

ACT 171

H.B. NO. 2363

A Bill for an Act Relating to Public Benefit Corporations.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 414D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§414D- Notice to the attorney general of commencement of proceeding. (a) The attorney general shall be given written notice of the commencement of any proceeding that this chapter authorizes the attorney general to bring but that has been commenced by another person within ten days of its commencement.

(b) Whenever any provision of this chapter requires that notice be given to the attorney general before or after the commencement of a proceeding or permits the attorney general to commence a proceeding:

- (1) If no proceeding has been commenced, the attorney general may take appropriate action, including but not limited to seeking injunctive relief; or
- (2) If a proceeding has been commenced by a person other than the attorney general, the attorney general, as of right, may intervene in such proceeding.”

SECTION 2. Chapter 414D, Hawaii Revised Statutes, is amended by adding to part X a new section to be appropriately designated and to read as follows:

“§414D- Limitations on merger by public benefit corporations. (a) Without the prior approval of the circuit court for the first circuit in a proceeding in which the attorney general has been given written notice, a public benefit corporation may merge only with:

- (1) A public benefit corporation;
- (2) A foreign corporation that would qualify under this chapter as a public benefit corporation;
- (3) A wholly owned corporation, if the public benefit corporation is the surviving corporation and continues to be a public benefit corporation after the merger;
- (4) A corporation; provided that:
 - (A) On or prior to the effective date of the merger, assets with an equal value to the greater of the fair market value of the net tangible and intangible assets (including goodwill) of the public benefit corporation, or the fair market value of the public benefit corporation if it were to be operated as a business concern, are

transferred to one or more persons who would have received its assets under section 414D-245(a)(5) and (6) had it dissolved;

- (B) The public benefit corporation shall return, transfer, or convey an asset held by it upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the merger, in accordance with such condition; and
- (C) The merger is approved by a majority of directors of the public benefit corporation who are not and will not become members or shareholders in or officers, employees, agents, or consultants of the surviving corporation.

(b) At least twenty days before the consummation of any merger of a public benefit corporation pursuant to subsection (a)(4), notice, including a copy of the proposed plan of merger, shall be delivered to the attorney general.

(c) Without the prior written approval of the attorney general or the circuit court for the first circuit, in a proceeding in which the attorney general has been given written notice, no member of a public benefit corporation may receive or keep anything as a result of a merger other than a membership in the surviving public benefit corporation. The court shall approve the transaction if it is in the public interest.”

SECTION 3. Chapter 414D, Hawaii Revised Statutes, is amended by adding to part XII a new section to be appropriately designated and to read as follows:

“§414D- Notice to the attorney general of intention to dissolve. (a) A public benefit corporation shall give the attorney general written notice that it intends to dissolve before the time it delivers the articles of dissolution to the director. The notice shall include a copy or summary of the plan of dissolution.

(b) No assets shall be transferred or conveyed by a public benefit corporation as part of the dissolution process until twenty days after it has given the written notice required by subsection (a) to the attorney general or until the attorney general has consented in writing to the dissolution, or indicated in writing that the attorney general will take no action in respect to, the transfer or conveyance, whichever is earlier.

(c) When all or substantially all of the assets of a public benefit corporation have been transferred or conveyed following approval of dissolution, the board shall deliver to the attorney general a list showing those (other than creditors) to whom the assets were transferred or conveyed. The list shall indicate the addresses of each person (other than creditors) who received assets and indicate what assets each received.”

SECTION 4. Section 414D-14, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

““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, 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.”

SECTION 5. Section 414D-54, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

“(c) A corporation’s power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The

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proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee, or other legal representative[-], or in the case of a public benefit corporation, by the attorney general.”

SECTION 6. Section 414D-90, Hawaii Revised Statutes, is amended to read as follows:

“~~[(§)414D-90]~~ **Derivative suits.** (a) A proceeding may be brought on behalf of a domestic or foreign corporation to procure a judgment in its favor by any member or members having five per cent or more of the voting power, or by fifty members, whichever is less, or any director.

(b) In any such proceeding, each complainant shall be a member or director at the time the proceeding is initiated.

(c) A complaint in a proceeding brought on behalf of a corporation shall be verified and allege with particularity the demand made, if any, to obtain action by the directors, and either why the complainants could not obtain the action or why they did not make the demand. If a demand for action was made and the corporation’s investigation of the demand is in progress when the proceeding is filed, the court may stay the suit until the investigation is completed.

(d) On termination of the proceeding, the court may require the complainants to pay any defendant’s reasonable expenses (including counsel fees) incurred in defending the suit if it finds that the proceeding was commenced frivolously or in bad faith.

(e) If the proceeding on behalf of the corporation results in the corporation taking some action requested by the complainants or otherwise is successful, in whole or in part, or if anything was received by the complainants as the result of a judgment, compromise, or settlement of an action or claim, the court may award the complainants reasonable expenses (including counsel fees).

(f) The complainants shall notify the attorney general within ten days after commencing any proceeding under this section if the proceeding involves a public benefit corporation.”

SECTION 7. Section 414D-140, Hawaii Revised Statutes, is amended to read as follows:

“~~[(§)414D-140]~~ **Removal of directors by judicial proceeding.** (a) The circuit court of the county where a corporation’s principal office is located may remove any director of the corporation from office in a proceeding commenced either by the corporation or its members holding at least ten per cent of the voting power of any class, or the attorney general in the case of a public benefit corporation, if the court finds that with respect to the corporation, the director’s removal is in the best interest of the corporation due to:

- (1) The director’s fraudulent or dishonest conduct;
- (2) The director’s gross abuse of authority or discretion; or
- (3) A final judgment finding that the director has violated a duty set forth in sections 414D-149 and 414D-152, and that removal is in the best interest of the corporation.

(b) The court that removes a director may bar the director from serving on the board for a period prescribed by the court.

(c) If members or the attorney general commence a proceeding under subsection (a), the corporation shall be made a party defendant.

(d) If a public benefit corporation or its members commence a proceeding under subsection (a), within ten days of its commencement, they shall give the attorney general written notice of the proceeding.”

SECTION 8. Section 414D-150, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) A transaction in which a director has a conflict of interest may be approved if:

- (1) In the case of a public benefit corporation, the transaction is approved by the attorney general, before or after the transaction is consummated;
- [14] (2) The material facts of the transaction and the director’s interest were disclosed or known to the board of directors or a committee of the board and the transaction was authorized, approved, or ratified by the board or committee of the board; or
- [2] (3) The material facts of the transaction and the director’s interest were disclosed or known to the members and they authorized, approved, or ratified the transaction.”

SECTION 9. Section 414D-222, Hawaii Revised Statutes, is amended to read as follows:

“[~~§414D-222~~] **Sale of assets other than in regular course of activities.**

(a) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property (with or without the goodwill) other than in the usual and regular course of its activities on the terms and conditions and for the consideration determined by the corporation’s board if the proposed transaction is authorized by subsection (b).

(b) Unless this chapter, the articles, the bylaws, or the board of directors or members (acting pursuant to subsection (d)) require a greater vote or voting by class, the proposed transaction to be authorized must be approved:

- (1) By the board;
- (2) By the members by two-thirds of the votes cast or a majority of the voting power, whichever is less; and
- (3) In writing by any person or persons whose approval is required by a provision of the articles authorized by section 414D-188 for an amendment to the articles or bylaws.

(c) If the corporation does not have members, the transaction must be approved by a vote of a majority of the directors in office at the time the transaction is approved. In addition, the corporation shall provide notice of any directors’ meeting at which the approval is to be obtained in accordance with section 414D-145(c). The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a copy or summary of a description of the transaction.

(d) The board may condition its submission of the proposed transaction, and the members may condition their approval of the transaction, on receipt of a higher percentage of affirmative votes or on any other basis.

(e) If the corporation seeks to have the transaction approved by the members at a membership meeting, the corporation shall give notice to its members of the proposed membership meeting in accordance with section 414D-105. The notice ~~must~~ shall also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, of the property or assets of the corporation and contain or be accompanied by a copy or summary of a description of the transaction.

(f) If the board needs to have the transaction approved by the members by written consent or written ballot, the material soliciting the approval shall contain or be accompanied by a copy or summary of a description of the transaction.

(g) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned (subject to any contractual rights), without further action by the members or any other person who approved the transaction in accordance with the procedure set forth in the resolution proposing the transaction or, if none is set forth, in the manner determined by the board of directors.

(h) A sale, lease, exchange, or other disposition of the property of a corporation shall not be deemed to be the sale, lease, exchange, or other disposition of all or substantially all the property of the corporation if the corporation is retaining sufficient property to continue one or more significant business segments or lines of the corporation after the sale, lease, exchange, or other disposition. Furthermore, the business segments or lines retained must not be only temporary operations or merely a pretext to avoid members' rights which might otherwise arise under this chapter.

(i) A public benefit corporation shall give written notice to the attorney general twenty days before it sells, leases, exchanges, or otherwise disposes of all, or substantially all, of its property if the transaction is not in the regular course of its activities, unless the attorney general has given the corporation a written waiver of this subsection."

SECTION 10. Section 414D-245, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

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

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

[~~(7)~~] (8) Doing every other act necessary to wind up and liquidate its assets and affairs.”

SECTION 11. Section 414D-252, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) The court may dissolve a corporation in a proceeding by the attorney general if it is established that [the]:

- (1) The corporation obtained its articles of incorporation through fraud [or the];
- (2) The corporation has continued to exceed or abuse the authority conferred upon it by law[-];
- (3) The corporation is a public benefit corporation and the corporate assets are being misapplied or wasted; or
- (4) The corporation is a public benefit corporation and is no longer able to carry out its activities.”

SECTION 12. Section 414D-253, Hawaii Revised Statutes, is amended to read as follows:

“§414D-253 Procedure for judicial dissolution. (a) Venue for a proceeding by the attorney general to dissolve a corporation shall be in the circuit court[-] for the first circuit. Venue for a proceeding brought by any other party named in section 414D-252 shall be in the county where a corporation’s principal office (or, if none in this State, its registered office) is or was last located.

(b) Directors or members shall not be deemed necessary parties to a proceeding to dissolve a corporation unless relief is sought against them individually.

(c) A court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver or custodian pendente lite with all powers and duties the court directs, take other action required to preserve the corporate assets wherever located, and carry on the activities of the corporation until a full hearing can be held.

(d) A person other than the attorney general who brings an involuntary dissolution proceeding for a public benefit corporation, within ten days of its commencement, shall give written notice of the proceeding to the attorney general.”

SECTION 13. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 14. This Act shall take effect upon its approval.

(Approved July 6, 2004.)

Note

1. Edited pursuant to HRS §23G-16.5.