

Hawaii Sustainable Business Corporation How-To Guide

Overview

Unlike traditional corporations that make business decisions primarily to maximize shareholder value, sustainable business corporations aim to create value for all of their stakeholders. Status as a sustainable business corporation requires a company's management to consider the impact of its business on stakeholders (such as employees, suppliers, and communities where they operate) while also fulfilling fiduciary duties to shareholders. Sustainable business corporations also have some legal responsibilities that differ from typical business corporations. For example, sustainable business corporations must use a third-party standard to prepare an annual report to shareholders that reports on the corporation's social and environmental performance. This guide will help to explain the process for forming a sustainable business corporation and for converting an existing company into a sustainable business corporation in Hawaii. The full text of Hawaii's Sustainable Business Corporations Act (Hawaii Revised Statutes Chapter 420D) is available at the [Hawaii State Legislature's website](#). As with most legal matters, you should consult with a legal professional before taking any action.

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Forming a Brand New Entity as a Sustainable Business Corporation

In Hawaii, the process for forming a sustainable business corporation tracks closely to the process of forming any other type of corporation. You must file articles of incorporation with the Department of Commerce and Consumer Affairs for the State of Hawaii and must state in that filing that the corporation is a sustainable business corporation.

Step #1: Select an available name for your company

Your company's name cannot be the same as or too closely resemble another Hawaii corporation's name. The name that you choose must also include the word "corporation", "limited", or "incorporated", or an abbreviation of one of those words.

Actions

- Check the availability of your preferred name by searching the [Hawaii Department of Commerce and Consumer Affairs Business Entity Database](#).
- Reserve an available name for 120 days by filing an [Application for Reservation of Name](#) with the director of commerce and consumer affairs for the State of Hawaii.

Step #2: Choose a registered agent, incorporator, and directors

You will need to designate a registered agent, incorporator, and directors. Every Hawaii corporation must have a registered agent that agrees to accept legal documents on behalf of the corporation if it is sued. The initial directors can be appointed by the incorporator, which should be documented in written resolutions that are signed by the incorporator.

The incorporators must appoint an individual to serve as a benefit director. A benefit director, in addition to his/her normal duties as a director, must be independent and is responsible for issuing an opinion in the annual benefit report on the sustainable business corporation's progress in promoting its general public benefit and any specific public benefits during that year.

Fill the Following Roles		
Registered Agent	<ul style="list-style-type: none"> An individual who is a full-time resident of Hawaii or a business entity that is registered with the Hawaii Department of Commerce and Consumer Affairs. 	☑
Incorporator(s)	<ul style="list-style-type: none"> The person(s) who initiate the process of incorporating the company by signing and filing the articles of incorporation. A corporation can have more than one incorporator. 	☑
Directors	<ul style="list-style-type: none"> Members of your corporate board tasked with overseeing the affairs of your company. 	☑
Benefit Director	<ul style="list-style-type: none"> A director whose role is to opine on the company's compliance with its general public benefit and specific public benefit(s) in the annual benefit report. 	☑

Draft the Following Documents		
Resolutions of the Incorporator	<ul style="list-style-type: none"> Resolutions can be used to appoint the directors. Resolutions should be written and signed by the incorporators. 	☑

Step #3: Draft your articles of incorporation and file them with the Department of Commerce and Consumer Affairs

Articles of incorporation can be created either by using a standard form provided by the Hawaii Department of Commerce and Consumer Affairs or by drafting your own articles of incorporation. Below we describe what must be included in your company's articles of incorporation, as well as optional items that are permitted, but not required, by the Sustainable Business Corporations Act.

Statement of Status: Your company's articles of incorporation must state explicitly that the company is a sustainable business corporation. This can be accomplished by including the following language to your articles of incorporation: "This corporation is a sustainable business corporation."

Purpose: By virtue of the Sustainable Business Corporations Act, all sustainable business corporations automatically have the purpose of creating a material positive impact on society and the environment. This is called "general public benefit." You also have the option of identifying one or more "specific public benefit" purposes in your articles.

Optional: Include a Specific Public Benefit or Benefits In Your Articles of Incorporation

Hawaii permits sustainable business corporations to include one or more specific public benefit purposes in their articles of incorporation. Examples of “specific public benefits” include:

- Providing low-income or underserved individuals or communities with beneficial products or services.
- Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business.
- Preserving the environment.
- Improving human health.
- Promoting the arts, sciences, or advancement of knowledge.
- Increasing the flow of capital to entities with a public benefit purpose.
- Using the right to exclude, conferred by any and all patents in which the sustainable business corporation has an interest in this right, for the following purposes:¹
 - Creating and retaining good jobs within Hawaii as well as throughout the United States;
 - Upholding fair labor standards nationally and internationally; and
 - Enhancing environmental protection nationally and internationally.
- Accomplishing any other particular benefit on society or the environment as specified in the sustainable business corporation’s articles of incorporation.

Note: In Hawaii, any amendment of the articles of incorporation to amend, add, or delete a specific public benefit must be approved by the shareholders by a “minimum status vote” (i.e., by the holders of at least two-thirds of the outstanding shares of each class of shares in the company, each class voting separately, regardless of any voting limitations imposed by the certificate of incorporation or bylaws).

Standard of Conduct: The directors of a sustainable business corporation are required to consider the effect that their actions or inaction have on the following:

- The shareholders of the sustainable business corporation.
- The accomplishment of the sustainable business corporation’s general public benefit purpose and any specific public benefit purpose.

The directors of a sustainable business corporation may also consider the effect that their actions or inaction have on the following:

- The employees and workforce of the sustainable business corporation, its subsidiaries, and its suppliers.
- The interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the sustainable business corporation.

¹ Note that by electing this specific public benefit purpose related to patents, a corporation’s status as a sustainable business corporation becomes permanent, and its purpose to achieve this specific public benefit may not be deleted from its articles of incorporation.

- Community and societal factors, including those of each community in which offices or facilities of the sustainable business corporation, its subsidiaries, or its suppliers are located.
- The local and global environment.
- The short-term and long-term interests of the sustainable business corporation, including benefits that may accrue to the sustainable business corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the sustainable business corporation.
- The ability of the sustainable business corporation to accomplish its general public benefit purpose and any specific public benefit purpose.
- The resources, intent, and conduct of any person seeking to acquire control of the corporation.
- Any other pertinent factors or the interests of any other group that they deem appropriate.

Standing for Benefit Enforcement Proceedings: Certain parties may bring a claim against a sustainable business corporation to enforce the general or specific public benefit purposes of the sustainable business corporation and the standard of conduct for its directors. Such a claim may only be commenced by:

- a director of the sustainable business corporation; or
- a shareholder of the sustainable business corporation.

Using Hawaii’s Standard Form to Create Your Articles of Incorporation	Drafting Your Articles of Incorporation Without a Standard Form
<u>Required Items</u>	<u>Required Actions</u>
<ul style="list-style-type: none"> • Access the Articles of Incorporation form via the website of the Hawaii Department of Commerce and Consumer Affairs. • Complete the form by following the accompanying instructions. • Ensure that your purpose as a sustainable business corporation is clearly stated in a separate provision. • Include the signature of each incorporator, and indicate that each person is signing in the capacity as an incorporator. 	<ul style="list-style-type: none"> • Include each provision required by HRS § 414-32. • Put the provisions in the order in which they appear in the statute. • Follow as closely as possible the wording of the statute. • Do not forget to include the provision stating that the corporation is a sustainable business corporation.
<u>Optional</u>	
<ul style="list-style-type: none"> • Include one or more specific public benefit purpose(s). 	

Step #4: Draft corporate bylaws to establish governance rules for your business

<u>Actions</u>
<ul style="list-style-type: none"> • Consider some of the unique responsibilities of sustainable business corporations before crafting your bylaws. • If the sustainable business corporation has chosen to appoint a “benefit officer”, the corporation should consider whether to include provisions in its bylaws setting forth the duties and powers of the position. A benefit officer, if any, performs management duties related to carrying out the general public benefit and, if applicable, the specific public benefit(s). The benefit officer is also responsible for preparing the annual benefit report. <p><i>Note: Hawaii sustainable business corporations must publish an annual benefit report each year. Consider including procedures for the creation of this report in your bylaws to help ensure that your business and its purposes are aligned.</i></p>

Step #5: Draft resolutions to be adopted at an initial meeting of the directors or by unanimous written consent in lieu of a meeting

After your corporation is formed or in connection with its formation, you should hold a meeting of the directors, at which the board's resolutions are adopted and recorded in corporate minutes. Alternatively, a meeting of the directors is not required if all directors consent in a signed writing to the proposed resolutions and those consents are included in the corporation's minutes or filed with the corporate records.

Actions

- Hold your first board of directors meeting or obtain written consent to:
 - Appoint corporate officers.
 - Adopt bylaws.
 - Authorize the issuance of stock.
 - Authorize, approve, and ratify any other preliminary tasks related to the formation of the sustainable business corporation.

Step #6: Post-formation considerations

After forming your sustainable business corporation, you should consider taking additional steps to address requirements unique to sustainable business corporations in Hawaii. For example, you can establish procedures for publishing the "annual benefit report." Prior to its final publication, the annual benefit report must be posted on your sustainable business corporation's website, or otherwise made available to the public, for a 60-day public comment period. The final annual benefit report must be sent to each of your shareholders within 120 days following the end of the sustainable business corporation's fiscal year. Hawaii also requires sustainable business corporations to post the report to the public portion of the company's website, or if no public website is available, to provide it free of charge to any person who requests a copy. For help with generating your annual benefit report, access the online tool [here](#).

The preparation of your annual benefit report requires your company to choose a standard for defining, reporting, and assessing your corporation's overall corporate social and environmental performance. This is known as the "third-party standard." The standard you select must be comprehensive, independent, and transparent. For more information on third-party standards, visit benefitcorp.net.

Actions

- Choose a third-party standard.
- Set a timeline with key dates for the preparation and publication of your annual benefit report.
- Post a draft of the annual benefit report to your website for a 60-day public comment period.
- Deliver your final report to each shareholder within 120 days of the end of the fiscal year.
- Post the annual report publically on your website.

Summary: To Form a New Sustainable Business Corporation

- **In connection with formation:**
 - Draft articles of incorporation.
 - Deliver to the Hawaii Department of Commerce and Consumer Affairs:
 - Articles of incorporation.
 - Payment of filing fee.
 - Draft:
 - Resolutions of the incorporator(s).
 - Resolutions of the board, to be adopted at a meeting or by written consent in lieu of a meeting.
 - Bylaws.
- **Post-formation:**
 - Choose a third-party standard.
 - Prepare the annual benefit report.
 - Post a draft of the annual benefit report to your website for a 60-day public comment period.
 - Send the final annual benefit report to all shareholders within 120 days of fiscal yearend.
 - Post the annual benefit report publically on the company's website.

Converting Your Company into a Sustainable Business Corporation

An existing corporation can become a sustainable business corporation by amending its articles of incorporation to include a statement that the organization is a sustainable business corporation. This How-To Guide addresses the steps required for an existing corporation to become a sustainable business corporation in Hawaii.

For entities like limited liability companies, limited partnerships, or other types of entities that are not standard business corporations, transitioning to a sustainable business corporation must be accomplished through a conversion or merger. If your existing company is not a business corporation and you would like it to become one, you should seek the assistance of a legal professional.

Step #1: Conduct due diligence and plan ahead

There are no tax implications for an existing corporation that elects to become a sustainable business corporation, but this transition may impact your organization in other ways. You should review your corporate documents and contracts to determine if any updates or changes may be necessary or desirable after your company becomes a sustainable business corporation. You should also consider all of the changes and steps that you may need to take as you transition your business into a sustainable business corporation, like putting procedures in place to measure your social and environmental impact.

<u>Required Actions</u>
<ul style="list-style-type: none"> • Analyze and plan for business implications including: <ul style="list-style-type: none"> ○ Legal requirements. ○ Corporate governance considerations. • Draft amendments to the articles of incorporation: <ul style="list-style-type: none"> ○ Include a statement that the corporation is a sustainable business corporation.
<u>Optional Actions</u>
<ul style="list-style-type: none"> • Draft amendments to bylaws, if any: <ul style="list-style-type: none"> ○ Draft amendments to your bylaws governing the management of the sustainable business corporation, including the powers and duties of the “benefit director.” ○ If your company has chosen to appoint a “benefit officer,” the corporation should include provisions in its bylaws setting forth the duties and powers of the position.

Due Diligence		
Contracts	<ul style="list-style-type: none"> Review contracts including any bank or loan documents to determine if any consents, notices, or other actions are required in connection with your company's amendment of its articles of incorporation. 	☑
Corporate Organizational Documents	<ul style="list-style-type: none"> Review corporate charter and bylaws to determine if you would like or need to make any changes as a result of electing sustainable business corporation status. Review corporate charter, bylaws, and any voting or other shareholder agreements to determine if any consents, notices, or other actions are required in connection with your company's amendment of its articles of incorporation. 	☑

Step #2: Draft amendments to the articles of incorporation

You must amend the articles of incorporation to include a statement that your company is a sustainable business corporation. You can do this by completing and filing Articles of Amendment, which can be found at the [Hawaii Department of Commerce and Consumer Affairs' website](#). If you originally drafted your articles of incorporation, you may draft your own amendments and file them with the Department of Commerce and Consumer Affairs. Below we describe what amendments to the articles of incorporation you must make, as well as optional amendments that are permitted, but not required, by the Sustainable Business Corporation Act.

Statement of Status: You must include an amendment to the articles of incorporation that states explicitly that the company is a sustainable business corporation. This can be accomplished by drafting an amendment that includes the following language: “This corporation is a sustainable business corporation.”

Purpose: By virtue of the Sustainable Business Corporation Act, all sustainable business corporations automatically have the purpose of creating a material positive impact on society and the environment. This is called “general public benefit.” You also have the option of amending the articles of incorporation to identify one or more “specific public benefit” purposes in your articles.

Optional: Include Specific Public Benefits In Your Articles of Incorporation

Hawaii permits sustainable business corporations to include one or more specific public benefit purposes in their articles of incorporation. Examples of “specific public benefits” include:

- Providing low-income or underserved individuals or communities with beneficial products or services.
- Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business.
- Preserving the environment.
- Improving human health.
- Promoting the arts, sciences, or advancement of knowledge.
- Increasing the flow of capital to entities with a public benefit purpose.
- Conferring any other particular benefit on society or the environment as specified in the sustainable business corporation’s articles of incorporation.
- Using the right to exclude, conferred by any and all patents in which the sustainable business corporation has an interest in this right, for the following purposes:²
 - Creating and retaining good jobs within Hawaii as well as throughout the United States;
 - Upholding fair labor standards nationally and internationally; and
- Enhancing environmental protection nationally and internationally

Note: In Hawaii, you may amend the articles of incorporation to amend, add, or delete a specific public benefit if approved by your shareholders in a minimum status vote (i.e., approved by two-thirds of the outstanding shares of each class of shares in the company, each class voting separately, regardless of any voting limitations imposed by the certificate of incorporation or bylaws).

Standard of Conduct: The directors of a sustainable business corporation are required to consider the effect that their actions or inaction have on the following:

- The shareholders of the sustainable business corporation.
- The accomplishment of the sustainable business corporation’s general public benefit purpose and any specific public benefit purpose.

The directors of a sustainable business corporation may also consider the effect that their actions or inaction have on the following:

- The employees and workforce of the sustainable business corporation, its subsidiaries, and its suppliers.

² Note that by electing this specific public benefit purpose related to patents, a corporation’s status as a sustainable business corporation becomes permanent, and its purpose to achieve this specific public benefit may not be deleted from its articles of incorporation.

- The interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the sustainable business corporation.
- Community and societal factors, including those of each community in which offices or facilities of the sustainable business corporation, its subsidiaries, or its suppliers are located.
- The local and global environment.
- The short-term and long-term interests of the sustainable business corporation, including benefits that may accrue to the sustainable business corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the sustainable business corporation.
- The ability of the sustainable business corporation to accomplish its general public benefit purpose and any specific public benefit purpose.
- The resources, intent, and conduct of any person seeking to acquire control of the corporation.
- Any other pertinent factors or the interests of any other group that they deem appropriate.

Standing for Benefit Enforcement Proceedings: Certain parties may bring a claim against a sustainable business corporation by commencing a “benefit enforcement proceeding.”

If the articles of incorporation are silent about this issue, benefit enforcement proceedings may be commenced only by:

- the sustainable business corporation itself;
- a director of the sustainable business corporation; or
- a shareholder of the sustainable business corporation.

You may also include a provision in your articles of incorporation to authorize any other person or group to commence a benefit enforcement proceeding.

Using Hawaii’s Standard Form to Amend Your Articles of Incorporation	Drafting Amendments to Your Articles of Incorporation
<u>Required Items</u>	<u>Required Actions</u>
<ul style="list-style-type: none"> • Find Form Articles of Amendment on the Hawaii Department of Commerce and Consumer Affairs website. • Include the required new provision stating that the corporation is a sustainable business corporation. • Complete other required information. • File the form with the Hawaii Department of Commerce and Consumer Affairs. 	<ul style="list-style-type: none"> • Include each provision required by Hawaii Rev. Stat. §414-286. • Put the provisions in the order in which they appear in the statute. • Follow as closely as possible the wording of the statute. • Do not forget to include the provision stating that the corporation is a sustainable business corporation.

Optional Amendments

- Include one or more specific public benefit purpose(s).
- Identify one or more considerations that the board must prioritize over other considerations.
- Identify additional persons who are authorized to commence a benefit enforcement proceeding.

Step #3: Obtain board approval of the amendments at a meeting of the directors or by unanimous written consent in lieu of a meeting

The board of directors will have to approve any amendments to the existing articles of incorporation and any amendments to the bylaws by adopting resolutions that reflect the board's approval of the amendments, using the procedures laid out in Hawaii Rev. Stat. §414-283. your current articles of incorporation and bylaws. You may convene a special meeting to vote on your plan or conduct a vote during one of your scheduled board meetings. The amendments must be approved by a majority of the board at a meeting where a quorum is present. The board must then adopt resolutions approving the amendments and record the resolutions in the minutes.

Alternatively, if your bylaws so allow, the board may adopt the resolutions in lieu of a meeting if all directors consent in a signed writing to the proposed actions and those consents are included in the corporation's minutes or filed with the corporate records. Check your articles of incorporation and your bylaws for any additional requirements for board approval of amendments that they may impose.

Actions

- Review your articles of incorporation and bylaws to determine the procedures required for the board to adopt amendments to those documents.
- Propose your amendments at a regular meeting or a special meeting of the board of directors and vote on the proposal, or obtain the written signed consent of all directors authorizing the amendments.
- Document the board's approval with resolutions recorded in the meeting minutes.

Note: If by vote, the board must approve the amendments by a majority vote in favor of the amendments at a meeting where a quorum is present.

Step #4: Obtain shareholder approval of the amendments and the election of sustainable business corporation status

Your shareholders will have to approve the decision to become a sustainable business corporation and the required amendments to the articles of incorporation. Shareholders can approve the amendment by voting at a shareholder meeting or by signing a written consent.

When voting to amend the articles of incorporation to include the statement that the corporation is a sustainable business corporation, the amendment must be passed by a “minimum status vote,” in which the holders of at least two-thirds of the outstanding shares of each class of shares in the company, each class voting separately (regardless of any voting limitations imposed by the certificate of incorporation or bylaws), approve the amendment.

A shareholder meeting is not required if the action is approved by all of the shareholders evidenced by one or more consents describing the proposed action or amendment, signed by each shareholder and included in the minutes or filed with the corporate records reflecting the action approved. Check your articles of incorporation and your bylaws for any additional requirements for shareholder approval of amendments that they may impose.

Actions

- Review your articles of incorporation and bylaws to determine the procedures required for the shareholders to adopt amendments to those documents.
- Hold a vote on any amendments to your articles of incorporation or draft a consent and have it signed by all shareholders.
- Document the shareholders’ approval in the meeting minutes or corporate records.

Note: A “minimum status vote” is needed for shareholder approval of the amendment to the articles stating that the corporation is a sustainable business corporation (“Minimum status vote” means the approval of the holders of at least two-thirds of the outstanding shares of each class of shares entitled to vote, each class voting separately, regardless of any voting limitations in the articles).

Step #5: File the amendments to the articles of incorporation

File your approved amendments to your articles of incorporation with the Hawaii Department of Commerce and Consumer Affairs.

Step #6: Post-conversion considerations

After forming your sustainable business corporation, you should consider taking additional steps to address requirements unique to sustainable business corporations in Hawaii. For example, you can establish procedures for preparing the annual benefit report, which must be posted on your sustainable business corporation’s website, or otherwise made available to the public, for a 60-day public comment period. Additionally, you must provide the final annual benefit report to your shareholders within 120 days following the end of the sustainable business corporation’s fiscal year. Your benefit report should be accessible on the public portion of your company’s website for free or otherwise provided free of charge to the public. For help with generating your annual benefit report, access the online tool [here](#).

The preparation of your annual benefit report requires your company to choose a standard for defining, reporting, and assessing your corporation's overall corporate social and environmental performance. This is known as the "third-party standard." The standard you select must be comprehensive, independent, credible, and transparent. For more information on third-party standards, visit benefitcorp.net.

Actions

- Choose a third-party standard.
- Set a timeline with key dates for the preparation and filing of your annual benefit report.
- Post your report on your sustainable business corporation's website, or otherwise make available to the public, for a 60-day public comment period prior to publication.
- Deliver your report to each shareholder within 120 days of the end of the fiscal year.
- Post the annual report on your website.

Summary: To Convert to a Sustainable Business Corporation

- **In connection with conversion:**
 - Draft:
 - Amendment(s) to the articles of incorporation.
 - Resolutions of the board approving the amendment(s) to be adopted at a meeting or by written consent in lieu of a meeting.
 - Stockholder consent.
 - Amended bylaws (optional).
 - File with the Hawaii Department of Commerce and Consumer Affairs:
 - Articles of Amendment
 - Payment of filing fee.
- **Post-conversion:**
 - Choose a third-party standard.
 - Prepare the annual benefit report.
 - Send the annual benefit report to all shareholders within 120 days of fiscal yearend, concurrently with any other annual reports you send to shareholders.
 - Post the annual benefit report publically on the company's website.