



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011**

ON THE FOLLOWING MEASURE:

H.B. NO. 1638, RELATING TO PUBLIC BENEFIT CORPORATIONS.

BEFORE THE:

HOUSE COMMITTEE ON ECONOMIC REVITALIZATION AND BUSINESS

DATE: Tuesday, February 15, 2011 **TIME:** 8:00 a.m.

LOCATION: State Capitol, Room 312

TESTIFIER(S): David M. Louie, Attorney General, or
Hugh Jones, Supervising Deputy Attorney General

Chair McKelvey and Members of the Committee:

The Attorney General opposes this legislative proposal as currently drafted.

Under the common law and under various Hawaii statutes and federal laws, the Attorney General has oversight authority over public charities, private foundations, and charitable trusts¹. Among other things, the Attorney General has regulatory oversight over "public benefit corporations" recognized under chapter 414D, Hawaii Revised Statutes. A public benefit corporation under current law is a corporation that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code because it is operated for charitable, religious, or educational purposes, or which, upon dissolution, must distribute its assets to another public benefit corporation².

¹These statutes include chapters 323D, 414D, 467B, 431:1-204(c)(1)(C), and 517E, Hawaii Revised Statutes, and the Federal Telemarketing Sales Rule.

²See section 414D-14, Hawaii Revised Statutes:

"Public benefit corporation" means any corporation designated by statute as a public benefit corporation, or any corporation that is recognized as exempt under section 501(c)(3) of the Internal Revenue Code of 1986, as amended,

Chapter 414D, Hawaii Revised Statutes, provides the Attorney General with oversight of mergers and dissolutions of public benefit corporations, as conflict of interest transactions involving directors and officers and the sale of assets by public benefit corporations. There are presently over 1,680 registered charitable organizations that are registered with the Attorney General under section 467B-2.1, Hawaii Revised Statutes. Many of these organizations are "public benefit corporations."

One major problem with this bill as drafted is that in an attempt to create a new form of taxable, for-profit entity, it uses nomenclature that is used throughout the Revised Model Nonprofit Corporation Act, adopted in Hawaii as chapter 414D, Hawaii Revised Statutes, to describe "charities" that operate in nonprofit corporation form. If adopted in its current form, this bill will create irreconcilable conflicts between the two chapters, but more importantly, widespread public confusion about whether this new form of business entity is charitable or not.

The Attorney General respectfully requests that this measure be held because there appears to be no way to constitutionally amend³ this bill to describe this new form of business entity as anything other than a "public benefit

or that is organized for public or charitable purposes and upon dissolution must distribute its assets to a public benefit corporation, the United States, a state, or a person recognized as exempt under section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

³See article III, section 14 of the Hawaii Constitution which provides in pertinent part "[n]o law shall be passed except by bill. Each law shall embrace but one subject, which shall be expressed in its title." (emphasis added).

corporation" because the title of this measure is "A Bill
Relating to Public Benefit Corporations."

TO THE HOUSE ECONOMIC REVITALIZATION & BUSINESS COMMITTEE
THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2011

Date: Tuesday, February 15, 2011
Time: 8:00 am
Conference Room: 312

**TESTIMONY ON HOUSE BILL NO. 1638
RELATING TO PUBLIC BENEFIT CORPORATIONS**

TO THE HONORABLE ANGUS L.K. MCKELVEY & THE HONORABLE ISAAC W CHOY,
CHAIRS, AND MEMBERS OF THE COMMITTEE:

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

This bill creates a new chapter in the Hawaii Revised Statutes that would establish a new type of private entity called a public benefit corporation. We appreciate the bill's intent to promote socially responsible for-profit businesses. Unfortunately, the creation of such an entity ultimately does more harm than good.

We believe the new entity will cause confusion and mislead the public. First, there is already an entity called a "public benefit corporation" which can be formed under HRS chapter 414D, the Hawaii Nonprofit Corporations Act. Some of these 414D-entities are considered quasi-government instrumentalities (such as the Hawaii Health Systems Corp created by legislative action, HRS chapter 323F). Other 414-D PBCs are nonprofits that have secured 501(c)(3) tax exempt status from the Internal Revenue Service ("IRS"). The Attorney General has

oversight of these entities to protect the public trust and must be consulted for issues such as determining conflicts of interest, transfers of assets, approving mergers, and removing directors.

Under this current bill, businesses that choose to be one of these new “public benefit corporations” would easily be confused with the nonprofit entities of the same name. In fact, the purpose of this new law seems to be to let these private companies brand themselves as semi-non-profit or State entities when in reality, these companies are truly private with agendas that are not enforced and examined by the Attorney General or anyone with public authority. The public may invest in these entities thinking they are watched over and held accountable by the State but in fact, they are not. Nothing in the bill deters a business from encouraging that mistaken belief, nor sets standards for ensuring that it complies with the intent of this legislation.

In recent years, Hawaii has experienced problems with the public being misled by organizations calling themselves “nonprofits.” To protect the public, this legislative body wisely responded by establishing the Attorney General’s authority to oversee and enforce nonprofit law. Unfortunately, we can expect the same outcomes of public confusion for this new measure. We hope that this legislative body will again make protecting the public a priority by holding this bill. While this new bill creates these nonprofit-like entities that may be a valuable marketing tool, branding of this kind is not normally accomplished through

legislation and it should not be. There is too much riding on a perceived "seal of approval" from state government.

Moreover, it is arguable that everything contemplated in the bill can be done under current corporate law. There is no case law that suggests a benefit corporation would have any true advantage in a court of law or before the IRS. Until the IRS or courts react otherwise, this bill is at best premature. Any promises of business advantage are unproven. This bill suggests we try to prove the advantage on the backs of Hawaii's small businesses and other public fee payers.

At its worst, this bill is a waste of public money and something that will confuse and possibly be the source of fraud on the public. The cost to implement this bill has been estimated at \$143,000 and since our fees currently would not be able to cover this amount, we would have to ask for an appropriation or to raise fees on the public.

For these reasons, we respectfully ask that this bill be held. Thank you for the opportunity to testify.



**Testimony to the House Committee on Economic Revitalization and Business
Tuesday, February 15, 2011 at 8:00 a.m.
Conference Room 312, State Capitol**

**RE: HOUSE BILL NO. 1638 RELATING TO PUBLIC BENEFIT
CORPORATIONS**

Chair McKelvey, Vice Chair Choy, and Members of the Committee:

The Chamber of Commerce of Hawaii (“Chamber”) is in support of the intent of HB 1638 relating to Public Benefit Corporations and respectfully request that the committee pass this measure for further discussion.

The Chamber is the largest business organization in Hawaii, representing more than 1,100 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the “Voice of Business” in Hawaii, the organization works on behalf of its members, which employ more than 200,000 individuals, to improve the state’s economic climate and to foster positive action on issues of common concern.

This measure establishes an organizational and regulatory framework for public benefit corporations.

Transparent companies, with clear social benefits, will attract investors and consumers and encourages beneficial corporate behavior without additional regulation. It will be attractive to investors who are seeking businesses that create public benefits and Hawaii will be known as a place that encourages the creation of these businesses.

Thank you for the opportunity to provide testimony.

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 ECONOMIC REVITALIZATION & BUSINESS

Representative Angus L.K. McKelvey, Chair

Representative Isaac W. Choy, Vice Chair

HEARING

Tuesday, February 15, 2011

8:00 a.m.

Conference Room 312

Re: HB 1638 Relating to Public Benefit Corporations.
STRONG SUPPORT

Dear Chair McKelvey, Vice Chair Choy, 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 HB 1638. 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.

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 Benefit Corporations to help our community.

The DCCA asserts this legislation will create a significant burden on their office, that this statute is unnecessary, and will cause confusion. We respectfully disagree with each of these points. The DCCA records registrations of a number of entities. Instead of filing as a corporation or an LLC, a company would merely file as a Benefit Corporation. Thus, DCCA's aggregate ongoing filings will not increase. There will be some internal start up costs to denote "Benefit Corporation" on certain forms. However, every change in the law requires some administrative paperwork revisions, so this cannot be a material factor against adopting improved laws. There is no requirement for DCCA to create a new registration form for Benefit Corporations, as attorneys can prepare client documents as they do now. However, if DCCA chooses to prepare a form document, it is quite a simple matter.

I emphasize that the DCCA will not determine qualifications for a "Benefit Corporation." Certification of "Benefit" status, if at all, will be by outside authorities with the capacity to certify, like B Labs. (This is similar to current nonprofit entities where further qualification of tax exemption is left to the IRS.) Thus, the DCCA will only accept and record the forms as with other entities.

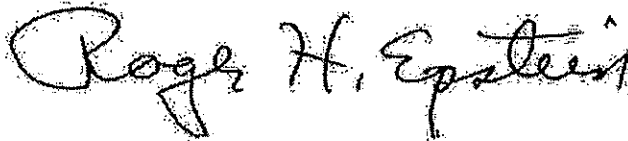
Nor do we see how adding a single additional entity will cause the confusion DCCA suggests would come about if there were the 100 different types of organizations they posture in their testimony.

Finally, I note that 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.

In summary, the Benefit 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, slightly slanted style.

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

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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.

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Honolulu, HI 96813
(808) 521-9274

COMMITTEE ON ECONOMIC REVITALIZATION AND BUSINESS

Rep. Angus L.K. McKelvey, Chair
Rep. Isaac W. Choy, Vice Chair

HEARING

Tuesday, February 15, 2011
8:00 a.m.
Conference Room 312

Re: HB 1638 Relating to Public Benefit Corporations.
SUPPORT

Dear Chair McKelvey, Vice Chair Choy, and Members of the Committee:

My name is Trever Asam. I am an attorney with Cades Schutte here in Honolulu and have been working with a group of individuals and organizations, including B Labs, a Pennsylvania non-profit organization, to draft "Benefit Corporation" legislation for Hawaii.

As you may know, SB1462, the Senate companion bill to HB 1638 received a hearing on Friday, February 11 in the Senate Commerce and Consumer Protection Committee. After hearing testimony from those in favor and those in opposition of the legislation, Senator Baker, the Committee Chair, requested that I meet with representatives from the office of the Attorney General and the DCCA to discuss ways to amend the legislation to address concerns raised in testimony by those two offices.

I have conferred with Hugh Jones from the office of the Attorney General and Tung Chan from the DCCA over the last two days, and the attached mark-up of the Senate legislation resulted. To summarize the changes:

- We have replaced the term "Public Benefit Corporation" with the term "Sustainable Business Corporation" to avoid confusion with Haw. Rev. Stat. 414D, in which an existing class of entities is already referred to as "public benefit corporations."
- We have removed the requirement of entities to file an annual "benefit statement" with the DCCA.

It should be noted that, although some of the DCCA's concerns regarding the legislation have been addressed through these amendments, at present the DCCA continues to oppose the legislation.

The office of the Attorney General raised an additional concern that could not be addressed through simple amendments to the legislative language: because the title of SB1462 was "Relating to Public Benefit Corporations," the office of the Attorney General suggested that if the legislation's title was inappropriate. To address this concern, and with the assistance of Senator Baker, a short-form bill with an appropriate title has been introduced in the Senate and will be amended to include the contents of the attached mark-up. Because the title of HB1638 refers to "Public Benefit Corporations," I believe that it is like that a similar process may be necessary in the House to address concerns likely to be raised by the office of the Attorney General.

In spite of these procedural hurdles, I remain strongly supportive of the legislation and believe that it represents an important step for Hawaii.

In addition to answering questions about the above issues, I am happy to discuss any of the technical aspects of the legislation.

Thank you for considering my testimony.

Sincerely,

Trever K. Asam

Attachment: Proposed language for SB298.

JAN 26 2011

A BILL FOR AN ACT

BUSINESS REGULATION

RELATING TO ~~PUBLIC BENEFIT CORPORATIONS.~~

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

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to be appropriately designated and to read
3 as follows:

4 "CHAPTER
5 **SUSTAINABLE BUSINESS**
~~PUBLIC BENEFIT~~ CORPORATIONS

6 § -1 Purpose and findings. This chapter authorizes the
7 organization of a form of business corporation that offers
8 entrepreneurs and investors the option to build and invest in
9 businesses that operate in a socially and environmentally
10 ~~responsible~~ **sustainable** manner. Enforcement of those responsibilities comes
11 not from governmental oversight, but rather from new provisions
12 on transparency and accountability included in this chapter.

13 § -2 Definitions. As used in this chapter:

14 "Benefit director" means the director designated as the
15 benefit director of a ~~public benefit~~ **sustainable business** corporation under
16 section -8.

17 "Benefit enforcement proceeding" means a claim or action
18 brought directly by a ~~public benefit~~ **sustainable business** corporation, or



1 derivatively on behalf of a ~~public benefit~~ **sustainable business** corporation, against
2 a director or officer for:

- 3 (1) Failure to pursue the general public benefit purpose
4 of the ~~public benefit~~ **sustainable business** corporation or any specific
5 public benefit purpose set forth in its articles; or
6 (2) Violation of a duty or standard of conduct under this
7 chapter.

8 "Benefit officer" means the individual designated as the
9 benefit officer of a ~~public benefit~~ **sustainable business** corporation under
10 section -10.

11 "General public benefit" means a material positive impact
12 on society and the environment, taken as a whole and as measured
13 by a third-party standard, from the business and operations of a
14 ~~public benefit~~ **sustainable business** corporation.

15 "Independent" means that a person has no material
16 relationship with a ~~public benefit~~ **sustainable business** corporation or any of its
17 subsidiaries. Serving as a benefit director or benefit officer
18 shall not deem a person independent. A material relationship
19 between a person and a ~~public benefit~~ **sustainable business** corporation or any of its
20 subsidiaries shall be conclusively presumed to exist if any of
21 the following apply:



- 1 (1) The person is, or has been within the last three
- 2 years, an employee of the ~~public benefit~~ **sustainable business** corporation
- 3 or any of its subsidiaries, other than as a benefit
- 4 officer;
- 5 (2) An immediate family member of the person is, or has
- 6 been within the last three years, an executive officer
- 7 of the ~~public benefit~~ **sustainable business** corporation or any of its
- 8 subsidiaries, other than as a benefit officer; or
- 9 (3) There is a beneficial or record ownership of five per
- 10 cent or more of the outstanding shares of the ~~public~~ **sustainable**
- 11 ~~benefit~~ **business** corporation by:
 - 12 (A) The person; or
 - 13 (B) An association:
 - 14 (i) Of which the person is a director, an
 - 15 officer, or a manager; or
 - 16 (ii) In which the person owns beneficially or of
 - 17 record five per cent or more of the
 - 18 outstanding equity interests.

19 A percentage of ownership in an association shall be calculated
 20 as if all outstanding rights to acquire equity interests in the
 21 association had been exercised.

1 "Minimum status vote" means that in addition to any other
2 approval or vote required by this chapter or a bylaw adopted by
3 the shareholders:

4 (1) The holders of shares of every class or series shall
5 be entitled to vote on the corporate action regardless
6 of any limitation stated in the articles of
7 incorporation or bylaws on the voting rights of any
8 class or series; and

9 (2) The corporate action must be approved by vote of the
10 shareholders of each class or series entitled to cast
11 at least two-thirds of the votes that all shareholders
12 of the class or series are entitled to cast thereon.

NOTE
★

13 ^{y "Sustainable business"}
"public benefit corporation" means a domestic corporation,
14 as defined in section 414-3, that has elected to become subject
15 to this chapter and whose status as a ~~public benefit~~ ^{sustainable business} corporation
16 has not been terminated as provided in this chapter.

17 "Specific public benefit" includes:

18 (1) Providing low-income or underserved individuals or
19 communities with beneficial products or services;

20 (2) Promoting economic opportunity for individuals or
21 communities beyond the creation of jobs in the normal
22 course of business;



- 1 (3) Preserving the environment;
- 2 (4) Improving human health;
- 3 (5) Promoting the arts, sciences, or advancement of
- 4 knowledge;
- 5 (6) Increasing the flow of capital to entities with a
- 6 public benefit purpose; and
- 7 (7) The accomplishment of any other particular benefit for
- 8 society or the environment.

9 "Subsidiary" of a person means an association in which the
 10 person owns beneficially or of record fifty per cent or more of
 11 the outstanding equity interests. A percentage of ownership in
 12 an association shall be calculated as if all outstanding rights
 13 to acquire equity interests in the association had been
 14 exercised.

** Insert here*

15 "Third-party standard" means a standard for defining,
 16 reporting, and assessing overall corporate social and
 17 environmental performance that is:

- 18 (1) Comprehensive in that it assesses the effect of the
- 19 business and its operations upon the interest listed
- 20 in section -7(a);
- 21 (2) Developed by an organization that is independent of
- 22 the ~~public benefit~~ *sustainable business* corporation;



- 1 (3) Credible because the standard is developed by an
2 organization that:
- 3 (A) Has access to necessary expertise to assess
4 overall corporate social and environmental
5 performance; and
- 6 (B) Uses a balanced multi-stakeholder approach
7 including a public comment period of at least
8 thirty days to develop the standard; and
- 9 (4) Transparent because the following information is
10 publicly available:
- 11 (A) The criteria considered when measuring the
12 overall social and environmental performance of a
13 business, as well as the relative weightings of
14 those criteria;
- 15 (B) The identity of the directors, officers, any
16 material owners, and the governing body of the
17 organization that developed and controls
18 revisions to the standard;
- 19 (C) The process by which revisions to the standard
20 are made;
- 21 (D) The process by which changes to the membership of
22 the governing body of the organization that



1 developed and controls revisions to the standard
 2 are made; and
 3 (E) An accounting of the sources of financial support
 4 for the organization that developed and controls
 5 revisions to the standard, with sufficient detail
 6 to disclose any relationships that could
 7 reasonably be considered to present a potential
 8 conflict of interest.

9 § -3 Formation of ~~public benefit~~ ^{sustainable business} corporations. A ~~public~~ ^{sustainable}
 10 ~~benefit~~ ^{business} corporation shall be formed in accordance with the
 11 domestic corporation organizational requirements of chapter 414,
 12 except that its articles shall also state that it is a ~~public~~ ^{sustainable}
 13 ~~benefit~~ ^{business} corporation.

14 § -4 Election of an existing domestic corporation to
 15 become a ~~public benefit~~ ^{sustainable business} corporation. (a) An existing domestic
 16 corporation may become a ~~public benefit~~ ^{sustainable business} corporation under this
 17 chapter by amending its articles so that they contain, in
 18 addition to the requirements of chapter 414, part XI, a
 19 statement that the corporation is a ~~public benefit~~ ^{sustainable business} corporation.
 20 The amendment shall not be effective unless it is adopted by at
 21 least the minimum status vote.



sustainable business

1 (b) If a corporation that is not a ~~public benefit~~
 2 corporation is a party to a merger, consolidation, or division,
 3 or is the exchanging corporation in a share exchange and the
 4 surviving, new, or any resulting corporation in the merger,
 5 consolidation, division, or share exchange is to be a ~~public~~
 6 ~~benefit~~ *business* corporation, then the plan of merger, consolidation,
 7 division, or share exchange shall not be effective unless it is
 8 adopted by the corporation by at least the minimum status vote.

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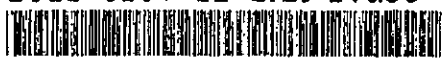
9 § -5 Termination of ~~public benefit~~ corporation status.
sustainable business

10 (a) A ~~public benefit~~ corporation may terminate its status as
 11 such and cease to be subject to this chapter by amending its
 12 articles to delete the statement that the corporation is a
 13 ~~public benefit~~ *sustainable business* corporation, as required by section -3. The
 14 amendment shall not be effective unless it is adopted by at
 15 least the minimum status vote.

16 (b) If a plan of merger, consolidation, division, or share
 17 exchange would have the effect of terminating the status of a
 18 business corporation as a ~~public benefit~~ *sustainable business* corporation, the plan
 19 shall not be effective unless it is adopted by at least the
 20 minimum status vote.

sustainable business

21 § -6 Corporate purposes. (a) Every ~~public benefit~~
 22 corporation shall have the purpose of creating a general public



1 benefit. This purpose is in addition to its purpose as
2 specified pursuant to section 414-41.

3 (b) In addition to its purpose under section 414-41 and
4 subsection (a), the articles of a ~~public benefit~~ ^{sustainable business} corporation may
5 identify one or more specific public benefits for which the
6 ~~public benefit~~ ^{sustainable business} corporation was created. The identification of a
7 specific public benefit under this subsection does not limit the
8 obligation of a ~~public benefit~~ ^{sustainable business} corporation to create a general
9 public benefit.

10 (c) The creation of general and specific public benefits
11 as provided in subsections (a) and (b) of this section shall be
12 in the best interests of the ~~public benefit~~ ^{sustainable business} corporation.

13 (d) A ~~public benefit~~ ^{sustainable business} corporation may amend its articles to
14 add, amend, or delete the identification of a specific public
15 benefit for which the ~~public benefit~~ ^{sustainable business} corporation was created.
16 The amendment shall not be effective unless it is adopted by at
17 least the minimum status vote.

18 § -7 Standard of conduct for directors. (a) In
19 discharging the duties of their respective positions, the board
20 of directors, committees of the board, and individual directors
21 of a ~~public benefit~~ ^{sustainable business} corporation, in considering the best
22 interests of the ~~public benefit~~ ^{sustainable business} corporation:



- 1 (1) Shall consider the effects of any action upon:
2 ~~sustainable business~~
3 (A) The shareholders of the ~~public benefit~~
4 corporation;
5 ~~sustainable business~~
6 (B) The employees and workforce of the ~~public benefit~~
7 corporation and its subsidiaries and suppliers;
8 (C) The interests of customers as beneficiaries of
9 the general or specific public benefit purposes
10 ~~sustainable business~~
11 of the ~~public benefit~~ corporation;
12 (D) Community and societal considerations, including
13 those of any community in which offices or
14 ~~sustainable business~~
15 facilities of the ~~public benefit~~ corporation or
16 its subsidiaries or suppliers are located;
17 (E) The local and global environment;
18 (F) The short-term and long-term interests of the
19 ~~sustainable business~~
20 ~~public benefit~~ corporation, including benefits
~~sustainable business~~
that may accrue to the ~~public benefit~~ corporation
from its long-term plans and the possibility that
these interests may be best served by the
~~sustainable business~~
continued independence of the ~~public benefit~~
corporation; and



sustainable business

1 (G) The ability of the ~~public benefit~~ corporation to
2 accomplish its general public benefit purpose and
3 any specific public benefit purpose;

4 (2) May consider:

5 (A) The resources, intent, and conduct of any person
6 seeking to acquire control of the corporation;
7 and

8 (B) Any other pertinent factors or the interests of
9 any other group that they deem appropriate; and

10 (3) Shall not be required to give priority to the
11 interests of any particular person or group referred
12 to in paragraphs (1) or (2) over the interests of any
13 other person or group unless the ~~public benefit~~ ^{sustainable business}
14 corporation has stated its intention to give priority
15 to interests related to a specific public benefit
16 purpose identified in its articles.

17 (b) The consideration of interests and factors in the
18 manner required by subsection (a) shall not constitute a
19 violation of a director's fiduciary duties.

20 (c) A director shall not be personally liable for monetary
21 damages for any action taken as a director if the director
22 performed the duties of the director's office in compliance with



1 the general standards of conduct pursuant to section 414-221 and
2 this section or for failure of the ~~public benefit~~ ^{sustainable business} corporation to
3 create a general public benefit or a specific public benefit.

4 (d) A director shall not have a fiduciary duty to a person
5 that is a beneficiary of the general or specific public benefit
6 purposes of a ~~public benefit~~ ^{sustainable business} corporation arising from the status
7 of the person as a beneficiary.

8 § -8 Benefit director. (a) The board of directors of a
9 ~~public benefit~~ ^{sustainable business} corporation shall include one director who shall
10 be designated the "benefit director" and shall have, in addition
11 to all of the powers, duties, rights, and immunities of the
12 other directors of the ~~public benefit~~ ^{sustainable business} corporation, the powers,
13 duties, rights, and immunities provided in this section.

14 (b) The benefit director shall be elected and may be
15 removed in the manner provided by sections 414-198 and 414-199,
16 and shall be an individual who is independent. The benefit
17 director may serve concurrently as the benefit officer. The
18 articles or bylaws of a ~~public benefit~~ ^{sustainable business} corporation may prescribe
19 additional qualifications of the benefit director, provided that
20 the qualifications are consistent with this subsection.

21 (c) The benefit director shall prepare, and the ~~public~~ ^{sustainable}
22 ~~benefit~~ ^{business} corporation shall include in the annual benefit report

1 to shareholders required by this chapter, a statement whether,
 2 in the opinion of the benefit director, the ~~public benefit~~ **sustainable business**
 3 corporation acted in accordance with its general, and any
 4 specific, public benefit purpose in all material respects during
 5 the period covered by the report and whether the directors and
 6 officers complied with sections -7(a) and -9(a),
 7 respectively. If in the opinion of the benefit director the
 8 ~~public benefit~~ **sustainable business** corporation or its directors or officers failed
 9 to act accordingly, then the statement of the benefit director
 10 shall include a description of the ways in which the ~~public~~ **sustainable**
 11 ~~benefit~~ **business** corporation or its directors or officers failed to act
 12 accordingly.

13 (d) For all purposes, the acts of an individual in the
 14 capacity of a benefit director shall constitute acts of that
 15 individual in the capacity of a director of the ~~public benefit~~ **sustainable business**
 16 corporation.

17 (e) If the bylaws of a ~~public benefit~~ **sustainable business** corporation provide
 18 that the powers and duties conferred or imposed upon the board
 19 of directors shall be exercised or performed by a person or
 20 persons other than the directors or if the bylaws of a statutory
 21 close corporation that is a ~~public benefit~~ **sustainable business** corporation provide
 22 that the business and affairs of the corporation shall be



1 managed by or under the direction of the shareholders, then the
 2 bylaws of the ~~public benefit~~ ^{sustain the business} corporation shall provide that the
 3 person, persons, or shareholders who perform the duties of the
 4 board of directors shall include a person with the powers,
 5 duties, rights, and immunities of a benefit director. ^{sustain the business}

6 (f) Regardless of whether the bylaws of a ~~public benefit~~
 7 corporation include a provision eliminating or limiting the
 8 personal liability of directors, a benefit director shall not be
 9 personally liable for any act or omission committed in the
 10 capacity of a benefit director unless the act or omission
 11 constitutes self-dealing, wilful misconduct, or a knowing
 12 violation of law.

13 § -9 Standard of conduct for officers. (a) Each
 14 officer of a ~~public benefit~~ ^{sustain the business} corporation shall consider the
 15 interests and factors described in section -7(a) in the
 16 manner provided in that section when:

- 17 (1) The officer has discretion to act with respect to a
 18 matter; and
 19 (2) It reasonably appears to the officer that the matter
 20 may have a material effect on:
 21 (A) The creation of general or specific public
 22 benefit by the ~~public benefit~~ ^{sustain the business} corporation; or



1 (B) Any of the interests or factors referred to in
2 section -7(a).

3 (b) The consideration of interests and factors pursuant to
4 subsection (a) shall not constitute a violation of the officer's
5 fiduciary duties.

6 (c) An officer shall not be personally liable for monetary
7 damages for any action taken as an officer if the officer
8 performed the duties of the position in compliance with the
9 general standards of conduct pursuant to section 414-233 and
10 this section or for failure of the ~~public benefit~~ ^{sustain 'le business} corporation to
11 create a general or specific public benefit.

12 (d) An officer shall not have a fiduciary duty to a person
13 that is a beneficiary of the general or specific public benefit
14 purposes of a ~~public benefit~~ ^{sustain 'le business} corporation arising from the status
15 of the person as a beneficiary. ^{sustain 'le business}

16 § -10 Benefit officer. A ~~public benefit~~ corporation may
17 have an officer designated the "benefit officer" who shall have
18 the authority and shall perform the duties in the management of
19 the ~~public benefit~~ ^{sustain 'le business} corporation relating to the purpose of the
20 corporation to create general or specific public benefit as may
21 be provided by or pursuant to the bylaws or, in the absence of
22 controlling provisions in the bylaws, as may be determined by or



1 pursuant to resolutions or orders of the board of directors. If
 2 ~~a public benefit~~ **sustain ble business** corporation has a benefit officer, the duties
 3 of the benefit officer shall include preparing the benefit
 4 report required by section -12.

5 § -11 Right of action. (a) Except as provided in
 6 sections -12(e) and -12(f), the duties of directors and
 7 officers under this chapter, and the general and any specific
 8 public benefit purpose of a ~~public benefit~~ **sustain ble business** corporation, shall be
 9 enforced only in a benefit enforcement proceeding. Except as
 10 provided in section -12(e) and -12(f), no person may bring
 11 an action or assert a claim against a ~~public benefit~~ **sustain ble business** corporation
 12 or its directors or officers with respect to the duties of
 13 directors and officers under this chapter and the general and
 14 any specific public benefit purpose of the ~~public benefit~~ **sustain ble business**
 15 corporation, except in a benefit enforcement proceeding.

16 (b) A benefit enforcement proceeding may be commenced or
 17 maintained only:

- 18 (1) Directly by the ~~public benefit~~ **sustain-ble business** corporation; or
 19 (2) Derivatively by:
 20 (A) A shareholder;
 21 (B) A director;



1 (C) A person or group of persons that owns
2 beneficially or of record five per cent or more
3 of the equity interests in an association of
4 which the ~~public benefit~~ **sustain business** corporation is a
5 subsidiary; or

6 (D) Any other persons as may be specified in the
7 articles or bylaws of the ~~public benefit~~ **sustain le business**
8 corporation. **sustainable business**

9 § -12 Annual benefit report. (a) A ~~public benefit~~
10 corporation shall deliver to each shareholder an annual benefit
11 report including:

12 (1) A narrative description of: **susta ble business**
13 (A) The ways in which the ~~public benefit~~ corporation
14 pursued general public benefits during the year
15 and the extent to which general public benefit
16 was created; **sustainable business**

17 (B) The ways in which the ~~public benefit~~ corporation
18 pursued any specific public benefit that the
19 articles state as a purpose of the ~~public benefit~~ **sustain le business**
20 corporation and the extent to which that specific
21 public benefit was created; and



1 (C) Any circumstances that have hindered the creation
2 ~~public benefit~~ ^{sustain ble business} corporation of general or
3 specific public benefits;

4 (2) An assessment of the overall social and environmental
5 ~~public benefit~~ ^{sustain ble business} performance of the corporation,
6 prepared in accordance with a third-party standard
7 applied consistently with any application of that
8 standard in prior benefit reports or accompanied by an
9 explanation of the reasons for any inconsistent
10 application;

11 (3) The name of the benefit director and the benefit
12 officer, if any, and the address to which
13 correspondence to each of them may be directed;

14 (4) The compensation paid by the ~~public benefit~~ ^{sustain ble business}
15 corporation during the year to each director in that
16 capacity;

17 (5) The name of each person that owns five per cent or
18 ~~public benefit~~ ^{sustain-ble business} more of the outstanding shares of the corporation
19 either beneficially, to the extent known
20 ~~public benefit~~ ^{sustain ble business} to the corporation without independent
21 investigation, or of record;

1 (6) The statement of the benefit director described in
2 section -8(c); and

3 (7) A statement of any connection to the third party
4 standard, or its directors, officers, or material
5 owners from the ~~public benefit~~ ^{sustainable business} corporation, or its
6 directors, officers, and material owners, including
7 any financial or governance relationship that might
8 materially affect the credibility of the objective
9 assessment of the third party standard.

10 (b) The benefit report shall be sent annually to each
11 shareholder within one hundred twenty days following the end of
12 the fiscal year of the ~~public benefit~~ ^{sustainable business} corporation.

13 (c) A ~~public benefit~~ ^{sustainable business} corporation shall post its most
14 recent benefit report on the public portion of its website, if
15 any, except that the compensation paid to directors and any
16 financial or proprietary information included in the benefit
17 report may be omitted from the benefit report as posted. **If a**

18 ~~(d) Concurrently with the delivery of the benefit report~~
19 ~~to shareholders pursuant to subsection (b), the public benefit~~
20 ~~corporation shall deliver a copy of the benefit report to the~~
21 ~~department of commerce and consumer affairs for filing, except~~
22 ~~that the compensation paid to directors and any financial or~~
website, it shall deliver a copy of its sustainable business
most recent benefit report on demand and without charge



1 ~~proprietary information included in the benefit report may be~~
2 ~~omitted from the benefit report as filed under this section.~~
3 ~~The department of commerce and consumer affairs shall charge a~~
4 ~~fee of \$70 for filing a benefit report.~~

5 (e) ~~In addition to the penalties set forth in section~~
6 ~~414 473, each **Sustain-ble business** public benefit corporation that fails or refuses~~
7 ~~to file its benefit report for any year shall be subject to a~~
8 ~~forfeiture of an amount to be determined by the director of~~
9 ~~commerce and consumer affairs not to exceed \$100 for every~~
10 ~~violation, neglect, or failure, to be recovered by action~~
11 ~~brought in the name of the State by the director. A continuance~~
12 ~~of a failure to file the required report shall be a separate~~
13 ~~offense for each thirty days of the continuance. The director~~
14 ~~of commerce and consumer affairs, for good cause shown, may~~
15 ~~reduce or waive the penalty imposed by this section.~~

16 (f) ~~In addition to the grounds for administrative~~
17 ~~dissolution set forth in section 414 401, the director of~~
18 ~~commerce and consumer affairs may commence a proceeding under~~
19 ~~section 414 402 to administratively dissolve a public benefit **Sustain-its business**~~
20 ~~corporation if the public benefit corporation fails to file its **Sustain-its business**~~
21 ~~annual benefit report for a period of two years.~~

22 (g) ~~The provisions of section 414 16 shall apply to this~~
~~section.~~



1 SECTION 2. This Act shall take effect upon its approval.

2

INTRODUCED BY:

Yr. Shan

Erinne Chum Oakland

Melanie Pina

Johnathan

Clarence Nishikawa

Mike Gabriel

Amil Yje

R. D. D. J.

Will Eyo

J. J.

James R. Stone

Jill Anne Johnson



Report Title:

Public Benefit Corporations; Organization

Description:

Establishes an organizational and regulatory framework for public benefit corporations.

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





Hawaii Venture Capital
Association
805 Kainui Drive
Kailua, Hawaii 96734
808-262-7329
<http://www.hvca.org>

DATE: February 12, 2011

HEARING DATE/TIME: Tuesday, Feb 15 at 8:00 in Room 312

TO: COMMITTEE ON ECONOMIC REVITALIZATION AND BUSINESS
Representative Angus L.K. McKelvey, Chair
Representative Isaac Choy, Vice Chair

FROM: Bill Spencer
President
Hawaii Venture Capital Association

RE: Testimony In STRONG SUPPORT for HB1638 *Relating to Public Benefit Corporations*

Thank you for the opportunity to provide testimony in STRONG SUPPORT of HB 1638. A Public Benefit Corporation is a form of organization that by its nature operates in a socially and environmentally responsible manner. Such companies are held to a high standard by their officers, directors and the public rather than the government. It provides transparency and accountability.

Such organizations are deemed worth of investment by organizations and individuals who seek to invest responsibly and consistently with their own important values. Socially responsible investing has become an important form of investing across the country as individuals seek to benefit from a "triple bottom line", where companies they invest in, not only provide a return on their investment, but do good work that benefits society as a whole.


I encourage you to support this bill and encourage the establishment of Public Benefit Corporations in Hawaii for the sake of consumers, entrepreneurs and investors who want to do the right thing and be recognized as entities who subscribe to a high standard in respect to their actions.

Sincerely,

Bill Spencer
President
Hawaii Venture Capital Association



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 of Hawai'i

1000 Bishop Street, Suite 902 • Honolulu, HI 96813
808.546.2288 telephone • 808.546.2211 fax
info@efhawaii.org • www.efhawaii.org

February 14, 2011

COMMITTEE ON ECONOMIC REVITALIZATION AND BUSINESS

Representative Angus L.K. McKelvey, Chairman
Representative Isaac W. Choy, Vice Chairman

HEARING

Tuesday, February 15, 2011

8:00 a.m.

Conference Room 312

Re: Testimony in Support of HB1638 Relating to Public Benefit Corporations

Dear Chairman McKelvey, Vice Chairman Choy, and Members of the Committee:

As President of the Entrepreneurs Foundation of Hawai'i, a 501(c)(3) nonprofit organization that encourages entrepreneurial companies to engage in community service and philanthropy, I strongly support passage of HB1638. The legislation would permit electing corporations to pursue both profit and the creation of public benefits, filling gaps in the law that currently interfere with these endeavors. By allowing companies to consider the interests of employees, the environment, or communities without being subject to lawsuits for harming the interests of shareholders, HB1638 will encourage the formation and development of socially responsible enterprises. Social entrepreneurs will be able to build their companies, attract investors, and deliver both profits and public benefits to the Hawai'i community.

I strongly urge your support for HB1638.

Sincerely yours,

/s/

Leigh-Ann K. Miyasato
President & Executive Director

Economic Revitalization and Business Committee
Chairman - Angus L.K. McKelvey and Vice Chairman - Issac W. Choy

Hearing

Tuesday, Feb 15 at 8:00 in Room 312.

Re: HB1638 Relating to Public Benefit Corporations

Dear Committee Members,

Thank you.

Your willingness to consider HB1638 is very much appreciated.

HB1638 needs your strong support. Benefit Corporations, also known as "B Corps," are good for business and good for Hawaii. HB1638 would serve the interests of businesses, shareholders, and consumers by permitting corporations to affirm a commitment to creating public benefits.

Businesses that generate calculable benefits for society can be known, not only for their products and profits but, for their quantifiable good works.

Hawaii should be encouraging and supporting Benefit Corporations.

The enthusiasm and passion that the "B Corp" structure will bring to Hawaii will help to promote the Spirit of Aloha as the way Hawaii does business.

Please strongly support HB1638

Sincerely,

Denny McDonough

President of A & R M Systems

Adjunct: Chaminade University, Honolulu, Hawaii

e-mail: denyatarms@aol.com



**We Support the Hawaii Benefit Corporation Legislation
February 10, 2011**

On behalf of the American Sustainable Business Council, I am writing to express our support for HB1638; the Hawaii Benefit Corporation Bill.

The idea behind the B Corporation fits in very well with Hawaii's long-standing 'Aloha' principle for doing business. That principle holds that business should be conducted in a manner that respects the natural environment and supports local communities, while also generating profit. It's a win-win-win

HB1638 builds on this principle. B Corporations are 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 Benefit Corporations, fiduciary duty is redefined by stating that the creation of public benefit is in the best interests of the Benefit 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.

The American Sustainable Business Council, based in Washington D.C., represents over 65,000 companies throughout US. We believe that business has a role to play building a financially vibrant economy, while also protecting our environment and quality of life in our communities. We have played a key role in having similar Benefit Corporation bills passed in Vermont and Maryland during their 2010 legislative sessions.

We believe that Benefit Corporations will make Hawaii an even more attractive place to do business and bring additional investment into the state's economy. A "new economy" is blossoming across the country made up of businesses that are finding ways to do well while helping our environment and society at large. States that welcome these new businesses will be poised for growth. Hawaii should maintain its leadership position by enacting a Benefits Corporation law.

Respectfully yours,

Richard Eidlin
Issues Director
American Sustainable Business Council
303-478-0131
www.asbcouncil.org

TESTIMONY

Committee: ERB Room #312
Hearing Date: 2/15/2011 8:00AM
HB1638

Testimony in Strong Support of HB1638

Testifier: Gary Hooser, speaking as an individual

Honorable Committee Chair Representative McKelvey, Vice Chair Choy and members of the House Committee on Economic Recovery and Business:

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 HB1638 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 – HB1638 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 consider passing out HB1638.

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

'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

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'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.

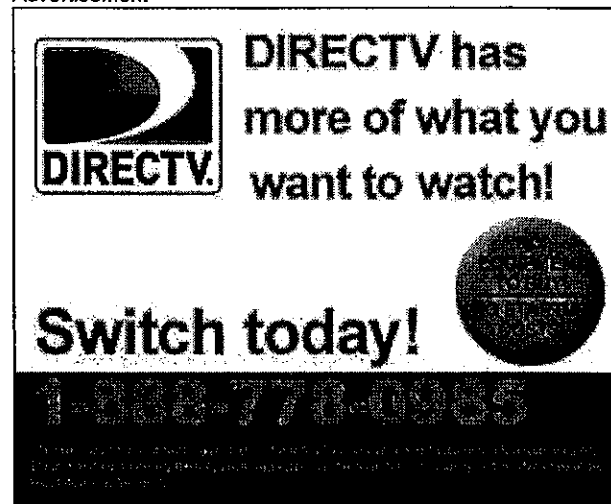
"If you're feeding back into your customers goodwill, social justice, making sure your employees have sustainable wages, people

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.

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

**TESTIMONY OF
WILLIAM H. CLARK, JR.
ON
HOUSE BILL 1638
BEFORE
HAWAII STATE LEGISLATURE
HOUSE COMMITTEE ON
ECONOMIC REVITALIZATION AND BUSINESS**

February 15, 2011

c

Chair McKelvey and members of the Committee:

My name is William H. Clark, Jr. I appreciate this opportunity to provide testimony in support of H.B. 1638 regarding benefit corporations.

I am a partner in Drinker Biddle & Reath LLP and practice in its Philadelphia office in the Corporate and Securities Group. Throughout my career I have been involved in drafting corporation and other entity laws. My experience in that area is summarized in the Appendix.

Recently I have been serving as pro bono counsel to B Lab in connection with its support of the enactment of benefit corporation legislation 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 H.B. 1638. The legislation that has been introduced in Hawaii is similar to legislation authorizing benefit corporations that has been enacted in Maryland, New Jersey¹, and Vermont. Similar legislation has been introduced, or will be introduced in the next few weeks, in California, Colorado, Michigan, North Carolina, and Pennsylvania. In the course of my work on benefit corporation legislation, I have had the opportunity to participate in meetings of seven different bar

¹ As of February 9, 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.

association corporation law drafting committees – in California, Colorado, Maryland, Pennsylvania, Vermont, Virginia, and Washington. H.B. 1638 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 benefit corporation legislation. As the beneficiary of all of that prior work, H.B. 1638 reflects the “state of the art” and the best thinking of many lawyers and legislators. Thus, I am confident in saying that enactment of H.B. 1638 will be very good for Hawaii and its citizens.

The Legal Reason Why H.B. 1638 is Needed

The purpose of H.B. 1638 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. H.B. 1638 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 H.B. 1638 provides for corporations.

Overview of H.B. 1638

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. H.B. 1638 may be summarized as follows:

- A benefit 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 benefit corporation are modified to be consistent with those purposes.
- Once a year a benefit 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 H.B. 1638

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

Every benefit 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 benefit corporation may also identify specific public benefits that it is the purpose of the corporation to create.

It is important to emphasize that benefit corporations are for-profit businesses. In particular, passage of H.B. 1638 will have no effect on the taxation of benefit corporations, and a business corporation that elects to become a benefit corporation will continue to be

taxed as a business corporation.

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

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

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

Each year the benefit 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 benefit corporation 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 H.B. 1638.

Thank you for your attention.

Appendix

Experience of William H. Clark, Jr. with Entity Law Drafting Projects

I have served in the following capacities:

- Reporter for the Third Edition of the Model Nonprofit Corporation Act, which was adopted in 2008.
- ABA Reporter for the Model Entity Transactions Act, which was a joint project of the American Bar Association (ABA) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) and authorizes mergers and other transactions involving more than one form of entity.
- Reporter for the Model Registered Agents Act prepared by NCCUSL, which provides uniform rules for agents for service of process for all types of entities.
- Reporter for the Uniform Law Enforcement Access to Entity Information Act prepared by NCCUSL, which is designed to satisfy the requirements of an international body, called the Financial Action Task Force, which was formed by the G-7 countries in 1989 to fight money-laundering and terrorist financing.
- Vice Chair of the NCCUSL drafting committee that is harmonizing all of the uniform unincorporated entity laws so that their language is consistent and they can be integrated into a single code.
- Co-chair of the NCCUSL drafting committee that prepared the Business Organizations Act, which provides a framework states can use to integrate their corporation and other entity laws into a single code.
- ABA Business Law Section Advisor to the NCCUSL drafting committee that prepared the Revised Uniform Limited Liability Company Act.
- ABA Business Law Section Advisor to the NCCUSL drafting committee that prepared the Uniform Statutory Trust Entity Act.
- Member of the Committee on Corporate Laws of the ABA Section on Business Law, which prepares the Model Business Corporation Act, and Chair of several task forces of the Committee which prepared various provisions of the Model Business Corporation Act.
- Co-chair and Reporter for the Title 15 / Business Associations Committee of the Business Law Section of the Pennsylvania Bar Association. For more than 20 years I have been responsible for drafting the Pennsylvania corporation and other entity laws.
- Legislative Counsel to the North Dakota Corporate Governance Council which prepared the first shareholder friendly corporation law in the United States.

TESTIMONY

House Committee on Economic Revitalization and Business
Chairman- Representative Angus L.K. McKelvey, Vice Chairman – Issac W. Choy

Tuesday, February 15, 2011
8:00 a.m.

HB1638 Relating to Public Benefit Corporations

Dear Committee Members,

Thank you for hearing HB1638 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 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.

Sincerely,

John Webster, Director
The Hogan Entrepreneurs
Chaminade University

TESTIMONY

House Economic Revitalization and Business Committee
Chairman - Angus L.K. McKelvey and Vice Chairman - Issac W. Choy

Tuesday, Feb 15, 2011
8:00 a.m. Conference Room 312

HB1638 Relating to Public Benefit Corporations

Dear Committee Members,

Thank you for hearing **HB1638** 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 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,

Patrick Bustamante
Business Consultant

TESTIMONY

House Committee on Economic Revitalization and Business
Representative Angus L.K. McKelvey, Chair and
Representative Isaac W. Choy, Vice Chair

Tuesday, February 15, 2011
8:00 a.m. Conference Room 312

HB 1638 Relating to Public Benefit Corporations

Dear Committee Members,

Thank you for hearing HB 1638 today. This bill is an important way to help those companies who are believers in doing business in ways that promote profitability, community development and support, and environmental stewardship.

Providing emergent organizations a vehicle for systematically including community and environmental impact in their strategies and goals may have a significant positive impact on our economy. Research out of the University of Washington and Boston University (*Academy of Management Journal*, 42:5, 488 – 506) indicates that explicit inclusion of social and environmental goals in an organization's strategy is positively related to a firm's financial performance. Organizations that include social and environmental impact among their goals tend to be more financially successful than those that do not.

But, in spite of their intent to create positive outcomes for a range of stakeholders, case law has been interpreted to make corporations chiefly attentive to the financial interests of shareholders.

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. B Corp legislation has been introduced in seven other states.

This organizational structure facilitates the impact that entrepreneurs and others bring to their development of new sustainable ventures. As indicated by the research cited above, it may also enhance the success of these ventures, thereby contributing to the economic, social and environmental health of Hawaii.

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

Sincerely,

Scott J. Schroeder, PhD
Dean, School of Business
Chaminade University of Honolulu

TESTIMONY

House Committee on Economic Revitalization and Business
Representative Angus L.K. McKelvey, Chair and
Representative Isaac W. Choy, Vice Chair

Tuesday, February 15, 2011
8:00 a.m. Conference Room 312

HB 1638 Relating to Public Benefit Corporations

Dear Committee Members,

Thank you for hearing HB 1638 today. This bill is an innovative way to help create more jobs in Hawai'i. It will create a way for investors who wish to commit funds to businesses with confidence that they will pursue profit in ways that serve values such as environmental and social responsibility. There are investors who want to make such investments in Hawai'i and business opportunities that meet those criteria. It is in the best interest of the state economy that they should have a mechanism to do so.

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, businesses have felt compelled to organize as non-profits to avoid running afoul of their fiduciary responsibilities, but the non-profit format is very restrictive and does not allow for equity investment.

The Benefits Corporation or “B Corp” was developed to provide a way to embed the intentions of the investors and founding entrepreneurs in the bylaws of the corporation so everyone is notified and obligated to pursue the goals for which the corporation was formed. 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. It can benefit Hawai'i as well by attracting capital and socially responsible entrepreneurs to the state. I encourage you to pass this legislation.

Sincerely,

Gifford Pinchot III, President
Bainbridge Graduate Institute

RE: HB1638

Hearing Date: Tuesday, February 15, 8:00 am

Committee on Economic Revitalization & Business

Rep. Angus L.K. McKelvey, Chair

Rep. Isaac W. Choy, Vice Chair

Representative McKelvey, Representative Choy, and Members of the Committee,

I am writing in support of HB1638, the bill that establishes a framework for the Public Benefit Corporation (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.

Public benefit 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 this measure to raise the bar for business standards here in Hawaii.

Mahalo,



Michael Kramer
Managing Partner, Natural Investments LLC
Keauhou, HI
808-331-0910

COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

Chairman - Angus L.K. McKelvey

Vice Chairman - Issac W. Choy

HEARING

Friday, February 15, 2011

8:30 a.m. / Room 312

Re: HB1638 Relating to Public Benefit Corporations- SUPPORT

Dear Chair McKelvey, Vice Chair Choy, and Members of the Committee:

Thank you for your consideration of this bill. As the Co-founder and CEO of GreenCar Hawaii I strongly support passage of HB1638.

The legislation would permit electing corporations to pursue both profit and the creation of public benefits, filling gaps in the law that currently interfere with these endeavors. The voluntary regime established by HB1638 would serve the interests of corporations, shareholders, and consumers and would make Hawaii a better place to do business.

HB1638 is important to businesses. Consumers and investors are seeking socially responsible companies – companies that can make a profit while accomplishing social good. This bill permits corporations to declare a commitment to creating public benefits, while simultaneously providing a mechanism through which to verify these benefits. Corporations that accomplish measurable benefits for society can be recognized for their good works and identified by interested consumers and investors.

Successful Benefit Corporations will be transparent, committed to public benefits, and profitable. They are the types of businesses whose development should be encouraged in Hawaii. I strongly urge your support for this legislation.

Sincerely,

Justin MacNaughton

CEO / GreenCar Hawaii

808-346-9572 / jmacnaughton@greencarhawaii.com

www.greencarhawaii.com

TESTIMONY

House Committee on Economic Revitalization and Business
Representative Angus L.K. McKelvey, Chair and Representative Issac W. Choy, Vice
Chair

Tuesday, February 15, 2011
8:00 a.m. Conference Room 312

HB1638 Relating to Public Benefit Corporations

Dear Committee Members,

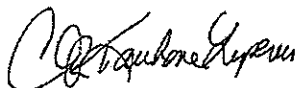
Thank you for hearing HB 1638 today. I support HB1638 as an innovative way to encourage companies to adopt practices that support a Triple Bottom Line. While none dispute the importance of profits, most companies also recognize the need to address the social and environmental impact of their activities.

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. Having a “B Corp”, or Benefits Corporation, allows companies another option 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. Hawai‘i, with a root culture that ensures shared responsibility for taking care of our people and places, is well-positioned to be part of these pioneering efforts.

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,



Cheryl L. Ka`uhane Lupenui
President and Chief Executive Officer
YWCA of O`ahu

From: grencoll@greencollartech.com on behalf of Brent Norris [aloha@greencollartech.com]
Sent: Monday, February 14, 2011 12:23 PM
To: ERBtestimony
Cc: Michael Kramer
Subject: HB1638 - Sustainable Business Corporations in Hawaii

RE: HB1638

Hearing Date: Tuesday, February 15, 8:00 am

Committee on Economic Revitalization & Business
Rep. Angus L.K. McKelvey, Chair
Rep. Isaac W. Choy, Vice Chair

Aloha Representative McKelvey, Representative Choy, and Members of the Committee,

I am writing in support of HB1638, the bill that establishes a framework for the Public Benefit Corporation (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;
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- (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.

Public benefit 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 this measure to raise the bar for business standards here in Hawaii.

Always with Aloha,
-Brent

Green Collar Technologies Vision
...a global model of sustainability and abundance in Hawaii.

Brent Norris | 808-896-7656
<http://GreenCollarTech.com>
Hawai`i Innovation Center at Hilo
117 Keawe Street, #132 | Hilo, Hawai`i 96720
Green Collar Technologies
2010 SBA State of Hawai`i Home Based Business Champions