



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2018**

ON THE FOLLOWING MEASURE:

S.B. NO. 2747, S.D. 2, RELATING TO NONPROFIT CORPORATIONS.

BEFORE THE:

HOUSE COMMITTEES ON CONSUMER PROTECTION AND COMMERCE
AND ON JUDICIARY

DATE: Wednesday, March 21, 2018 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): Russell A. Suzuki, Acting Attorney General, or
Stacie M. Nakamura, Deputy Attorney General

Chairs Takumi and Nishimoto and Members of the Committees:

The Department of the Attorney General (Department) supports this bill. This bill amends the Hawaii Nonprofit Corporations Act, chapter 414D, Hawaii Revised Statutes (HRS). We request that the bill be passed with the amendment noted below.

The main purposes of this bill are to (1) clarify that public benefit corporations may not purchase its memberships, (2) clarify that a person who does not have authority to vote as a member of the board is not a director, and (3) make other housekeeping amendments. If enacted, the bill would be effective upon approval.

Purchase of Memberships

Public benefit corporations are normally prohibited from making any distributions other than for charitable purposes under section 414D-19, HRS. Unlike shareholders of a corporation or partners of a partnership, members of a public benefit corporation do not have an economic ownership interest in the public benefit corporation. Therefore, a public benefit corporation's use of its charitable assets to purchase its memberships would amount to a distribution to its members and would evade the rule against distributing charitable assets for non-charitable purposes.

If passed, this bill will explicitly prohibit public benefit corporations from purchasing its memberships, prevent charitable assets from being used for non-

charitable purposes, and conform the Hawaii Nonprofit Corporations Act to the Revised Model Nonprofit Corporation Act (1987).

Directors Must Have Authority to Vote

Based on the numerous inquiries received by the Department, there appears to be confusion as to whether ex-officio directors, or individuals named as directors based on their position or status, who do not have any authority to vote as a member of the board are in fact directors of a nonprofit corporation for purposes of chapter 414D, HRS. Non-voting directors would be unable to perform their fiduciary duties as a director if they are unable to vote to take any action.

This bill clarifies that the term “directors” as used in the Hawaii Nonprofit Corporations Act only includes those who have the authority to vote as a member of the board.

Housekeeping Amendments

This bill also makes other housekeeping amendments, consistent with the Revised Model Nonprofit Corporation Act (1987) and other sections of the Hawaii Nonprofit Corporations Act, to clarify that a corporation with members may designate its directors, add words that had been inadvertently removed through Act 87, Session Laws of Hawaii 2017, and allow the Attorney General more time to conduct a review of a proposed sale of substantially all of the assets of a public benefit corporation other than in the regular course of its activities.

Requested Amendment

S.B. No. 2747, S.D. 2, section 3 includes a new clarifying amendment to section 414D-134, HRS. Although we appreciate the intent of the prior Committee to clarify the statute, the amendment strays from the intended meaning of the statute. The Department initially proposed an amendment, consistent the Revised Model Nonprofit Corporation Act (1987), allowing the articles or bylaws of a nonprofit corporation with members to provide that directors may be *designated*. However, the current amendment to section 414D-134, HRS, instead allows the directors to be *appointed* by designation. The official comment to the Revised Model Nonprofit Corporation Act (1987) distinguishes between the words “designate” and “appoint”. The comments

explain that designation occurs when the articles or bylaws name an individual as a director or designate the holder of some office or position as a director, while any person, corporation, or entity may appoint a director. Because the original amendment to section 414D-134, HRS, was intended to reflect both the wording and meaning of the Revised Model Nonprofit Corporation Act (1987), we request that the Committees amend S.B. No. 2747, S.D. 2, section 3 consistent with the wording contained in the attached proposed amendment, which will clarify how the word “designated” should be interpreted in the statute.

We respectfully request that the Committees pass this bill with the requested amendment.

SECTION 3. Section 414D-134, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) If the corporation has members, all the directors (except the initial directors) shall be elected at the first annual meeting of members, and at each annual meeting thereafter, unless the articles or bylaws provide some other time or method of election, or provide that some of the directors are (1) appointed by some other person or (2) designated [~~representative~~]."



Our Vision: Charitable organizations have the philanthropic resources necessary to fulfill their missions for a better Hawaii.

Our Mission: We advance philanthropy throughout Hawaii by actively promoting the practice of ethical and effective fundraising with education, training, advocacy, and mentoring for the benefit of all, with the spirit of aloha.

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Wednesday, March 21st, 2018 at 2:00pm

Conference Room 329

House Committee on Consumer Protection & Commerce

To: Representative Roy M. Takumi, Chair
Representative Linda Ichiyama, Vice Chair

House Committee on Judiciary

To: Representative Scott Y. Nishimoto, Chair
Representative Joy A. San Buenaventura, Vice Chair

From: Cathy Alsup, CFRE
President, Association of Fundraising Professionals, Aloha Chapter

Re: SB 2747, SD 2- Relating to Nonprofit Corporations

My name is Cathy Alsup, CFRE, President of the Association of Fundraising Professionals – Aloha Chapter (AFP Aloha Chapter). The AFP Aloha Chapter advances philanthropy throughout Hawaii by actively promoting the practice of ethical and effective fundraising. We are committed to education, training, advocacy, and mentoring in the field of fundraising for the benefit of all, with the spirit of aloha. Founded in Hawaii in 1983, the Association of Fundraising Professionals (AFP) Aloha Chapter is a professional association whose membership is comprised of persons involved in non-profit development, non-profit management and fundraising consulting. The chapter members represent organizations on Oahu, Maui, Kauai and the Big Island.

I write in support of SB 2747, SD 2 which clarifies regulations for membership and directorship of public benefit corporations and which increases the length of time that the Attorney General has to review proposed sale of all of the assets of public benefit corporations.

SB 2747, SD 2 helps to clarify operating guidelines for public benefit corporations regarding membership and qualifications to be a director of such an organization. The specific updates to the Hawai'i Revised Statutes that this measure makes will ultimately help members of AFP Aloha Chapter to comply by our State laws that govern organizational structure and operating procedures.

Thank you for the opportunity to testify in support of SB 2747, SD 2.

SB-2747-SD-2

Submitted on: 3/19/2018 6:17:59 PM

Testimony for CPC on 3/21/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Benton Kealii Pang, Ph.D.	Individual	Support	No

Comments:

I support SB 2747 SD2 to (1) clarify that public benefit corporations may not purchase its memberships, (2) clarify that a person who does not have authority to vote as a member of the board is not a director, and (3) make other housekeeping amendments. Please pass this bill.