyler Mongan

646 9th Ave

Honolulu, HI 96816

--

every dollar spent is a choice. choose local. choose green. choose Hawai'i

Tyler Mongan

HonuGuide

808.688.8459

tmongan@honuguide.com

www.honuguide.com

www.theecolocal.com

pr powered by [NMG](#)

ALI-ABA Topical Courses
Choice of Business Entity - 2011 Update

February 17, 2011
Video Webcast

Hybrid Entities

By

Robert R. Keatinge
Of Counsel, Holland & Hart LLP
Denver, Colorado

L3Cs AND BENEFIT CORPORATIONS

ALI-ABA Video Law Review
 CHOICE OF BUSINESS ENTITY – 2011
 Update: Choosing and Using Business Forms in Uncertain Times

February 17, 2011
 Live Nationwide via Satellite on the American Law Network
 Washington, D.C.

Robert R. Keatinge
 Holland & Hart LLP
 555 17th Street, Suite 3200
 Denver, CO 80202
 rkeatinge@hollandhart.com
 303/295-8595
 303/713-6207 (fax)

I. Introduction

A. Several states have considered, and some have adopted low-profit limited liability company (“L3C”) legislation based on perceived benefits to both private foundations and entrepreneurs alike. A second form of legislation, the ‘benefit corporation’ seeks to allow directors to pursue socially responsible objectives.

II. Socially Responsible Businesses or Greenwash. Much of the *sturm und drang* about both L3Cs and benefit corporations has related to the “branding” of the organizations as being socially responsible businesses. In other words, the promoters are assuring the supporters that simply by using a particular form of business entity, one can get the reputation of being socially responsible. Under neither of the regimes is there any state enforcement – nor do the states have the resources to engage in marketing and verification for the supporters. Thus, the idea that a business that adopts one of these forms has any valid state imprimatur for their social responsibility is simply a sham. The promoter of the benefit corporation, B Lab, Inc., does offer – for a fee – to certify the social responsibility of a business. To the extent that such endorsement has value, it should have value without building it into the structure of corporate law, but apparently the market and benefit of these paid endorsements was insufficient without a government mandate. In both cases, in the event the organization cannot meet, or ties of meeting, the standards contained in the statute, the business simply reverts to a regular LLC or corporation as the case may be, without the requirement to account for the assets and profits as would a state nonprofit corporation.

While many, including the author, salute those who sacrifice income for social good, neither of these vehicles actually require that income be sacrificed. There is nothing in the L3C statute that requires that the L3C be “low profit” but rather that it would not have been formed but for its selfless purpose. Unlike a true nonprofit organization which generally cannot distribute profits to its owners, there is no penalty for abandoning the socially responsible purpose which they professed at the outset. In short, both forms have a great potential for state endorsed greenwash.

III. Benefit Corporations.

Benefit corporations seek to modify the duties of directors of a business corporation to allow them to consider “general public benefit” in acting or declining to act. Under a bill pending in Colorado, “general public benefit” means:

a material, positive impact on society and the environment, taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation.

Colorado Senate Bill 11-005 as introduced. In the initial bill, the third party standard must be developed by a third party and must meet the criteria that, coincidentally, have been established by B Labs. In some respects, loosening the limitations on directors to allow them to consider socially beneficial considerations – particularly where the shareholders have bought into those considerations – simply puts business corporations on the same footing as LLCs already have, allowing owners to agree as to the adoption of socially beneficial objectives. In addition, to the extent that the imprimatur of B Lab, Inc. or any other arbiter of social responsibility serves a desirable purpose, either hedonically or in terms of marketing, such approval is not a matter of corporate law, but rather between the business and its evaluator, and the state does not have a useful role to play in the process.

IV. Low-Income Limited Liability Companies (“L3Cs”)

A. LLC. An L3C is a limited liability company organized under state law. This affords the L3C the benefit of the flexibility, but that flexibility is limited by the provisions of the L3C statutes.

B. Identification in Articles of Organization. All LLCs in the state having L3C legislation must state whether they are L3Cs.¹ Thus, if an LLC happens to have an exempt purpose, it will need to indicate that it is an L3C even if it has no intention of attempting to qualify its investments as PRIs.

C. Additional state statutory provisions

1. The categorization of an L3C is not elective, it is definitional. In other words, an LLC that happens to meet the purpose provisions of the L3C legislation is an L3C regardless of whether it intends to be an L3C or not. Thus, some organizations may be subject to the requirements applicable to L3Cs even if they do not intend to be. For example, an LLC that seeks to be an exempt organization may be an L3C. For example, the Vermont L3C legislation² provides:

(23) “L3C” or “low-profit limited liability company” means a person organized under this chapter that is organized for a business purpose that satisfies and is at all times operated to satisfy each of the following requirements:

¹ See, e.g., 11 V.S.A. § 3023(a).

² 11 V.S. A. § 3001(23) (Vermont); Wyo.Stat. 17-15-102(a)(ix) (Wyoming);

(a) The company:

(i) significantly furthers the accomplishment of one or more charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986, 26 U.S.C. § 170(c)(2)(B); and

(ii) would not have been formed but for the company's relationship to the accomplishment of charitable or educational purposes.

(B) No significant purpose of the company is the production of income or the appreciation of property; provided, however, that the fact that a person produces significant income or capital appreciation shall not, in the absence of other factors, be conclusive evidence of a significant purpose involving the production of income or the appreciation of property.

(C) No purpose of the company is to accomplish one or more political or legislative purposes within the meaning of Section 170(c)(2)(D) of the Internal Revenue Code of 1986, 26 U.S.C. § 170(c)(2)(D).

(D) If a company that met the definition of this subdivision (23) at its formation at any time ceases to satisfy any one of the requirements, it shall immediately cease to be a low-profit limited liability company, but by continuing to meet all the other requirements of this chapter, will continue to exist as a limited liability company. The name of the company must be changed to be in conformance with subsection 3005(a) of this title.

2. Thus, a Vermont LLC that happens to have a significant charitable purpose will be an L3C, regardless of whether it elects to be one.
3. Name (varies from statute to statute). others may not.
4. Disclosure. Some state L3C statutes require the L3C to make disclosure.³
5. Purpose. Some state statutes require that the purpose of the L3C be included in the articles of organization.⁴

³ 805 ILCS 180/1-26(d) ("Any company operating or holding itself out as a low-profit limited liability company in Illinois, any company formed as a low-profit limited liability company under this Act, and any chief operating officer, director, or manager of any such company is a "trustee" as defined in Section 3 of the Charitable Trust Act.")

SB298, SD2 Relating to Business Regulations

The American Sustainable Business Council (ASBC), based in Washington D.C., represents over 65,000 companies throughout US. We are delighted that support for **SB298, SD2 Relating to Business Regulations** continues to grow. The fact that the Senate Judiciary Committee is now hearing testimony on this bill is a positive development and we would like to add our voice to that of others who have supported the bill from its inception.

We remain convinced that the idea of the Sustainable Business Corporation fits in very well with Hawaii's culture of 'Aloha.'

SB298, SD2 Relating to Business Regulations builds on the principle of doing business in a manner that is respectful of the environment and the community while generating profit. A Sustainable Business Corporation is a new corporate entity that offers entrepreneurs and investors the option to build and invest in businesses that meet higher standards of corporate purpose, accountability and transparency.

In a traditional corporation, fiduciary duty focuses exclusively on increasing shareholder profits. In the case of Sustainable Business Corporations, fiduciary duty is redefined by stating that the creation of public benefit is in the best interests of the Corporation. This allows corporate officers to define other goals beyond just making a profit and then gives investors the power to require those officers to make decisions that reflect those goals. These goals can be community or environmental, which have their own intrinsic value, and also help to build a company's brand and customer loyalty.

We believe that business has a role to play building a financially vibrant economy, while also protecting our environment and the quality of life in our communities.

We are confident that Sustainable Business Corporations will make Hawaii a more attractive place to do business. Businesses across the country are finding ways to do well while helping our environment and society at large. States that welcome these new businesses will benefit. ASBC has played a key role in having similar bills passed in Vermont and Maryland during their 2010 legislative sessions.

We urge Hawaii to reinforce its message of doing business with aloha by enacting SB298, SD2.

Respectfully yours

Richard Eidlin

Issues Director, American Sustainable Business Council

303-478-0131

www.asbcouncil.org

From: [susan_cox](#)
To: [JDLTestimony](#)
Subject: support bill SB298 SD2
Date: Tuesday, March 01, 2011 10:52:24 PM

TO: COMMITTEE ON JUDICIARY AND LABOR

Senator Clayton Hee, Chair, Committee on Judiciary and Labor

Senator Maile S.L. Shimabukuro, Vice Chair

RE: HEARING on SB298 SD2

DATE: Thursday, March 3, 2011

TIME: 10:00 a.m. Conference Room 016

Senators Hee and Shimabukuro and Members of the Committee,

I am writing in support of SB298 SD2, the bill that establishes a framework for the establishment of the Sustainable Business Corporation in Hawaii. As a small green business owner this type of corporate structure is good for Hawaii and good for business. Such entities will formally agree to operate for the public benefit as follows:

- (1) Providing low-income or underserved individuals or communities with beneficial products or services;
- (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- (3) Preserving the environment;
- (4) Improving human health;
- (5) Promoting the arts, sciences, or advancement of knowledge;
- (6) Increasing the flow of capital to entities with a public benefit purpose; and
- (7) The accomplishment of any other particular benefit for society or the environment.

I believe that public benefit corporations will be more successful businesses, which will encourage the entire business community to consider positive practices.

As this is a voluntary standard, obviously it is meant for those conscientious businesses that wish to embrace this high level of transparency and accountability. I urge the Committee to enable such businesses to strive for this level of integrity, and as such I urge you to support SB298 SD2 to raise the bar for business standards here in Hawaii.

Mahalo,

Aloha,
Susan Cox
POB 1234
Kapa'au, HI 96755

From: [Michael Kramer](#)
To: [JD.Tastimony](#)
Subject: Testimony re SB 298
Date: Tuesday, March 01, 2011 2:10:57 PM

TO: COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair, Committee on Judiciary and Labor
Senator Maile S.L. Shimabukuro, Vice Chair

RE: HEARING on SB298 SD2
DATE: Thursday, March 3, 2011
TIME: 10:00 a.m. Conference Room 016

Senators Hee and Shimabukuro and Members of the Committee,

I am writing in support of SB298 SD2, the bill that establishes a framework for the establishment of the Sustainable Business Corporation in Hawaii. There are many reasons why this type of corporate structure is good for Hawaii and good for business. Businesses that benefit the community by operating in a socially and environmentally responsible manner increase customer loyalty, which makes good business sense as they prove their worthiness to the public beyond merely the products and services they provide. Such entities will formally agree to operate for the public benefit as follows:

- (1) Providing low-income or underserved individuals or communities with beneficial products or services;
- (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- (3) Preserving the environment;
- (4) Improving human health;
- (5) Promoting the arts, sciences, or advancement of knowledge;
- (6) Increasing the flow of capital to entities with a public benefit purpose; and
- (7) The accomplishment of any other particular benefit for society or the environment.

Sustainable business corporations exist to serve the interests of multiple stakeholders: shareholders, employees, customers, communities, and the environment. In demonstrating care for these stakeholders, I believe that public benefit corporations will be more successful businesses, which will encourage the entire business community to consider similar practices.

As this is a voluntary standard, obviously it is meant for those conscientious businesses that wish to embrace this high level of transparency and accountability. I urge the Committee to enable such businesses to strive for this level of integrity, and as such I urge you to support SB298 SD2 to raise the bar for business standards here in Hawaii.

Mahalo,

A large, handwritten signature in black ink that reads "Michael Kramer". The signature is written in a cursive, flowing style.

Michael Kramer
Founder, Kuleana Green Business Program, Kona-Kohala Chamber of Commerce
Board Member, Sustainability Association of Hawaii
Managing Partner, Natural Investments LLC

From: [Chenoa Farnsworth](#)
To: [JDLTestimony](#)
Subject: Testimony SB 298 SD2 Support
Date: Wednesday, March 02, 2011 7:41:08 AM

TO: COMMITTEE ON JUDICIARY AND LABOR

Senator Clayton Hee, Chair, Committee on Judiciary and Labor
Senator Maile S.L. Shimabukuro, Vice Chair

RE: HEARING on SB298 SD2

DATE: Thursday, March 3, 2011

TIME: 10:00 a.m. Conference Room 016

Senators Hee and Shimabukuro and Members of the Committee,

I am writing in support of SB298 SD2, the bill that establishes a framework for the establishment of the Sustainable Business Corporation in Hawaii. There are many reasons why this type of corporate structure is good for Hawaii and good for business. Businesses that benefit the community by operating in a socially and environmentally responsible manner increase customer loyalty, which makes good business sense as they prove their worthiness to the public beyond merely the products and services they provide. Such entities will formally agree to operate for the public benefit as follows:

- (1) Providing low-income or underserved individuals or communities with beneficial products or services;
- (2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- (3) Preserving the environment;
- (4) Improving human health;
- (5) Promoting the arts, sciences, or advancement of knowledge;
- (6) Increasing the flow of capital to entities with a public benefit purpose; and
- (7) The accomplishment of any other particular benefit for society or the environment.

Sustainable business corporations exist to serve the interests of multiple stakeholders: shareholders, employees, customers, communities, and the environment. In demonstrating care for these stakeholders, I believe that public benefit corporations will be more successful businesses, which will encourage the entire business community to consider similar practices.

As this is a voluntary standard, obviously it is meant for those conscientious businesses that wish to embrace this high level of transparency and accountability. I urge the Committee to enable such businesses to strive for this level of integrity, and as such I urge you to support SB298 SD2 to raise the bar for business standards here in Hawaii.

Mahalo,

Chenoa Farnsworth

Managing Director
Hawaii Angels
900 Fort Street Mall, Suite 1570
Honolulu, HI 96813
(808) 447-9372

www.hawaiiangels.org

Your use of any and all information, products or services made available through the HAWAII ANGELS or ANGELSOFT websites, email, or any correspondence or general or special meeting is at your own risk. You agree that HAWAII ANGELS and individual Hawaii Angels' members or employees, remunerated or non-remunerated, will not be liable for any direct, special, indirect, incidental, consequential or punitive damages, however characterized arising out of your use or inability to use the websites or any information, products or services of HAWAII ANGELS whether based in contract, tort, statutory or other grounds.

Investors must certify that they are an accredited or sophisticated investor as those terms are defined by Regulation D of the Securities Act of 1933 including subsequent amendments to the Act.

TESTIMONY

Senate Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Thursday, March 3, 2011
10:00 a.m.

SB298, SD2 Sustainable Business Corporations

Dear Committee Members,

Thank you for hearing SB 298, SD2 today. This bill is an innovative way to help those companies who are believers in the so-called Triple Bottom Line. While none dispute the importance of profits, most companies also recognize the need to address the social and environmental impact of their activities.

All too often, in spite of such desires, case law has been interpreted to make corporations primarily attentive to financial interests – often at the expense of social and environmental impact. Sometimes, companies have felt compelled to organize as non-profits to avoid running afoul of their fiduciary responsibilities.

The Sustainable Business Corporation (SBC) was developed to allow companies to act in the interest of all stakeholders by creating a mechanism for annual reporting of their public sustainability performance. The shareholders of SBC's have a duty to act in the interest of the public sustainable objectives they committed to create.

This idea has taken hold in many areas of the US. Maryland and Vermont have enacted similar "B Corp" style legislation and New Jersey has passed it in both houses. It has been introduced in seven other states.

This organizational structure facilitates the excitement and enthusiasm that young entrepreneurs and others bring to their endless pursuit of new sustainable ventures.

I commend you for introducing such legislation and wholeheartedly encourage you to enact it. This will be a significant stimulus to innovative companies of all types.

Sincerely,

John Webster, Director
The Hogan Entrepreneurs
Chaminade University

TESTIMONY

In Favor

Senate Committee on Judiciary and Labor
Senator Clayton Hee, Chair and Senator Maile S.L. Shimabukuro, Vice Chair

Thursday, March 3, 2011
10:00 a.m. Conference Room 016

SB298, SD2 Relating to Business Regulations

Dear Committee Members,

Thank you for hearing **SB298, SD2** today. This bill is an innovative way to help those companies who are believers in the so-called Triple Bottom Line. While none dispute the importance of profits, most companies also recognize the need to address the social and environmental impact of their activities.

All too often, in spite of such desires, case law has been interpreted to make corporations primarily attentive to financial interests – often at the expense of social and environmental impact. Sometimes, companies have felt compelled to organize as non-profits to avoid conflicting with their fiduciary responsibilities.

The Benefits Corporation or the “B Corp” was developed to allow companies to act in the interest of all stakeholders by creating a mechanism for annual reporting of their public benefits performance. The shareholders of “B Corps” have a duty to act in the interest of the public benefit they committed to create.

This idea has taken hold in many areas of the US. Maryland and Vermont have enacted “B Corp” style legislation and New Jersey has passed it in both houses. It has been introduced in seven other states.

This organizational structure facilitates the excitement and enthusiasm that young entrepreneurs and others bring to their endless pursuit of new sustainable ventures.

I commend you for introducing such legislation and wholeheartedly encourage you to enact it. This will be a significant stimulus to innovative companies of all types.

Respectfully yours,

Patrick Bustamante
Business Consultant

The Washington Post

'Benefit corporations' sign up

By Danielle Douglas
Capital Business Staff Writer
Monday, January 24, 2011; A11

It was not enough for Pennye Jones-Napier to sell eco-friendly chew toys or fair-trade collars at her Takoma Park pet store, the Big Bad Woof. She wanted to make sure her customers could hold her accountable to the sustainable practices she preached.

That is why she jumped at the chance to incorporate her business as a "benefit corporation," a legal designation binding her to the socially conscious commitments written into her charter. Jones-Napier was one of 12 business owners to apply for the status on the day Maryland, the first state in the country to recognize this new class of company, opened registration in October.

"Your mission sets the tone for what you do every day in your business," she said. "If your mission is aligned with social ideals, which our company is, then this is a terrific fit."

Fifteen benefit corporations have been created in the three months since new legislation, signed into law in April, took effect. If the Maryland Small Business Development Center (MSBDC) has its way, dozens more soon will join those ranks. The organization, a partnership of the U.S. Small Business Administration and the University of Maryland at College Park, is hosting a free

workshop Wednesday on the new corporate structure.

"It's new ground, but it can play a more important role in compelling entrepreneurs to do social good while they make a profit," said Casey Wilson, retail industry and sustainability programs manager at the MSBDC.

At its core, benefit corporations blend the altruism of nonprofits with the business sensibilities of for-profit companies. These hybrid entities pay taxes and can have shareholders, without the risk of being sued for not maximizing profits. Companies can consider the needs of customers, workers, the community or environment and be well within their legal right.

A benefit corporation, for instance, could

Advertisement

Kodak

Bring in any old printer to
 **and save an additional**
\$50 off any new Kodak Printer

478 Alakawa Street
Honolulu, 808-525-7182
98-051 Kamenhameha Highway
Aiea, 808-485-6940

OFFER EXPIRES 2/19/2011

http://www.washingtonpost.com/wp-dyn/content/article/2011/01/23/AR2011012303690_pf.html

Print Powered By  FormatDynamics™

The Washington Post

'Benefit corporations' sign up

choose to buy from local vendors at a higher cost to reduce its carbon footprint, much as the Big Bad Woof does. The company, as a part of the incorporation, is required to file an annual report on contributions to the goals set forth in the charter and submit to an audit by an independent third party.

Laura E. Jordan, a lawyer with Capital Law Firm in the District, advises companies to seek out organizations with established standards to conduct the third-party review. The law does not specify acceptable auditors, but Jordan suggests that a company such as B-Lab, a Berwyn, Pa., outfit that certifies socially responsible businesses, would be a good choice. The nonprofit has awarded 371 private companies in 54 industries its B Corporation moniker - akin to a Good Housekeeping seal of approval.

There are no tax breaks or procurement incentives for benefit corporations in Maryland, but the classification offers a competitive advantage, said Jordan, who is helping more than 20 companies become benefit corporations. She pointed to a 2010 Cone study in which 61 percent of consumers surveyed had purchased a product because of the company's long-term commitment to a cause or issue.

"If you're feeding back into your customers goodwill, social justice, making sure your employees have sustainable wages, people

understand that and in turn will support you for it," Jones-Napier said.

Shortly after Maryland passed the benefit corporation legislation last year, Vermont got in on the act. Several other states, including New York and California, are considering similar bills. New York is one of 31 states with a "corporate constituency statute," which allows for the consideration of non-financial interests but lacks the full protection of the new law.

The workshop at MSBDC is part of a larger push by the organization to educate small businesses on socially and environmentally conscious practices. Wilson noted that next month the center will kick off a 16-part online training course on sustainability.

Advertisement



DIRECTV has more of what you want to watch!

Switch today!

1-888-778-0985

NO EQUIPMENT TO BUY!
NO STARTUP COSTS!

Offer ends 2/29/11. Credit card required (except in MA & PA). New approved customers only (lease required). \$19.95 Handling & Delivery fee may apply. Applicable use tax adjustment may apply on the retail value of the installation. Call for details.

http://www.washingtonpost.com/wp-dyn/content/article/2011/01/23/AR2011012303690_pf.html

Print Powered By  FormatDynamics™

**TESTIMONY OF
WILLIAM H. CLARK, JR.
ON
SENATE BILL 298
BEFORE
HAWAII STATE LEGISLATURE
SENATE COMMITTEE ON
JUDICIARY AND LABOR**

March 3, 2011

Senator Hee and members of the Committee:

My name is William H. Clark, Jr. I appreciate this opportunity to provide testimony in support of S.B. 298 regarding sustainable business corporations.

I am a partner in Drinker Biddle & Reath LLP and practice in its Philadelphia office in the Corporate and Securities Group. Recently I have been serving as pro bono counsel to a nonprofit organization called B Lab in connection with its support of the enactment of legislation similar to S.B. 298 in various states around the country. Working with Trever Asam and his colleagues in the Honolulu bar, I prepared the first draft of the legislation that has been introduced as S.B. 298. The legislation that has been introduced in Hawaii is similar to legislation that has been enacted in Maryland, New Jersey¹, Vermont, and Virginia². Similar legislation has been introduced, or will be introduced in the next few weeks, in California, Colorado, Michigan, New York, North Carolina, and Pennsylvania. In the course of my work in those various states, I have had the opportunity to participate in meetings of eight different bar association corporation law drafting committees – in California, Colorado,

¹ As of March 1, 2011 (the date this testimony was prepared), the New Jersey legislation had passed both houses of the New Jersey legislature unanimously and was awaiting signature by the Governor.

² As of March 1, 2011 (the date this testimony was prepared), the Virginia legislation had passed both houses of the Virginia legislature unanimously and was awaiting signature by the Governor.

Maryland, New York, Pennsylvania, Vermont, Virginia, and Washington. S.B. 298 reflects those discussions with lawyers from around the country, as well as the testimony at the various legislative hearings that have been held and the legislative decisions made in the states that have enacted this type legislation. As the beneficiary of all of that prior work, S.B. 298 reflects the “state of the art” and the best thinking of many lawyers and legislators. Thus, I am confident in saying that enactment of S.B. 298 will be very good for Hawaii and its citizens.

The Legal Reason Why S.B. 298 is Needed

The purpose of S.B. 298 is to provide a legal framework for corporations that wish to operate on a for-profit basis, but that also wish – at the same time – to operate in a way that produces benefits for society and the environment beyond the production of goods and services and the provision of gainful employment. S.B. 298 is necessary because corporation law requires the directors of a corporation to be focused on making the maximum profit for the shareholders. Corporation law is different in this respect from the law governing limited liability companies. The members of an LLC have the freedom to vary the fiduciary duties of the persons managing an LLC. Thus it is not necessary to change the law to permit an LLC to be organized in the way that S.B. 298 provides for corporations.

Overview of S.B. 298

The goal of the legislation is to harness the power of the free market for the benefit of society and the environment. It sets up a system of disclosure and private monitoring that does not rely on the government to police the provisions of the bill. S.B. 298 may be summarized as follows:

- A sustainable business corporation has a purpose to benefit society and the

environment, while also having the traditional purpose of making a profit for its shareholders.

- The duties of the directors and officers of a sustainable business corporation are modified to be consistent with those purposes.
- Once a year a sustainable business corporation must report on its performance during the previous year, and must make that report publicly available so that its employees, customers, other businesses in its industry, and the public generally can evaluate the corporation's performance.
- If a shareholder or director does not think the corporation is pursuing its benefit purpose, the shareholder or director may bring a lawsuit to correct the situation.

Description of the Provisions of S.B. 298

Being a sustainable business corporation is purely voluntary. An existing business corporation may elect to become a sustainable business corporation by a two-thirds vote of its shareholders. Terminating sustainable business corporation status or changing the type of public benefit to be created by the corporation similarly requires a two-thirds vote.

Every sustainable business corporation has as one of its corporate purposes the creation of a material positive impact on society and the environment taken as a whole. A sustainable business corporation may also identify specific public benefits that it is the purpose of the corporation to create.

It is important to emphasize that sustainable business corporations are for-profit businesses. In particular, passage of S.B. 298 will have no effect on the taxation of sustainable business corporations, and a business corporation that elects to become a

sustainable business corporation will continue to be taxed as a business corporation.

The directors of a sustainable business corporation are required to consider the following interests and factors when making decisions:

- the ability of the sustainable business corporation to accomplish its public benefit purpose;
- the shareholders of the sustainable business corporation;
- the employees and workforce of the sustainable business corporation and its subsidiaries and suppliers;
- the interests of customers as beneficiaries of the general or specific public benefit purposes of the sustainable business corporation;
- community and societal considerations, including those of any community in which offices or facilities of the sustainable business corporation or its subsidiaries or suppliers are located;
- the local and global environment; and
- the short-term and long-term interests of the sustainable business corporation, including benefits that may accrue to the sustainable business corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the sustainable business corporation.

An officer of a sustainable business corporation must also consider those interests and factors when an officer has discretion to act with respect to a matter and it reasonably appears to the officer that the matter may have a material effect on the creation of public benefit or on one of the factors or interests I just listed.

The fiduciary duties of directors and officers of a sustainable business corporation are

a significant change from existing Hawaii law. Section 414-221 of the Hawaii business corporation law permits directors of Hawaii business corporations to consider the interests of corporate constituencies other than the shareholders, but the directors are not required to do so.

Since the purpose of a regular business corporation is to maximize the profitability of the corporation for the benefit of its shareholders, it makes sense that the directors would not have a mandatory duty to anyone other than the shareholders. In a sustainable business corporation, on the other hand, which has the added purpose of creating public benefit, it makes sense that the duties of directors would expand to include interests and factors relevant to the creation of public benefit. In the case of officers, section 414-233 of the Hawaii business corporation law does not include a constituencies provision such as that applicable to directors; and thus officers are not even given the option of considering the interests of constituencies.

Every sustainable business corporation must have a “benefit director” who is responsible for evaluating the success of the corporation in creating public benefit. A sustainable business corporation may also have a “benefit officer” with such responsibilities as may be assigned to that position.

Each year the sustainable business corporation must prepare and distribute to its shareholders a report describing its efforts to create public benefit during the preceding year. The report must be filed with the Department of Commerce and Consumer Affairs, thus making it a matter of public record. The report must also be posted on any public website maintained by the corporation. In a regular business corporation, the corporation’s financial statements will show how the corporation is performing. The annual report on the creation of

public benefit is intended to supplement the financial statements and to fill in the rest of the picture on how the corporation has performed.

As I have worked on this type of legislation around the country, I have repeatedly been impressed with the number of businesses who are supportive of the concept and eager to adopt this new form if it is available to them. I am confident that there will be a very positive response to the enactment of S.B. 298.