

MINA' TRENTA NA LIHESLATURAN GUÅHAN

2010 (SECOND) REGULAR SESSION

BILL NO. 325 -30(COR)

Introduced by:

v.c. pangelinan

2010 FEB 23 11:52 AM

AN ACT 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 AND FOR OTHER PURPOSES.

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

2 **Section 1. Legislative Findings and Intent.** *I Liheslaturan Guåhan*
3 finds that the addition of a new Part 5 to Title 18 of the Guam Code Annotated,
4 which is designated as Public Law 29-144 and known as the Guam Corporation
5 Business Act, was substantively patterned after the Revised Model Business
6 Corporation Act (RMBCA). The Guam Corporation Business Act omitted certain
7 provisions of the RMBCA, including provisions governing the standards of
8 liability for directors and directors' conflicting interest transactions. *I*
9 *Liheslaturan Guåhan* further finds that it is necessary to amend §28817 which
10 contained technical drafting errors. It is the intent of *I Liheslaturan Guåhan* to
11 empower the Compiler of Laws to assign chapter and subchapter headings
12 consistent with the Revised Model Business Corporation Act.

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

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18 **“§28817A. Standards of Liability for Directors.** (a) A director shall not
19 be liable to the corporation or its shareholders for any decision to take or not to
20 take actions, or any failure to take any action, as a director, unless the party
21 asserting liability in a proceeding establishes that:

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23 1) any provision in the articles of incorporation authorized by
24 §28202(b)(4) or protection afforded by §28861 for action
25 taken in compliance with §§ 28862 or 28863, if interposed as a
26 bar to the proceeding by the director, does not preclude
27 liability; and
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- 2) the challenged conduct consisted or was the result of:
 - (i) action not in good faith; or
 - (ii) a decision
 - (A) which the director did not reasonably believe to be in the best interest of the corporation, or
 - (B) as to which the director was not informed to an extent the director reasonably believed appropriate in the circumstances; or
 - (iii) a lack of objectivity due to the director's familial, financial or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct
 - (A) which relationship or which domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation, and
 - (B) after a reasonable expectation to such effect has been established, the director shall not have established that the challenged conduct was reasonably believed by the director to be in the best interest of the corporation, or
 - (iv) a sustained failure of the director to devote attention to ongoing oversight of the business and affairs of the corporation, or a failure to devote timely attention, by making (or causing to be made) appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need therefore; or
 - (v) receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and its shareholders that is actionable under applicable law.

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

- (1) for money damages, shall also have the burden of establishing that:
 - (i) harm to the corporation or its shareholders has been suffered, and
 - (ii) the harm suffered was proximately caused by the director's challenged conduct;

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

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

(c) Nothing contained in this section shall

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

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

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

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

**“SUBARTICLE B
DIRECTORS’ CONFLICTING INTEREST TRANSACTIONS**

- §28860. SubArticle Definitions.
- §28861. Judicial Action.
- §28862. Directors’ Action.
- §28863. Shareholders’ Action.

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

(a) “Conflicting Interest” with respect to a corporation means the interest a director of the corporation has respecting a transaction effected or proposed to be effected by the corporation (or by a

1 subsidiary of the corporation or any other entity in which the
2 corporation has a controlling interest) if

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4 (1) whether or not the transaction is brought before the board of
5 directors of the corporation for action, the director knows at the
6 time of commitment that he or a related person is a party to the
7 transaction or has a beneficial financial interest in or so closely
8 linked to the transaction and of such financial significance to
9 the director or a related person that the interest would
10 reasonably be expected to exert an influence on the director's
11 judgment if he were called upon to vote on the transaction; or

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13 (2) the transaction is brought (or is of such character and
14 significance to the corporation that it would in the normal
15 course be brought) before the board of directors of the
16 corporation for action, and the director knows at the time of
17 commitment that any of the following persons is either a party
18 to the transaction or has a beneficial financial interest in or so
19 closely linked to transaction and of such financial significance
20 to the person that the interest would reasonably be expected to
21 exert an influence on the director's judgment if he were called
22 upon to vote on the transaction:

- 23 (i) an entity (other than the corporation) of which the
24 director is a director, general partner, agent, or
25 employee;
- 26 (ii) a person that controls one or more of the entities
27 specified in sub-clause (i) or an entity that is
28 controlled by, or is under common control with, one
29 or more of the entities specified in sub-clause (i); or
- 30 (iii) an individual who is a general partner, principal,
31 or employer of the director.

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33 (b) "Directors conflicting interest transaction" with respect to a
34 corporation means a transaction effected or proposed to be effected
35 by the corporation (or by a subsidiary of the corporation or any other
36 entity in which the corporation has a controlling interest) respecting
37 which a director of the corporation has a conflicting interest.

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39 (c) "Related person" of a director means:

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41 (1) the spouse (or a parent or sibling thereof) of the director, or a
42 child, grandchild, sibling, aren't (or spouse of any thereof) of
43 the director, or an individual having the same home as the
44 director, or a trust or estate of which an individual specified in
45 this clause(1) is a substantial beneficiary' or;

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(2) a trust, estate, incompetent, conservatee, or minor of which the director is a fiduciary.

(d) “Required disclosure” means disclosure by the director who has a conflicting interest of

(1) the existence and nature of his conflicting interest, and

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

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

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

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

(1) directors’ action respecting the transaction was at any time taken in compliance with §28862;

(2) shareholders’ action respecting the transaction was at any time taken in compliance with §28863; or

(3) the transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

§28862. Directors’ Action. (a) Directors’ action respecting a transaction is effective for purposes of §28861(b)(1) if the transaction received

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the affirmative vote of a majority (but no fewer than two) of those qualified directors on the board of directors or on a duly empowered committee of the board who voted on the transaction after either required disclosure to them (to the extent the information was not known by them) or compliance with subsection (b); provided that action by a committee is so effective only if:

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

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

- (1) discloses to the directors voting on the transaction the existence and nature of his conflicting interest and informs them of the character and limitations imposed by that duty before their vote on the transaction, and
- (2) plays no part, directly or indirectly, in their deliberations or vote.

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

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

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

1 **§28863. Shareholders' Action.** (a) Shareholders' action respecting a
2 transaction is effective for purposes of §28861(b)(2) if a majority of the
3 votes entitled to be cast by the holders of all qualified shares were cast in
4 favor of the transaction after

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6 (1) notice to shareholders describing the director's conflicting
7 interest transaction,

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9 (2) provision of the information referred to in subsection (d), and

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

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15 (b) For purposes of this section, "qualified shares" means any shares
16 entitled to vote with respect to the director's conflicting interest
17 transaction except shares that, to the knowledge, before the vote, of the
18 secretary (or other officer or agent of the corporation authorized to
19 tabulate votes), are beneficially owned (or the voting of which is
20 controlled) by a director who has a conflicting interest respecting the
21 transaction or by a related person of the director, or both.

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23 (c) A majority of the votes entitled to be cast by the holders of all qualified
24 shares constitutes a quorum for purposes of action that complies with
25 this section. Subject to the provisions of subsections (d) and (e),
26 shareholders' action that otherwise complies with this section is not
27 affected by the presence of holders, or the voting, of shares that are not
28 qualified shares.

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30 (d) For purposes of compliance with subsection (a), a director who has a
31 conflicting interest respecting the transaction shall, before the
32 shareholders' vote, inform the secretary (or other officer or agent of
33 the corporation authorized to tabulate votes) of the number, and the
34 identity of persons holding or controlling the vote, of all shares that the
35 director knows are beneficially owned (or the voting of which is
36 controlled) by the director or by a related person of the director or
37 both.

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39 (e) If a shareholders' vote does not comply with subsection (a) solely
40 because of a failure of a director to comply with subsection (d), and if
41 the director establishes that his failure did not determine and was not
42 intended by him to influence the outcome of the vote, the court may,
43 with or without further proceedings respecting §28861(b)(3), take such
44 action respecting the transaction and the director, and give such effect,
45 if any, to the shareholders' vote, as it considers appropriate in the
46 circumstances."

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2 **Section 4. Amendment of §28817.** Section 28817 of Chapter 28, Part 5,
3 Division 1 of Title 18 of the Guam Code Annotated is hereby amended to read as
4 follows:
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6 “**§28817. Standards of Conduct for Directors.** (a) Each member of the
7 board of directors, when discharging the A director ~~shall discharge the director's~~
8 duties of as a director, shall act including the director's duties as a member of a
9 committee:

- 10 (1) In good faith;
11 ~~(2) With the care and ordinarily prudent person in a like position would~~
12 ~~exercise under similar circumstances; and~~
13 ~~(2) (3) In a manner the director reasonably believes to be in the best~~
14 ~~interest of the corporation.~~
15 ~~(b) In determining the best interest of the corporation, a director, in~~
16 ~~addition to considering the interest of the corporation's shareholder,~~
17 ~~may consider, in the director's discretion, any of the following factors:~~
18 ~~(1) The interest of the corporation's employees, customers, suppliers,~~
19 ~~and creditors;~~
20 ~~(2) The economy of Guam and the nation;~~
21 ~~(3) Community and societal considerations, including, without~~
22 ~~limitations, the impact of any action upon the communities in or~~
23 ~~near which the corporation has offices or operations, and~~
24 ~~(4) The long-term as well as short-term interests of the corporation and~~
25 ~~its shareholders, including, without limitation, the possibility that~~
26 ~~these interests may be best served by the continued independence~~
27 ~~of the corporation.~~
28 ~~(c) In discharging duties as a director, the director is entitled to rely on~~
29 ~~information, opinions, reports, or statements, including financial~~
30 ~~statements and other financial data, if prepared or presented by:~~
31 ~~(1) One or more officers or employees of the corporation whom the~~
32 ~~director reasonably believes to be reliable and competent in the~~
33 ~~matters presented;~~
34 ~~(2) Legal counsel, public accountants, or other persons as to matters~~
35 ~~the director reasonably believes are within the person's~~
36 ~~professional or expert competence; or~~
37 ~~(3) A committee of the board of directors of which the director is not a~~
38 ~~member if the director reasonably believes the committee merits~~
39 ~~confidence.~~
40 ~~(d) A director is not acting in good faith if the director has knowledge~~
41 ~~concerning the matter in question that makes reliance otherwise~~
42 ~~permitted by subsection (c) unwarranted.~~
43 ~~(e) A director is not liable for any action taken as a director, or any failure~~
44 ~~to take any action, if the director performed the duties of the director's~~
45 ~~office in compliance with this section.~~

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

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7 (c) In discharging board or committee duties a director, who does not have
8 knowledge that makes reliance unwarranted, is entitled to rely on the
9 performance by any of the persons specified in subsection (e)(1) or
10 subsection (e)(3) to whom the board may have delegated, formally or
11 informally by course of conduct, the authority or duty to perform one
12 or more of the board's functions that are delegable under applicable
13 law.

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15 (d) In discharging board or committee duties a director, who does not have
16 knowledge that makes reliance unwarranted, is entitled to rely on
17 information, opinions, reports or statements, including financial
18 statements and other financial data, prepared or presented by any of
19 the persons specified in subsection (e).

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21 (e) A director is entitled to rely, in accordance with subsection (c) or (d),
22 on:

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24 (1) one or more officers or employees of the corporation whom the
25 director reasonably believes to be reliable and competent in the
26 functions performed or the information, opinions, reports or
27 statements provided;

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

32 (i) within the particular person's professional or expert
33 competence or

34 (ii) as to which the particular person merits confidence;
35 or

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37 (3) a committee of the board of directors of which the director is not
38 a member if the director reasonably believes the committee
39 merits confidence."

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

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45 **Section 6. Effective Date.** This Act shall be effective upon enactment.