

I MINA'TRENTA NA LIHESLATURAN GUÅHAN
2010 (SECOND) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO I MAGA'LAHEN GUÅHAN

This is to certify that Bill No. 325-30 (COR), "AN ACT TO AMEND §281601(b), AND TO ADD A NEW §28817A AND A NEW SUBARTICLE B TO CHAPTER 28, PART 5, DIVISION 1 OF TITLE 18 OF THE GUAM CODE ANNOTATED, RELATIVE TO INCLUDING DIRECTORS' LIABILITY AND CONFLICT PROVISIONS IN THE REVISED MODEL BUSINESS CORPORATION ACT," was on the 19th day of March, 2010, duly and regularly passed.



Judith T. Won Pat, Ed. D.
Speaker

Attested:


Tina Rose Muña Barnes
Legislative Secretary

This Act was received by *I Maga'lahaen Guåhan* this 22nd day of March, 2010, at 2:15 o'clock P.M.



Assistant Staff Officer
Maga'lahaen's Office

APPROVED:

FELIX P. CAMACHO
I Maga'lahaen Guåhan

Date: _____

Public Law No. _____

I MINA'TRENTA NA LIHESLATURAN GUÅHAN
2010 (SECOND) Regular Session

Bill No. 325-30 (COR)

As amended on the Floor.

Introduced by:

v. c. pangelinan
T. C. Ada
F. B. Aguon, Jr.
F. F. Blas, Jr.
E. J.B. Calvo
B. J.F. Cruz
J. V. Espaldon
Judith P. Guthertz, DPA
T. R. Muña Barnes
Adolpho B. Palacios, Sr.
R. J. Respicio
Telo Taitague
Ray Tenorio
Judith T. Won Pat, Ed.D.

AN ACT TO AMEND §281601(b), AND TO ADD A NEW §28817A AND A NEW SUBARTICLE B TO CHAPTER 28, PART 5, DIVISION 1 OF TITLE 18 OF THE GUAM CODE ANNOTATED, RELATIVE TO INCLUDING DIRECTORS' LIABILITY AND CONFLICT PROVISIONS IN THE REVISED MODEL BUSINESS CORPORATION ACT.

1 **BE IT ENACTED BY THE PEOPLE OF GUAM:**

2 **Section 1. Legislative Findings and Intent.** *I Liheslaturan Guåhan* finds
3 that the addition of a new Part 5 to Title 18 of the Guam Code Annotated, which is
4 designated as Public Law 29-144, and known as the Guam Corporation Business
5 Act, was substantively patterned after the Revised Model Business Corporation

1 Act (RMBCA). The Guam Corporation Business Act omitted certain provisions of
2 the RMBCA, including provisions governing the standards of liability for directors
3 and directors' conflicting interest transactions. *I Liheslaturan Guåhan* further
4 finds that it is necessary to amend §28817 which contained technical drafting
5 errors. It is the intent of *I Liheslaturan Guåhan* to empower the Compiler of Laws
6 to assign Chapter and subchapter headings consistent with the Revised Model
7 Business Corporation Act.

8 **Section 2.** A new §28817A is hereby *added* to Chapter 28, Part 5, Division
9 1 of Title 18, of the Guam Code Annotated, to read as follows:

10 **“§28817A. Standards of Liability for Directors.** (a) A director
11 *shall not* be liable to the corporation *or* its shareholders for any decision to
12 take *or* not to take actions, *or* any failure to take any action, as a director,
13 unless the party asserting liability in a proceeding establishes that:

14 (1) any provision in the Articles of Incorporation authorized by
15 §28202(b)(4) *or* protection afforded by §28861 for action taken
16 in compliance with §§28862 *or* 28863, if interposed as a bar to
17 the proceeding by the director, *does not* preclude liability; and

18 (2) the challenged conduct consisted or was the result of:

19 (A) action not in good faith; *or*

20 (B) a decision

21 (i) which the director did *not* reasonably believe to be
22 in the best interest of the corporation, *or*

23 (ii) as to which the director was *not* informed to an
24 extent the director reasonably believed appropriate
25 in the circumstances; *or*

26 (C) a lack of objectivity due to the director's familial,
27 financial *or* business relationship with, *or* a lack of

1 independence due to the director's domination or control
2 by, another person having a material interest in the
3 challenged conduct

4 (i) which relationship *or* which domination or control
5 could reasonably be expected to have affected the
6 director's judgment respecting the challenged
7 conduct in a manner adverse to the corporation,
8 and

9 (ii) after a reasonable expectation to such effect has
10 been established, the director *shall not* have
11 established that the challenged conduct was
12 reasonably believed by the director to be in the
13 best interest of the corporation, or

14 (D) a sustained failure of the director to devote attention to
15 ongoing oversight of the business and affairs of the
16 corporation, or a failure to devote timely attention, by
17 making (or causing to be made) appropriate inquiry,
18 when particular facts and circumstances of significant
19 concern materialize that would alert a reasonably
20 attentive director to the need therefore; or

21 (E) receipt of a financial benefit to which the director was
22 *not* entitled or any other breach of the director's duties to
23 deal fairly with the corporation and its shareholders that
24 is actionable under applicable law.

25 (b) The party seeking to hold the director liable:

26 (1) for money damages, *shall* also have the burden of
27 establishing that:

1 (A) harm to the corporation or its shareholders has
2 been suffered, and

3 (B) the harm suffered was proximately caused by the
4 director's challenged conduct;

5 (2) for other money payment under a legal remedy, such as
6 compensation for the unauthorized use of corporate
7 assets, *shall* also have whatever persuasion burden may
8 be called for to establish that the payment sought is
9 appropriate in the circumstances; or

10 (3) for other money payment under an equitable remedy,
11 such as profit recovery by or disgorgement to the
12 corporation, *shall* also have whatever persuasion burden
13 may be called for to establish that the equitable remedy
14 sought is appropriate in the circumstances.

15 (c) Nothing contained in this Section *shall*

16 (1) in any instance where fairness is at issue, such as
17 consideration of the fairness of a transaction to the
18 corporation under §28861(b)(3), alter the burden of
19 proving the fact or lack of fairness otherwise applicable,

20 (2) alter the fact or lack of liability of a director under
21 another section of this Act, such as the provisions
22 governing the consequences of an unlawful distribution
23 under §28818 or a transactional interest under §28861, *or*

24 (3) affect any rights to which the corporation or a share
25 holder may be entitled under another statute of this
26 territory or the United States.”

1 **Section 3.** A new SubArticle B is hereby *added* to Chapter 28, Part 5,
2 Division 1 of Title 18 of the Guam Code Annotated to read as follows:

3 **“SubArticle B**

4 **Directors’ Conflicting Interest Transactions**

5 **§28860. SubArticle Definitions.**

6 **§28861. Judicial Action.**

7 **§28862. Directors’ Action.**

8 **§28863. Shareholders’ Action.**

9 **§28860. SubArticle Definitions.** For this SubArticle the
10 following definitions apply:

11 (a) *Conflicting interest* with respect to a corporation, means the
12 interest a director of the corporation has respecting a transaction effected or
13 proposed to be effected by the corporation (or by a subsidiary of the
14 corporation or any other entity in which the corporation has a controlling
15 interest) *if*

16 (1) whether or not the transaction is brought before the board
17 of directors of the corporation for action, the director knows at the
18 time of commitment that he or a related person is a party to the
19 transaction or has a beneficial financial interest in or so closely linked
20 to the transaction and of such financial significance to the director or a
21 related person that the interest would reasonably be expected to exert
22 an influence on the director’s judgment if he were called upon to vote
23 on the transaction; or

24 (2) the transaction is brought (or is of such character and
25 significance to the corporation that it would in the normal course be
26 brought) before the board of directors of the corporation for action,
27 and the director knows at the time of commitment that any of the

1 following persons is either a party to the transaction or has a
2 beneficial financial interest in or so closely linked to transaction and
3 of such financial significance to the person that the interest would
4 reasonably be expected to exert an influence on the director's
5 judgment if he were called upon to vote on the transaction:

- 6 (i) an entity (other than the corporation) of which the
7 director is a director, general partner, agent, or employee;
- 8 (ii) a person that controls one or more of the entities
9 specified in sub-clause (i) or an entity that is controlled
10 by, or is under common control with, one or more of the
11 entities specified in sub-clause (i); or
- 12 (iii) an individual who is a general partner, principal, or
13 employer of the Director.

14 (b) *Directors conflicting interest transaction*, with respect to a
15 corporation, means a transaction effected or proposed to be effected by the
16 corporation (or by a subsidiary of the corporation or any other entity in
17 which the corporation has a controlling interest) respecting which a director
18 of the corporation has a conflicting interest.

19 (c) *Related person of a director* means:

- 20 (1) the spouse (or a parent or sibling thereof) of the director,
21 or a child, grandchild, sibling, parent (or spouse of any
22 thereof) of the director, or an individual having the same
23 home as the director, or a trust or estate of which an
24 individual specified in this clause (1) is a substantial
25 beneficiary; or
- 26 (2) a trust, estate, incompetent, conservatee, or minor of
27 which the director is a fiduciary.

1 (d) *Required disclosure* means disclosure by the director who has a
2 conflicting interest of

3 (1) the existence and nature of his conflicting interest; and

4 (2) all facts known to him respecting the subject matter of
5 the transaction that an ordinarily prudent person would
6 reasonably believe to be material to a judgment about
7 whether or not to proceed with the transaction.

8 (e) *Time of commitment* respecting a transaction means the time when the
9 transaction is consummated or, if made pursuant to contract, the time
10 when the corporation (or its subsidiary or the entity in which it has
11 controlling interest) becomes contractually obligated so that its
12 unilateral withdrawal from the transaction would entail significant loss,
13 liability, or other damage.

14 **§28861. Judicial Action.** (a) A transaction effected or proposed
15 to be effected by a corporation (or by a subsidiary of the corporation or any
16 other entity in which the corporation has a controlling interest) that is not a
17 director's conflicting interest transaction may not be enjoined, set aside, or
18 give rise to an award of damages or other sanctions, in a proceeding by a
19 shareholder or by or in the right of the corporation, because a director of the
20 corporation, or any person with whom or which he has personal, economic,
21 or other association, has an interest in the transaction.

22 (b) A director's conflicting interest transaction may not be
23 enjoined, set aside, or give rise to an award of damages or other sanctions, in
24 a proceeding by a shareholder or by or in the right of the corporation,
25 because the director, or any person with whom or which he has a personal,
26 economic, or other association, has an interest in the transaction, if;

- 1 (1) directors' action respecting the transaction was at any time
2 taken in compliance with §28862;
- 3 (2) shareholders' action respecting the transaction was at any time
4 taken in compliance with §28863; or
- 5 (3) the transaction, judged according to the circumstances at the
6 time of commitment, is established to have been fair to the
7 corporation.

8 **§28862. Directors' Action.** (a) Directors' action respecting a
9 transaction is effective for purposes of §28861(b)(1) if the transaction
10 received the affirmative vote of a majority but no fewer than two (2) of those
11 qualified directors on the board of directors or on a duly empowered
12 committee of the board who voted on the transaction after either required
13 disclosure to them (to the extent the information was not known by them) or
14 compliance with Subsection (b); provided that action by a committee is so
15 effective only if:

- 16 (1) all its members are qualified directors, and
- 17 (2) its members are either all the qualified directors on the board or
18 are appointed by the affirmative vote of a majority of the
19 qualified directors on the board.

20 (b) If a director has a conflicting interest respecting a transaction,
21 but neither he nor a related person of the director specified in §28860(c)(1)
22 is a party to the transaction, and if the director has a duty under law or
23 professional canon, or a duty of confidentiality to another person, respecting
24 information relating to the transaction such that the director may not make
25 the disclosure described in §28860(d)(2), then disclosure is sufficient for
26 purposes of Subsection (a) if the director:

1 (1) discloses to the directors voting on the transaction the
2 existence and nature of his conflicting interest and informs
3 them of the character and limitations imposed by that duty
4 before their vote on the transaction, and

5 (2) plays no part, directly or indirectly, in their deliberations or
6 vote.

7 (c) A majority (but no fewer than two (2) of all the qualified
8 directors on the board of directors, or on the committee, constitutes a
9 quorum for purposes of action that complies with this Section. Directors'
10 action that otherwise complies with this Section is not affected by the
11 presence or vote of a director who is not a qualified director.

12 (d) For purposes of this Section, "qualified director" means, with
13 respect to a director's conflicting interest transaction, any director who does
14 not have either

15 (1) a conflicting interest respecting the transaction, or

16 (2) a familial, financial, professional, or employment relationship
17 with a second director who does have a conflicting interest
18 respecting the transaction, which relationship would, in the
19 circumstances, reasonably be expected to exert an influence on
20 the first director's judgment when voting on the transaction.

21 **§28863. Shareholders' Action.** (a) Shareholders' action
22 respecting a transaction is effective for purposes of §28861(b)(2) if a
23 majority of the votes entitled to be cast by the holders of all qualified shares
24 were cast in favor of the transaction after

25 (1) notice to shareholders describing the director's conflicting
26 interest transaction,

27 (2) provision of the information referred to in Subsection (d), and

1 (3) required disclosure to the shareholders who voted on the
2 transaction (to the extent the information was not known by
3 them).

4 (b) For purposes of this Section, “qualified shares” means any
5 shares entitled to vote with respect to the director’s conflicting interest
6 transaction except shares that, to the knowledge, before the vote, of the
7 secretary (or other officer or agent of the corporation authorized to tabulate
8 votes), are beneficially owned (or the voting of which is controlled) by a
9 director who has a conflicting interest respecting the transaction or by a
10 related person of the director, or both.

11 (c) A majority of the votes entitled to be cast by the holders of all
12 qualified shares constitutes a quorum for purposes of action that complies
13 with this Section. Subject to the provisions of Subsections (d) and (e),
14 shareholders’ action that otherwise complies with this Section is not affected
15 by the presence of holders, or the voting, of shares that are not qualified
16 shares.

17 (d) For purposes of compliance with Subsection (a), a director who
18 has a conflicting interest respecting the transaction shall, before the
19 shareholders’ vote, inform the secretary (or other officer or agent of the
20 corporation authorized to tabulate votes) of the number, and the identity of
21 persons holding or controlling the vote, of all shares that the director knows
22 are beneficially owned (or the voting of which is controlled) by the director
23 or by a related person of the director or both.

24 (e) If a shareholders’ vote does not comply with Subsection (a)
25 solely because of a failure of a director to comply with Subsection (d), and if
26 the director establishes that his failure did not determine and was not
27 intended by him to influence the outcome of the vote, the court may, with or

1 without further proceedings respecting §28861(b)(3), take such action
2 respecting the transaction and the director, and give such effect, if any, to the
3 shareholders' vote, as it considers appropriate in the circumstances.”

4 **Section 4.** §28817 of Chapter 28, Part 5, Division 1 of Title 18 of the
5 Guam Code Annotated is hereby *amended* to read as follows:

6 “**§28817. Standards of Conduct for Directors.** (a) Each member
7 of the board of directors, when discharging the duties of a director, shall act

8 (1) in good faith; and

9 (2) in a manner the director reasonably believes to be in the best
10 interests of the corporation.

11 (b) The members of the board of directors or a committee of the
12 board, when becoming informed in connection with their decision-making
13 function or devoting attention to their oversight function, shall discharge
14 their duties with the care that a person in a like position would reasonably
15 believe appropriate under similar circumstances.

16 (c) In discharging board or committee duties, a director, who does
17 not have knowledge that makes reliance unwarranted, is entitled to rely on
18 the performance by any of the persons specified in Subsection (e)(1) or
19 Subsection (e)(3) to whom the board may have delegated, formally or
20 informally by course of conduct, the authority or duty to perform one (1) or
21 more of the board's functions that are delegable under applicable law.

22 (d) In discharging board or committee duties, a director, who does
23 not have knowledge that makes reliance unwarranted, is entitled to rely on
24 information, opinions, reports or statements, including financial statements
25 and other financial data, prepared or presented by any of the persons
26 specified in Subsection (e).

1 (e) A director is entitled to rely, in accordance with Subsection (c)
2 or (d), on:

3 (1) one (1) or more officers or employees of the corporation
4 whom the director reasonably believes to be reliable and
5 competent in the functions performed or the information,
6 opinions, reports or statements provided;

7 (2) legal counsel, public accountants, or other persons
8 retained by the corporation as to matters involving skills
9 or expertise the director reasonably believes are matters

10 (i) within the particular person's professional or
11 expert competence, or

12 (ii) as to which the particular person merits
13 confidence; or

14 (3) a committee of the board of directors of which the
15 director is not a member if the director reasonably
16 believes the committee merits confidence.”

17 **Section 5. Empowerment.** The Compiler of Laws is empowered to
18 assign chapter and subchapter headings consistent with the Revised Model
19 Business Corporation Act.

20 **Section 6.** Subsection (b) of §281601 of Article 16 of Chapter 28, Title 18,
21 Guam Code Annotated, is hereby *amended* to read:

22 “(b) If the corporation, or an officer or agent thereof, refuses to
23 permit an inspection sought by a stockholder or attorney or other agent
24 acting for the stockholder pursuant to Subsection (a) of this Section, or does
25 not reply to the demand within ten (10) business days after the demand has
26 been made, the stockholder may apply to the Superior Court of Guam for an
27 order to compel such inspection.”

1 **Section 7. Effective Date.** This Act *shall* be effective upon its enactment.