

# SB1171

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| Measure Title:    | RELATING TO NONPROFIT CORPORATIONS.  |
| Report Title:     | Nonprofit Corporations   |
| Description:      | <p>Amends chapter 414D, Hawaii Revised Statutes, to clarify that public benefit corporations may not purchase its memberships, to clarify that a person who does not have authority to vote as a member of the board is not a director, to clarify that a corporation with members may designate its directors, to add previous wording that was inadvertently removed through Act 87, Session Laws of Hawaii 2017, and to increase the length of time that the Attorney General has to review proposed sale of substantially all of the assets of public benefit corporations other than in the regular course of its activities.</p> |
| Companion:        | <a href="#">HB944</a>  |
| Package:          | Governor   |
| Current Referral: | CPH, JDC   |
| Introducer(s):    | KOUCHI (Introduced by request of another party)  |



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2019**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 1171, RELATING TO NONPROFIT CORPORATIONS.

**BEFORE THE:**

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

**DATE:** Monday, February 11, 2019 **TIME:** 9:30 a.m.

**LOCATION:** State Capitol, Room 229

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Patrick K. Kelly, Deputy Attorney General

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Chair Baker and Members of the Committee:

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 as drafted.

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.

We respectfully request that the Committee pass this bill as drafted.



UNIVERSITY of HAWAII<sup>1</sup>  
FOUNDATION

**TESTIMONY OF THE UNIVERSITY OF HAWAII FOUNDATION  
ON SENATE BILL NO. 1171, RELATING TO NONPROFIT CORPORATIONS**

**Hearing Date:** February 11, 2019  
**Committee:** Commerce, Consumer Protection, and Health  
**Time:** 9:30 a.m.  
**Location:** Room 229, State Capitol  
**Testifier:** Hugh R. Jones, In-House Counsel (956-6378)  
*(Written Testimony Only)*

Chair Baker and Vice Chair Chang and Committee Members:

The University of Hawaii Foundation (“UHF”), a private, nonprofit corporation, supports the passage of this bill that makes clarifying amendments to Hawaii’s nonprofit corporation law, chapter 414D, HRS. However, the UHF requests that the committee report the bill out with a friendly amendment that was made to the House companion bill, H.B. No. 944, H.D. 1. This amendment, clarifies that board action may be taken by a board of directors using a unanimous written consent, that is electronically signed by all directors. Presently the law is unclear on this point.

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Section 4 of H.B. No. 944, H.D. 1, makes an amendment to section 414D-144, HRS but creating a subsection (d) that reads as follows:

(d) For purposes of this section, "written consent" shall include a consent that is executed by an electronic or digital signature; provided that the corporation employs reasonable measures to authenticate such electronic or digital signatures. Such reasonable measures may include security measures used by board meeting portal systems that are commercially available."

The directors of many Hawaii nonprofit corporations must often take action between regularly scheduled directors' meetings, by using these "written consents" to authorize management to take certain actions. These may include employment matters, purchase and sale transactions, expenditures above certain thresholds, or that ratify actions taken by management in unanticipated circumstances, such as civil defense situations, bad weather or similar situations. The UHF, like many other for profit and nonprofit corporations uses an online "Board Portal" that allows directors to obtain their meeting notices, meeting agendas, and materials online or on smart devices. These portals also allow directors to electronically sign documents, such as as "written consent."

UHF requests the Committee's favorable consideration of this bill with the amendment noted above and that was made to the House companion bill, H.B. 944, in section 4 of House draft 1.

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**Testimony to the Senate Committee on Commerce, Consumer Protection and Health  
Senator Rosalyn Baker, Chair  
Senator Stanley Chang, Vice Chair  
Monday, February 11, 2019, 9:30 a.m.  
Conference Room 229  
SB 1171 - Relating to Nonprofit Corporations**

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Dear Chair Baker, Vice-Chair Chang and members of the CPH Committee:

On behalf of the Hawai`i Alliance of Nonprofit Organizations, I would like express **support of SB 1171**, relating to Nonprofit Corporations, with additional language suggested.

Hawai`i Alliance of Nonprofit Organizations (HANO) is a statewide, sector-wide professional association of nonprofits. Our mission is to unite and strengthen the nonprofit sector as a collective force to improve the quality of life in Hawai`i. Our member organizations provide essential services to every community in the state.

HANO supports the amendments being made to Chapter 414D that clarify that public benefit corporations may not purchase their memberships; to clarify that a person who is not a voting board member is not a director; that a corporation with members may designate its directors; and to add previous wording to increase the length of time the AG has to review proposed sale of substantially all of the assets of public benefit corporations other than in the regular course of its activities.

To reflect current conventional forms of communication and transacting, we ask that you consider adding language to Chapter 414D-144 to allow electronic or digital signature to constitute a form of "written consent" by boards of directors. The proposed language is included on page 2.

We appreciate your consideration of this request to add this language. These amendments were added and passed out of committee in the companion HB 944. Thank you for the opportunity to submit testimony.

Mahalo,

Lisa Maruyama  
President and CEO

SECTION 1. Section 414D-144, Hawaii Revised Statutes, is amended to read as follows with proposed language underscored:

**"§414D-144 Action without meeting.** (a) Unless the articles or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes filed with the corporate records reflecting the action taken.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(d) For purposes of this section a "written consent" shall be deemed to include a consent that is executed by way of an electronic or digital signature provided that the corporation employs reasonable measures to authenticate such electronic or digital signatures. Such measures may include security measures used by board meeting portal systems that are commercially available.