



# **Hawaii Sustainable Business Corporation How-To-Guide: Incorporating as a Sustainable Business Corporation Step-by-Step**

*October 2013*

*B Lab*



## **I. Introduction**

This paper serves as a guide for sustainable business corporation law. This guide will help to introduce what the benefit corporation law is and will guide businesses through the process of incorporating as a sustainable business corporation as required by the Hawaii Department of Commerce and Consumer Affairs. All legal matters should be consulted with a legal representative before any actions are taken. This tool is simply to educate companies who are interested in incorporating as a sustainable business corporation.

## **II. What is Sustainable Business Corporation Law?**

Before making the decision to incorporate as or switch to a sustainable business corporation, it is important to understand what the bill requires and if this is the right business form for your company. The sustainable business corporation law allows for the creation of a new and voluntary corporate entity that will allow businesses to consider profit as well as society and the environment. This form of incorporation allows a business to balance fiduciary duty between its shareholders and stakeholders. Currently, nineteen (19) states and the District of Columbia have enacted benefit corporation legislation around the country. These states have passed benefit corporation laws to encourage business growth, provide options for entrepreneurs and to attract the sizable social impact investment community to create new opportunities for economic growth.

The corporate form consists of three main parts that are required for the entrepreneur/business owner to comply with in order to incorporate as a sustainable business corporation. These parts are as follows:

Purpose: Sustainable business corporations have a new purpose that differs from traditional corporations. While traditional corporations have the single duty to maximize profit, sustainable business corporations have the increased purpose of considering society and the environment in addition to seeking a profit.

- 1) The form requires that businesses incorporating as a sustainable business corporation must declare their commitment to creating general public benefit (defined as a “material, positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a sustainable business corporation.”), and in some cases may be required to declare a specific benefit that the business produces.
- 2) Conversion into and out of a sustainable business corporation form takes a supermajority vote of 2/3 of all classes of shareholders. This ensures a high level of agreement amongst the shareholders. (Especially relevant for businesses looking to amending articles of incorporation.)
- 3) Each business is required to assess itself by a third-party standard to ensure that the sustainable business corporation is creating a positive impact.

Accountability: To ensure business accountability to creating material positive impact, the sustainable business corporation form requires directors to consider society and the environment. Additionally, the form provides shareholders with a private right of action to ensure their social impact investments are functioning according to the new purpose. These are much like the accountability elements of traditional corporations, however they include the consideration of society and the environment in addition to profit.

Transparency: Sustainable business corporations are required to produce an annual Benefit Report, which is assessed against a third party standard. The statute describes the parameters of what to look for when picking a standard for the basis of the report. The sustainable business corporation statute also requires that annual sustainable business reports be made public and shared with shareholders. Finally, some states require that the benefit report be filed with or submitted to the state.

The brief description of the sustainable business corporation law above will help to lay a foundation for the steps explained in the following sections. These steps will cover the processes of incorporation/electing sustainable business corporation status as required by the Department of Commerce and Consumer Affairs to the procedures required from companies that are sustainable business corporations. This is a guide for incorporation and other requirements by the Department of Commerce and Consumer Affairs, and is not intended to stand as legal advice. For all legal advice please seek a lawyer or speak to your legal board. If you would like more information regarding what a Sustainable Business Corporation is visit [www.benefitcorp.net](http://www.benefitcorp.net).

### **III. Incorporating as a Sustainable Business Corporation?**

Incorporating as a benefit corporation may change slightly from state-to-state, however this section will help businesses to think about, prepare and plan for the process of incorporating according to the requirements of the Department of Commerce and Consumer Affairs. The following is not meant to serve as legal advice and therefore all legal matters should be taken to a legal advisor. Before jumping into the incorporation process, there are two main questions for businesses looking to incorporate as a sustainable business corporation: (1) Is the business a newly formed entity? Or (2) is the business amending its Articles of Incorporation and becoming a sustainable business corporation? For those looking to incorporate for the first time, see the next section *IV. Newly Formed Sustainable Business Corporations*. For those businesses looking to amend their articles of incorporation to be governed by the sustainable business corporation status, see section *V. Amending Articles of Incorporation*. Finally, if currently an LLC and can't become a corporation for certain circumstances such as tax reasons, you can include the sustainable business corporation statute provisions in your governing documents (see *V. Amending Articles of Incorporation*).

### **IV. Newly Formed Sustainable business Corporations**

The steps for incorporation as a sustainable business corporation with the Department of Commerce and Consumer Affairs are much like the steps needed to establish any form of corporation. However, there are a few intricacies that are specific to the steps for incorporating as a sustainable business corporation. The following will help to walkthrough each step to ensure incorporation is done properly. Note that each state has a different process for incorporation and that legal assistance is recommended and sometimes required.

The following steps need to be taken in order to incorporate as a sustainable business corporation:

- 1) Articles of Incorporation – This form or letter must be filed with the Department of Commerce and Consumer Affairs in order to form a corporate entity.

- a. Submit Articles of Incorporation. Include the following in the Articles in the order requested by Department of Commerce and Consumer Affairs:
    - i. Name of Corporation
    - ii. Mailing Address
    - iii. Name and Address of Registered Agent
    - iv. Name(s) and Address(es) of Incorporator(s)
    - v. Mailing Address of Primary Office
    - vi. Number of shares being made available
    - vii. Signatures of Incorporators, Registered Agent and any other parties involved
  - b. To ensure sustainable business corporation status when incorporating as a new entity the following two steps are required:
    - i. Must state that it is a "Sustainable Business Corporation"
    - ii. May add any specific benefits as applicable.
    - iii. In the section needed to list directors and leadership, include designated benefit director.
- 2) Include any other forms needed for submission with Articles of Incorporation.
  - 3) Processing (*Application*) Fee (See website for fee amount).
  - 4) Submit forms to Department of Commerce and Consumer Affairs.

## **V. Amending Articles of Incorporation**

Existing businesses that are interested in changing their existing articles of incorporation to a sustainable business corporation are allowed to do so by taking the following steps. The procedure will likely need a legal representative to ensure all taxation and the amending of articles is done correctly, therefore all legal decisions should be made with a legal advisor. The following will be a walkthrough guide of the process for amending your Articles of Incorporation:

- 1) Fill out Form DC-5, The Hawaii Amended and Restated Articles of Incorporation to Amend Articles of Incorporation and submit to Department of Commerce and Consumer Affairs
- 2) Declare that the company is a sustainable business corporation and include any specific public benefits
- 3) The decision to amend articles of incorporation is contingent upon a two-thirds/minimum vote by the board of directors and shareholders (legal advisement may be required)
- 4) If a Benefit Director and Benefit Officer is required, they must be appointed upon amending of the articles
- 5) Submit \$25 filing fee.

For more in-depth legal advice and considerations see [\*How to Switch to Being a Benefit Corporation.\*](#)

## **VI. Further Sustainable business Corporation Considerations**

The sustainable business corporation statute also mandates certain activities that a sustainable business corporation will need to enact upon in order to operate as a sustainable business corporation. It also prescribes what action to take in certain situations. Each of these processes may vary from state-to-state however businesses incorporating as a sustainable business corporation should have an understanding of these processes before committing to this corporate form.

- 1) Filing Annual Reports – The sustainable business corporation statute requires that businesses incorporated as sustainable business corporations must assess their operations against a third-party standard and prepare an annual report. The benefit report must be shared with shareholders, made available to the public. Each state will have its own process on how filings should be processed.

To prepare an annual benefit report use the following steps:

- a) Use a qualified third-party standard as a basis for your annual benefit report (More information and a list of third-party standards can be found at [www.benefitcorp.net/selecting-a-third-party-standard](http://www.benefitcorp.net/selecting-a-third-party-standard))
- b) Use the results of that assessment to create a benefit report that states the following:
  - a. A narrative description of:
    - i. Process and rationale for selecting and/or changing third-party standard
    - ii. Ways in which the company pursued public benefit that amounted to general public benefit
    - iii. Ways in which the company pursued a specific benefit
    - iv. Any circumstances that have hindered the pursuit of creating general public benefit or specific benefit
  - b. Third-Party Assessment of general social and environmental performance
    - i. Must be consistent with original application or otherwise explained why not consistent
  - c. Name of benefit director and benefit officer, if any, and contact address
  - d. Compensation of Benefit Director
  - e. Name of each person that owns 5% or more in shares
  - f. Statement from director any connection with third-party standard and any information of restrictions or changes of the board
- c) Share finished annual benefit report with each shareholder (must be done within 120 days after end of fiscal year)
- d) Make the benefit report public by posting on company website or have available copies to send to those who request it for a 60 day period. Director compensation can be removed from publicly available documents.

\*Note that each state has its own requirements for how the Benefit Report should be prepared and with whom it should be shared.

**Any questions or concerns relative to corporate filings may be directed to the Department of Commerce and Consumer Affairs at (808) 586-2727. Questions in any other area should be directed to Fionnuala Seiferth by email at [Fionnuala@bcorporation.net](mailto:Fionnuala@bcorporation.net) and Holly Ensign-Barstow by email to [Holly@bcorporation.net](mailto:Holly@bcorporation.net) or by telephone to 212-608-4150.**