# COMMONWEALTH OF THE NORTHERN MARIANA ISALNDS SAIPAN, MARIANA ISLANDS

Volume 12 No. 05



May 15, 1990

1

commonwealth

register

Published monthly by the Registrar of Corporations Office of the Attorney General

#### COMMONWEALTH REGISTER

May 15, 1990 Volume 12 No. 05

# TABLE OF CONTENTS

### PROPOSED REGULATIONS

Proposed Regulations of the Registrar of Corporations Regarding the Procedures for Incorporating and other matters Affecting Corporations Office of the Attorney General ..... 6907 Proposed Amendments to the Coastal Resources Management Rules and Regulations of 1985 Coastal Resources Management Office ..... 6998 EMERGENCY REGULATIONS Notice of Emergency and Proposed Regulations Amending Certain Sections of the Alien Labor Rules and Regulations Relating to Labor Identification Certificate and Applications Fees Notice of Emergency Adoption of "Certificate of Need" Rules and Regulations PUBLIC NOTICE Notice of Private Tax Ruling Department of Finance ..... Attorney General Opinions published betwwen January 15, 1990 and May 15, 1990 

ŝ.

### PUBLIC NOTICE

### PROPOSED REGULATIONS OF THE REGISTRAR OF CORPORATIONS REGARDING THE PROCEDURES FOR INCORPORATING, AND OTHER MATTERS AFFECTING CORPORATIONS

The Registrar of Corporations, with the approval of the Governor, pursuant to 1 CMC § 9104(a) hereby gives notice to the public of the intention to adopt proposed revised regulations regarding the following:

- 1. The organization and creation of corporations in the CNMI;
- 2. The rights and obligations of corporate shareholders, officers and directors;
- 3. Fees for filing documents with the Registrar of corporations; and
- 4. Other matters generally affecting corporations.

The text of the proposed regulations are published with this notice in the Commonwealth Register.

The public may submit written comments and recommendations regarding the proposed regulations during the thirty day period following this date of publication in the Commonwealth Register. Any comments or recommendations should be sent to the Registrar of Corporations at the following address:

> Registrar of Corporations Office of the Attorney General 2nd Floor -- Administration Building Capitol Hill, Saipan, MP 96950

Dated this  $\frac{10^{\frac{15}{10}}}{10^{\frac{15}{10}}}$  day of April, 1990.

SOLEDAD B. SASAMOTO Registrar of Corporations

Approved by:

LORENZO I. DE LEON GUERRERO Governor

### NOTICIAN PUBLICO

# I MA-PROPOPONE NA REGULASION I REGISTRAR OF CORPORATIONS SIGUN GI SITUASION PARA INCORPORATING, YAN OTRO SIHA MANERA NI HA-AFEFECTA I CORPORATION SIHA

I Rehistran i Corporations, sigun i lCMC § 9104(a), estaguiya na hana guahaye noticia para i publico pot i intension na para umaadopta i mapropone na tinilaikan i regulasion sigun i sigente siha:

- I organision yan mafatinas i corporation siha gi halom i CNMI;
- I direcho yan obligasion niha i man gai-kabo, ofisiat siha yan i direktot siha;
- 3. Apas i documento siha an mana-halom gi Rehistran i Corporation; yan
- 4. Otro kasu henerat siha ni ha-afekta i corporation siha.

I man mapropone na regulasion siha ma publika guine na noticia gi halom i Commonwealth Register.

I publiko sina man submitte commento yan osino rekomendasion ni mapropone na regulasion duranten i trenta dias na tiempo despues de este na publicasion gi Commonwealth Register. Este na commento osino rekomendasion debe de umanahanao guato para i Rehistran i Corporations gi sigente na direksion:

> Registrar of Corporations Office of the Attorney General 2nd Floor -- Administration Building Capitol Hill, Saipan, MP 96950

Mafecha guine gi dia de  $10^{-12}$  Mayo, 1990.

SOLEDAD B. SASAMOTO Rehistran i Corporations

Ma-aprueba:

LORENZO I. DE LEON GUERRERO Gobietno

PAGE 6908

### CORPORATION REGULATIONS

### CHAPTER 1. GENERAL PROVISIONS

#### Subchapter A. Short title

- 1.01. Short title
- 1.02. Reservation of power to amend or repeal

# Subchapter B. Filing documents

- 1.20. Filing requirements
- 1.21. Forms
- 1.22. Filing, service, and copying fees
- 1.23. Effective time and date of filing
- 1.24. Correcting filed document
- 1.25. Filing duty of Registrar
- 1.26. Appeal from Registrar's refusal to file document
- 1.27. Evidentiary effect of copy of filed document
- 1.28. Certificate of existence
- 1.29. Penalty for signing false document

# Subchapter C. Registrar of Corporations

1.30. Powers

#### Subchapter D. Definitions

- 1.40. Regulation definitions
- 1.41. Notice
- 1.42. Number of shareholders

# CHAPTER 2. INCORPORATION

- 2.01. Incorporators
- 2.02. Articles of incorporation
- 2.03. Incorporation
- 2.04. Liability for preincorporation transactions
- 2.05. Organization of corporation
- 2.06. Bylaws
- 2.07. Emergency bylaws

# CHAPTER 3. PURPOSES AND POWERS

- 3.01. Purpose
- 3.02. General powers
- 3.03. Emergency powers
- 3.04. Ultra vires

### CHAPTER 4. NAME

- 4.01. Corporate name
- 4.02. Reserved name
- 4.03. Registered name

### CHAPTER 5. OFFICE AND AGENT

- 5.01. Registered office and registered agent
- 5.02. Change of registered office or registered agent
- 5.03. Resignation of registered agent
- 5.04. Service on corporation

CHAPTER 6. SHARES AND DISTRIBU-TIONS

### Subchapter A. Shares

- 6.01. Authorized shares
- 6.02. Terms of class or series determined by board of directors
- 6.03. Issued and outstanding shares
- 6.04. Fractional shares

# Subchapter B. Issuance of shares

- 6.20. Subscription for shares before incorporation
- 6.21. Issuance of shares
- 6.22. Liability of shareholders
- 6.23. Share dividends
- 6.24. Share options
- 6.25. Form and content of certificates
- 6.26. Shares without certificates
- 6.27. Restriction on transfer of shares and other securities

### 6.28. Expense of issue

# Subchapter C. Subsequent acquisition of shares by shareholders and corporation

- 6.30. Shareholder's preemptive rights
- 6.31. Corporation's acquisition of its own shares

### Subchapter D. Distributions

6.40. Distributions to shareholders

#### CHAPTER 7. SHAREHOLDERS

### Subchapter A. Meetings

- 7.01. Annual meeting
- 7.02. Special meeting
- 7.03. Court-ordered meeting
- 7.04. Action without meeting
- 7.05. Notice of meeting
- 7.06. Waiver of notice
- 7.07. Record date

### Subchapter B. Voting

- 7.20. Shareholders' list for meeting
- 7.21. Voting entitlement of shares
- 7.22. Proxies
- 7.23. Shares held by nominees
- 7.24. Corporation's acceptance of votes
- 7.25. Quorum and voting requirements for voting groups
- 7.26. Action by single and multiple voting groups
- 7.27. Greater quorum or voting requirements
- 7.28. Voting for directors; cumulative voting

# Subchapter C. Voting trusts and agreements

7.30. Voting trusts 7.31. Voting agreements

Subchapter D. Derivative proceedings

7.40. Procedure in derivative proceedings

CHAPTER 8. DIRECTORS AND OF-FICERS

### Subchapter A. Board of directors

- 8.01. Requirement for and duties of board of directors
- 8.02. Qualifications of directors
- 8.03. Number and election of directors
- 8.04. Election of directors by certain classes of share-holders
- 8.05. Terms of directors generally
- 8.06. Staggered terms for directors
- 8.07. Resignation of directors
- 8.08. Removal of directors by shareholders
- 8.09. Removal of directors by judicial proceeding
- 8.10. Vacancy on board
- 8.11. Compensation of directors

# Subchapter B. Meetings and action of board

- 8.20. Meetings
- 8.21. Action without meeting
- 8.22. Notice of meeting
- 8.23. Waiver of notice
- 8.24. Quorum and voting
- 8.25. Committees

Subchapter C. Standards of conduct

- 8.30. General standards for directors
- 8.31. Director conflict of interest
- 8.32. Loans to directors
- 8.33. Liability for unlawful distributions

# Subchapter D. Officers

- 8.40. Required officers
- 8.41. Duties of officers
- 8.42. Standards of conduct for officers
- 8.43. Resignation and removal of officers
- 8.44. Contract rights of offices

# Subchapter E. Indemnification

- 8.50. Subchapter definitions
- 8.51. Authority to identify
- 8.52. Mandatory indemnification
- 8.53. Advance for expenses
- 8.54. Court-ordered indemnification
- 8.55. Determination and authorization of indemnification
- 8.56. Indemnification of officers, employees, and agents
- 8.57. Insurance
- 8.58. Application of subchapter

# CHAPTER 9. [Reserved]

# CHAPTER 10. AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS

# Subchapter A. Amendment of articles of incorporation

10.01. Authority to amend 10.02. Amendment by board of directors

- 10.03. Amendment by board of directors and shareholders
- 10.04. Voting on amendments by voting group
- 10.05. Amendment before issuance of shares
- 10.06. Articles of amendment
- 10.07. Restated articles of incorporation
- 10.08. Amendment pursuant to reorganization
- 10.09. Effect of amendment

# Subchapter B. Amendment of bylaws

- 10.20. Amendment by board of directors or shareholders
- 10.21. Bylaw increasing quorum or voting requirement for shareholders
- 10.22. Bylaw increasing quorum or voting requirement for directors

# CHAPTER 11. MERGER AND SHARE EXCHANGE

- 11.01. Merger
- 11.02. Share exchange
- 11.03. Action on plan
- 11.04. Merger of subsidiary
- 11.05. Articles of merger or share exchange
- 11.06. Effect of merger or share exchange
- 11.07. Merger or share exchange with foreign corporation

# CHAPTER 12. SALE OF ASSETS

- 12.01. Sale of assets in regular course of business and mortgage of assets
- 12.02. Sale of assets other than in regular course of business

# CHAPTER 13. DISSENTERS' RIGHTS

Subchapter A. Right to dissential obtain payment for shares

- 13.01. Definitions
- 13.02. Right to dissent
- 13.03. Dissent by nominees and beneficial owners

Subchapter B. Procedure for exercise of dissenters' rights

- 13.20. Notice of dissenters' rights
- 13.21. Notice of intent to demand payment
- 13.22. Dissenters' notice
- 13.23. Duty to demand payment
- 13.24. Share restrictions
- 13.25. Payment
- 13.26. Failure to take action
- 13.27. After-acquired shares
- 13.28. Procedure if shareholder dissatisfied with payment of offer

# Subchapter C. Judicial appraisal of share

- 13.30. Court action
- 13.31. Court costs and counsel fees

### CHAPTER 14. DISSOLUTION

# Subchapter A. Voluntary dissolution

- 14.01. Dissolution by incorporators or initial directors
- 14.02. Dissolution by board of directors and shareholders
- 14.03. Articles of dissolution
- 14.04. Revocation of dissolution
- 14.05. Effect of dissolution
- 14.06. Known claims against dissolved corporation
- 14.07. Unknown claims against dissolved corporation

# Subchapter B. Administrative dissolution

- 14.20. Grounds for administrative dissolution
- 14.21. Procedure for and effect of administrative dissolution
- 14.22. Reinstatement following administrative dissolution
- 14.23. Appeal from denial of reinstatement

Subchapter C. Judicial dissolution

- 14.30. Grounds for judicial dissolution
- 14.31. Procedure for judicial dissolution
- 14.32. Receivership or custodianship
- 14.33. Decree of dissolution

# Subchapter D. Miscellaneous

14.40. Deposit with Director of Department of Finance

### CHAPTER 15. FOREIGN CORPORATIONS

### Subchapter A. Certificate of Authority

- 15.01. Authority to transact business required
- 15.02. Consequences of transacting business without a license
- 15.03. Application for certificate of authority
- 15.04. Amended certificate of authority
- 15.05. Effect of certificate of authority
- 15.06. Corporate name of foreign corporation
- 15.07. Registered office and registered agent of foreign corporation

- 15.08. Change of registered office or registered agent of foreign corporation
- 15.09. Resignation of registered agent of foreign corporation
- 15.10. Service on foreign corporation

### Subchapter B. Withdrawal

1

15.20. Withdrawal of foreign corporation

# Subchapter C. Revocation of certificate of authority

- 15.30. Grounds for revocation
- 15.31. Procedure for and effect of revocation
- 15.32. Appeal from revocation

### CHAPTER 16. RECORDS AND REPORTS

### Subchapter A. Records

- 16.01. Corporate records
- 16.02. Inspection of records by shareholders
- 16.03. Scope of inspection right
- 16.04. Court-ordered inspection

# Subchapter B. Reports

- 16.20. Financial statements for shareholders
- 16.21. Other reports to shareholders
- 16.22. Annual report for Registrar of Corporations

### CHAPTER 17. TRANSITION PROVISIONS

- 17.01. Application to existing domestic corporations
- 17.02. Application to qualified foreign corporations
- 17.03. Saving provisions
- 17.04. Severability

17.05. Repeal

17.06. Effective date

### CORPORATION REGULATIONS

CHAPTER 1. GENERAL PROVISIONS

Subchapter A. Short Title and Reservation of Power.

**1.01. Short Title.** These regulations shall be known as the "Commonwealth Business Corporation Regulation".

### 1.02. Reservation of Power to Amend or Repeal.

The Registrar of Corporations has the power to amend or repeal all or part of these regulation at any time and all domestic and foreign corporations subject to these Regulations are governed by the amendment or repeal.

Subchapter B. Filing of Documents.

### 1.20. Filing Requirements.

(a) A document must satisfy the requirements of this section, and of any other section that adds to or varies these requirements, to be entitled to filing by the Registrar of Corporations.

(b) These Regulations must require or permit filing the document in the office of the Registrar of Corporations.

(c) The document must contain the information required by these Regulations. It may contain other information as well. (d) The document must be typewritten or printed.

(e) The document must be executed:

(1) by the chairman of the board of directors, the president, or other officer of the corporation;

(2) if directors have not been selected or the corporation has not been formed, by the incorporator; or

(3) if the corporation is in the hands of a receiver, trustee, of other court appointed fiduciary, by the fiduciary.

(g) The person executing the document shall sign it and state beneath or opposite his signature his name and capacity in which he signs. The document may but need not contain: (1) the corporate seal, (2) an attestation by the secretary or an assistant secretary, (3) an acknowledgement, verification, or proof.

(h) If the Registrar of Corporations has prescribed a mandatory form for a document under section 1.21, the document must be in or on the prescribed form.

(i) The document must be delivered to the office of the Registrar of Corporations for filing and must be accompanied by two exact or conformed copies (except a s provided in sections 5.03 and 15.09), and proof of payment of filing fees required by law.

#### 1.21. FORMS

(a) The Registrar of Corporations may prescribe and furnish forms for:

(1) an application for a certificate of existence,

(2) a foreign corporation's application for a certificate of authority to transact

business in the Commonwealth, (3) a foreign corporation's application for a certificate

of withdrawal, and

(4) the annual report. If the Registrar of Corporations so requires, use of these forms is mandatory.

(b) The Registrar of Corporations may prescribe and furnish on request forms for other documents required or permitted to be filed by these Regulations but their use is not mandatory.

1.22. Filing, Service and Copying Fees.

(a) The following fees shall be paid to the Department of Finance and proof of payment delivered to the Registrar of Corporations when the documents described in this subsection are delivered for filing:

(1) Articles of Incorporation
\$ 100.

(2) Application for reserved name \$ 10.

(3) Notice of transfer of reserved name \$ 10.

(4) Application for registered name \$ 10.

(5) Application for renewal of registered name \$ 10.

(6) Corporations statement of change of registered agent or registered office or both \$ 10.

(7) Agents statement of change in registered office for each affected corporation \$ 10.

(8) Agent's statement of resignation \$ 10.

(9) Amended articles of incorporation \$ 50.

(10) Restated articles of incorporation \$ 50.

(11) Articles of merger or share exchange \$ 50.

(12) Articles of Dissolution
\$ 50.

(13) Articles of revocation of dissolution \$ 50.

(14) Certificate of administrative dissolution no fee.

(15) Application for reinstatement following administrative dissolution \$ 100.

(16) Certificate of reinstatement no fee.

(17) Certificate of judicial dissolution no fee.

(18) Application for certificate of authority \$ 100.

(19) Application for amended certificate of authority \$ 25.

(20) Application for certificate of withdrawal \$ 25.

(21) Certificate of revocation of authority to transact business no fee.

(22) Annual report \$ 50.

(23) Articles of correction \$ 25.

(24) Application for certificate of existence or authorization \$ 10.

(25) Application for use of indistinguishable name \$ 25.

(26) Any other document required or permitted to be filed by these Regulation \$ 25.

(b) The Registrar of Corporations shall collect a fee of

COMMONWEALTH REGISTER VOLUME 12 NO. 5 MAY 15, 1990 PAGE 6915

\$ 25 each time process is served on him under these Regulations. The party to a proceeding causing service of process is entitled to recover this fee as costs if he prevails in the proceeding.

(c) The Registrar of Corporations shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic of foreign corporation:

(1) \$.50 a page for copying; and

(2) \$2.50 for certificate.

**1.23.** Effective Time and Date of Document.

(a) Except as provided in subsection (b) and 1.24(c) a document accepted for filing is effective:

(1) at the time of filing on the date it is filed, as evidenced by the Registrar of Corporations date and time endorsement on the original document; or

(2) at the time specified in the document as its effective time on the date it is filed.

(b) A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at the close of business on that date. A delayed effective date may not be later than the 90th day after the date it is filed.

# 1.24. Correcting Filed Document.

(a) A domestic or foreign corporation may correct a document filed by the Registrar of Corporations if the document (1) contains an incorrect statement or (2) was defectively executed, sealed, verified, or acknowledged.

(b) A document is corrected:

(1) by preparing articles of correction that (i)describe the document (including the date filed) or attach a copy of it to the articles, (ii) specify the incorrect statement and the reason it is incorrect of the manner in which the execution was defective, and (iii) correct the incorrect statement or defective execution; and

(2) by delivering the articles of correction to the Registrar of Corporations for filing.

(c) Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

# **1.25.** Filing Duty of Registrar of Corporations.

(a) If a document delivered to the Registrar of Corporations for filing satisfies the requirements of 1.20, the Registrar of Corporations shall file it.

(b) The Registrar of Corporations files a document by stamping or otherwise endorsing "Filed", together with his name and official title and the date and time of receipt, on both the original and the document copy. After filing the document, except as provided in section 5.03 and 15.10, the Registrar of Corporations shall deliver the document copy to the domestic or foreign corporation or its representative.

(c) If the Registrar of Corporations refuses to file a document, she or he shall return it to the domestic or foreign corporation or its representative within five days after the document was delivered, together with brief written explanation of the reason for its refusal.

(d) The Registrar of Corporations duty to file documents under this section is ministerial. His or her filing or refusal to file a document does not:

(1) affect the validity or invalidity of the document in whole or part;

(2) relate to the correctness or incorrectness of information contained in the document;

(3) create a presumption that the document is correct or incorrect.

# 1.26. Appeal from Registrar of Corporations Refusal to File Document.

(a) If the Registrar of Corporations refuses to file a document delivered to his office for filing, the domestic or foreign corporation may appeal the refusal within 30 days after the

[

return of the document to the Commonwealth Superior Court. The appeal is commenced by petitioning the court to compel filing the document and by attaching to the petition the document and the Registrar of Corporations explanation of his or her refusal to file.

(b) The court may summarily order the Registrar of Corporations to file the document or take other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings.

# 1.27. Evidentiary Effect of Copy of Filed Document.

A certificate attached to a copy of a document filed by the Registrar of Corporations, bearing his or her signature (which may be a facsimile) and the seal of the Commonwealth, is conclusive evidence that the original is on file with the Registrar of Corporations.

# 1.28. Certificate of Existence.

(a) Anyone may apply to the Registrar of Corporations to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(b) A certificate of existence or authorization sets forth:

(1) the domestic corporation's name or the foreign corporation's name used in the Commonwealth;

(2) that (i) the domestic

corporation is duly incorporated under the laws of the Commonwealth, the date of incorporation, and the period of its duration if less than perpetual; or (ii) that the foreign corporation is authorized to transact business in the Commonwealth;

(3) that all corporation fees and penalties owed to the Commonwealth have been paid, if (i) payment is reflected in the records of the Registrar of Corporations and (ii) nonpayment affects the existence or authorization of the domestic or foreign corporation;

(4) that its most recent annual report required by section16.22 has been delivered to the Registrar of Corporations;

(5) that articles of dissolution have not been filed; and

(6) other facts of record in the office of the Registrar of Corporations that may be requested by the applicant.

(c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Registrar of Corporations may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in the Commonwealth.

# **1.29.** Penalty for Signing False Document.

(a) A person commits an offense if he signs a document he knows is false in any material respect with the intent that the docu ment be delivered to the Registrar of Corporations for filing.

(b) An offense under this section is a civil offense punishable by a civl fine not to exceed \$ 1,000.

Subchapter C. Registrar of Corporations.

# 1.30. Powers.

The Registrar of Corporations has the power reasonably necessary to perform the duties required by these Regulations and 4 CMC, Div.4.

# Subchapter D. Definitions.

# **1.40.** Regulation Definitions. As used in these Regulation:

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(3) "Commonwealth" means the Commonwealth of the Northern Mariana Islands.

(4) "Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or bold face or contrasting color, or typing in capitals or underlined, is conspicuous.

(5) "Corporation" or "domestic corporation means a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of these Regulation. (6) "Deliver" includes mail.

(7) "Distribution" means a direct or indirect transfer of money or other property (except its own shares) or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

(8) "Effective date of notice" is defined in section 1.41.

(9) "Employee" includes an officer but not a director. A director may accept duties that make him also an employee.

(10) "Entity" includes corporation and foreign corporation; non-profit corporation; profit and non-profit unincorporated associations; business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest; and state, United States and foreign government.

(11) "Foreign corporation" means a corporation for profit incorporated under a law other than the law of the Commonwealth.

(12) "Governmental subdivision" includes authority, county, district, and municipality.

(13) "Includes" denotes a partial definition.

(14) "Individual" includes the estate of an incompetent or deceased individual.

(15) "Means" denotes an exhaustive definition.

(16) "Notice" is defined in

section 1.41.

(17) "Person" includes individual and entity.

(18) "Principal office" means the office (in or out of the Commonwealth) so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.

(19) "Proceeding" includes civil suit and criminal, administrative, and investigator action.

(20) "Record date" means the date established under chapter 6 and 7 on which a corporation determines the identity of its shareholders and their holdings for purpose of these Regulation.

(21) "Secretary" means the corporate officer to whom the board of director has delegated responsibility under section 8.40(c) for custody of the minutes of the board of directors and of the shareholders and for authenticating records of the corporation.

(22) "Share" means the unit into which the proprietary interest in a corporation are divided.

(23) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(24) "State" when referring to a part of the United States includes a state, commonwealth, territory and insular possession (and their agencies and governmental subdivisions) of the United States.

(25) "Subscriber" means a

person who subscribes for the shares in a corporation, whether before of after incorporation.

(26) "United States" includes district, authority, commission, department and any other agency of the United States.

(27) "Voting group" means all shares of one or more classes series that under or the articles of incorporation or these Regulation are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. A11 shares entitled by the articles of incorporation or these Regulations to vote generally on the matter are for that purpose a single voting group.

### 1.41. Notice.

(a) Notice under these Regulation must be in writing unless oral notice is reasonable under the circumstances.

(b) Notice may be communicated; by telephone, telegraph, teletype, or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are impractical, notice may be communicated by a newspaper of general circulation in the area where published; or by radio, television, or other form of public broadcast communication.

(c) Written notice by a domestic or foreign corporation to its shareholders, if in a comprehensible form, is effective when mailed, if mailed postage paid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders.

(d) Written notice to a domestic or foreign corporation authorized to transact business in the Commonwealth may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in the most recent annual report or, in the case of a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.

(e) Except as provided in subsection (c), written notice, if in a comprehensible form, is effective at the earliest of the following:

(1) when received;

(2) five days after its deposit in the United States Mail, as evidenced by the postmark, if mailed postage paid and correctly addressed;

(3) on the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and if the receipt is signed by or on behalf of the addressee.

(f) Oral notice is effective when communicated if communicated in a comprehensible manner.

(g) If these Regulations prescribe notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of these Regulations, those

### requirements govern.

# 1.42. Number of Shareholders.

(a) For purposes of these Regulations the following identified as a shareholders in the corporation's current record of shareholders constitutes one shareholder:

(1) three or fewer co-owners;

(2) a corporation, partnership, trust, estate, or other entity;

(3) the trustees, guardians, custodians, or other fiduciaries of a single trust, estate, or account.

(b) For purposes of these Regulations, shareholders registered in substantially similar names constitute one shareholder if it is reasonable to believe that the name represents the same person.

#### CHAPTER 2. INCORPORATION

#### 2.01. Incorporators.

One or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the Registrar of Corporations for filing.

#### 2.02. Articles of Incorporation.

(a) The articles of incorporation must set forth:

(1) a corporate name for the corporation that satisfies the requirements of section 4.01;

(2) the number of shares that the corporation is authorized to issue;

(3) the address of the cor

poration's initial registered office and the name of the initial registered agent at that office; and

(4) the name and address of each incorporator.

(b) The articles of incorporation may set forth:

(1) the names and addresses of the individuals who are to serve as the initial directors;

(2) provisions not inconsistent with law regarding:

(i) the purpose or purposes for which the corporation is organized;

(ii) managing the business and regulating the affairs of the corporation;

(iii) defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders;

(iv) a par value for authorized shares or classes of shares;

(v) the imposition of personal liability on shareholders for the debts of the corporation to a specific extent and upon specific conditions; and

(3) any provision that under these Regulations are required or permitted to be set forth in the bylaws.

(c) The articles of incorporation need not set forth any of the corporate powers enumerated in these Regulations.

# 2.03. Incorporation.

(a) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are

### filed.

(b) The Registrar of Corporation's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the Commonwealth to cancel or revoke the incorporation or involuntary dissolve the corporation.

# 2.04. Liability for Preincorporation Transactions.

All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under these Regulations, are jointly and severally liable for all liabilities created while so acting.

2.05. Organization of Corporation.

(a) After incorporation:

(1) if initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting;

(2) if initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of the majority of the incorporators:

(i) to elect directors and complete the organization of the corporation; or

(ii) to elect a board of

directors who shall complete the organization of the corporation.

(b) Action required or permitted by these Regulation to be taken by the incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator.

(c) An organizational meeting may be held in or out of the Commonwealth.

### 2.06. Bylaws.

(a) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation.

(b) The bylaws of a corporation may contain any provisions for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

# 2.07. Emergency Bylaws.

(a) Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt bylaws to be effective only in an emergency defined in subsection (d). The emergency bylaws, which are subject to amendment or repeal by the shareholders, may make all provisions necessary for managing the corporation during the emergency, including:

(1) procedures for calling a meeting of the board of directors; (2) quorum requirements for the meeting;

(3) designation of additional or substitute directors.

(b) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

(c) Corporate action taken in good faith in accordance with the emergency bylaws:

(1) binds the corporation; and

(2) may not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purpose of this section if a quorum of the corporations directors cannot readily assembled because of some catastrophic event.

### CHAPTER 3. PURPOSE AND POWERS

### 3.01. Purpose.

(a) Every corporation incorporated under these Regulation has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.

(b) A corporation engaging in a business that is subject to regulation under another statute of the Commonwealth may incorporate under these Regulations only if permitted by and subject to all limitations of the other statute.

### 3.02. General Powers.

Unless the articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

(1) to sue and be sued, complain and defend in its corporate name;

(2) to have a corporate seal, which may be altered at will, and to use it or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;

(3) to make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of the CNMI, for managing the business and regulating the affairs of the corporation;

(4) to purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located, except as restricted by Article XII of the Constitution of the Northern Mariana Islands;

(5) to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(6) to purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interest in, or obligations of, any other entity; (7) to make contract and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(8) to lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment except as restricted by Article XII of the Constitution of The Northern Mariana Islands;

(9) to be a promoter, partner member associate, or manager of any partnership, joint venture, trust, or other entity;

(10) to conduct its business, locate offices, and exercise the powers granted by these Regulations within or without the Commonwealth;

(11) to elect directors and appoint officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;

(12) to pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents;

(13) to make donations for the public welfare or for charitable, scientific, or educational purposes;

(14) to transact any lawful business that will aid governmental policy;

(15) to make payments or

donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation.

### 3.03. Emergency Powers.

(a) In anticipation of or during an emergency defined in subsection (d), the board of directors of corporation may:

(1) modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

(2) relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(b) During an emergency defined in subsection (d), unless emergency bylaws provide otherwise:

(1) notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio; and

(2) one or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(c) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation:

(1) binds the corporation; and

(2) may not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event.

3.04. Ultra Vires.

(a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged:

(1) in a proceeding by a shareholder against the corporation to enjoin the act;

(2) in a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or

(3) in a proceeding by the Attorney General under section 14.30.

(c) In a shareholder's proceeding under subsection (b) (1) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act.

### CHAPTER 4. NAME

### 4.01. Corporate Name.

(a) A corporate name:

(1) must contain the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "ltd.," or words or abbreviations of like import in another language; and

(2) may not contain language stating or implying that the corporation is organized for a purpose other than that permitted by section 3.01 and its articles of incorporation.

(b) Except as authorized by subsections (c) and (d), a corporate name must be distinguishable upon the records of the Registrar of Corporations from:

(1) the corporate name of a corporation incorporated or authorized to transact business in the Commonwealth;

(2) a corporate name reserved or registered under section 4.02 or 4.03;

(3) the fictitious name adopted by a foreign corporation authorized to transact business in the Commonwealth because its real name is unavailable; and

(4) the corporate name of a not-for-profit corporation incorporated or authorized to transact business in the Commonwealth.

(c) A corporation may apply to the Registrar of Corporations for authorization to use a name that is not distinguishable upon his records from one or more of the names described in subsection (b). The Registrar of Cor-

COMMONWEALTH REGISTER VOLUME 12 NO. 5 MAY 15, 1990 PAGE 6925

porations shall authorize use of the name applied for if:

(1) the other corporation consents to the use in writing and submits an undertaking in form satisfactory to the Registrar of Corporations to change its name to a name that is distinguishable upon the records of the Registrar of Corporations from the name of the applying corporation; or

(2) the applicant delivers to the Registrar of Corporations a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in the Commonwealth.

(d) A corporation may use the name (including the fictitious name) of an other domestic or foreign corporation is use in the Commonwealth if the other corporation is incorporated or authorized to transact business in the Commonwealth and the proposed user corporation:

(1) has merged with the other corporation;

(2) has been formed by reorganization of the other corporation; or

(3) has acquired all or substantially all of the assets, including the corporate name, of the other corporation.

(e) These Regulations do not control the use of fictitious names.

### 4.02. Reserved Name.

(a) A person may reserve the exclusive use of a corporate name, including a fictitious

name for a foreign corporation whose corporate name is not available, by delivering an application to the Registrar of Corporations for filing. The application must set forth the name and address of the applicant and the name proposed to be reserved. If the Registrar of Corporations finds that the corporate name applied for is available, he or she shall reserve the name for the applicant's exclusive use for a nonrenewable 120-day period.

(b) The owner of a reserved corporate name may transfer the reservation to another person by delivering to the Registrar of Corporations a signed notice of the transfer that states the name and address of the transferee.

### 4.03. Registered Name.

(a) A foreign corporation may register its corporate name, or its corporate name with any addition required by section 15.06, if the name is distinguishable upon the records of the Registrar of Corporations from the corporate names that are not available under section 4.01 (b) (3).

(b) A foreign corporation registers its corporate name, or its corporate name with any addition required by section 15.06, by delivering to the Registrar of Corporations for filing an application:

(1) setting forth its corporate name, or its corporate name with any addition required by section 15.06, the state or country and date of its incorporation, and a brief description of the nature of the business in which it is engaged; and

(2) accompanied by a certificate of existence (or a document of similar import) from the state or country of incorporation.

(c) The name is registered for the applicant's exclusive use upon the effective date of the application.

(d) A foreign corporation whose registration is effective may renew it for successive years by delivering to the Registrar of Corporations for filing a renewal application, which complies with the requirements of subsection (b), between October 1 and December 31 of the preceding year. The renewal application renews the registration for the following calendar year.

(e) A foreign corporation whose registration is effective may thereafter qualify as a foreign corporation under that name or consent in writing to the use of that name by a corporation thereafter incorporated under these Regulation or by another foreign corporation thereafter authorized to transact business in the Commonwealth. The registration terminates when the domestic corporation is incorporated or the foreign corporation qualifies or consents to the qualification of another foreign corporation under the registered name.

### CHAPTER 5. OFFICE AND AGENT

# 5.01. Registered Office and Registered Agent.

Each corporation must continuously maintain in the Commonwealth:

(1) a registered office that may be the same as any of its places of business; and

(2) a registered agent, who may be:

(i) an individual who resides in the Commonwealth and whose business office is identical with the registered office;

(ii) a domestic corporation or not-for-profit domestic corporation whose business office is identical with the registered office; or

(iii) a foreign corporation or not-for-profit foreign corporation authorized to transact business in the Commonwealth whose business office is identical with the registered office.

# 5.02. Change of Registered Office or Registered Agent.

(a) A corporation may change its registered office or registered agent by delivering to the Registrar of Corporations for filing a statement of change that sets forth:

(1) the name of the corporation,

(2) the mailing address and location of its current registered office;

(3) if the current registered office is to be changed, the mailing address and location of the new registered office;

(4) the name of its current registered agent;

(5) if the current registered agent is to be changed, the name of the new registered agent and the new agent's written consent (either on the statement or attached to it) to the appointment; and

(6) that after the change or changes are made, the mailing addresses and locations of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the mailing address or location of his business office, he may change the mailing address and location of the registered office of any corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Registrar of Corporations for filing a statement that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

# 5.03. Resignation of Registered Agent.

(a) A registered agent may resign his agency appointment by signing and delivering to the Registrar of Corporations for filing the signed original and two exact or conformed copies of a statement of resignation. The statement may include a statement that the registered office is also discontinued.

(b) After filing the statement the Registrar of Corporations shall mail one copy to the registered office (if not discontinued) and the other copy to the corporation at its principal office.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the 31st day after the date on which the statement was filed.

# 5.04. Service on Corporation.

(a) A corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

(b) If a corporation has no registered agent, or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office. Service is perfected under this subsection at the earliest of:

(1) the date the corporation receives the mail;

(2) the date shown on the return receipt, if signed on behalf of the corporation; or

(3) five days after its deposit in the United States Mail as evidenced by the postmark, if mailed postpaid and correctly addressed.

(c) This section does not prescribe the only means, or necessarily the required means, of serving a corporation. CHAPTER 6. SHARES AND DISTRIBU-TIONS

Subchapter A. Shares.

#### 6.01. Authorized Shares.

(a) The articles of incorporation must prescribe the classes of shares and the number of shares of each class that the corporation is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must prescribe a distinguishing designation for each class, and prior to the issuance of shares of a class the preferences, limitations, and relative rights of that class must be described in the articles of incorporation. All shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class except to the extent otherwise permitted by section 6.02.

(b) The articles of incorporation must authorize (1) one or more classes of shares that together have unlimited voting rights, and (2) one or more classes of shares (which may be the same class or classes as those with voting rights) that together are entitled to receive the net assets of the corporation upon dissolution.

(c) The articles of incorporation may authorize one or more classes of shares that:

(1) have special, conditional, or limited voting rights, or no right to vote, except to the extent prohibited by these Regulations;

(2) are redeemable or convertible as specified in the articles of incorporation (i) at the option of the corporation, the shareholder, or another person or upon the occurrence of a designated event; (ii) for cash, indebtedness, securities, or other property; (iii) in a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic data or events;

(3) entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative;

(4) have preference over any other class of shares with respect to distributions, including dividends and distributions upon the dissolution of the corporation.

(d) The description of the designations, preferences, limitations, and relative rights of share classes in subsection (c) is not exhaustive.

6.02. Terms of Class or Series Determined by Board of Directors.

(a) If the articles of incorporation so provide, the board of directors may determine, in whole or part, the preferences, limitations, and relative rights (within the limits set forth in section 6.01) of (1) any class of shares before the issuance of any shares of that class or (2) one or more series within a class before the issuance of any shares of that series.

COMMONWEALTH REGISTER VOLUME 12 NO. 5 MAY 15, 1990 PAGE 6929

(b) Each series of a class must be given a distinguishing designation.

(c) All shares of a series must have preferences, limitations, and relative rights identical with those of other shares of the same series and, except to the extent otherwise provided in the description of the series, with those of other series of the same class.

(d) Before issuing any shares of a class or series created under this section, the corporation must deliver to the Registrar of Corporations for filing articles of amendment, which are effective without shareholder action, that set forth:

(1) the name of the corporation;

(2) the text of the amendment determining the terms of the class or series of shares;

(3) the date it was adopted; and

(4) a statement that the amendment was duly adopted by the board of directors.

6.03. Issued and Outstanding Shares.

(a) A corporation may issue the number of shares of each class or series authorized by the articles of incorporation. Shares that are issued are outstanding shares until they are reacquired, redeemed, converted, or cancelled.

(b) The reacquisition, redemption, or conversion of outstanding shares is subject to the limitations of subsection (c) of this section and to section 6.40.

(c) At all times that shares of the corporation are outstanding, one or more shares that together have unlimited voting rights and one or more shares that together are entitled to receive the net assets of the corporation upon dissolution must be outstanding.

### 6.04. Fractional Shares.

(a) A corporation may:

(1) issue fractions of a share or pay in money the value of fractions of a share;

(2) arrange for disposition of fractional shares by the shareholders;

(3) issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share.

(b) Each certificate representing scrip must be conspicuously labeled "scrip" and must contain the information required by section 6.25 (b).

(c) The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon liquidation. The holder of scrip is not entitled to any of these rights unless the scrip provides for them.

(d) The board of directors may authorize the issuance of scrip subject to any condition con sidered desirable, including:

(1) that the scrip will become void if not exchanged for full shares before a specified date; and

(2) that the shares for which the scrip is exchangeable may be sold and the proceeds paid to the scribeholders.

Subchapter B. Issuance of Shares.

6.20. Subscription for Shares Before Incorporation.

(a) A subscription for shares entered into before incorporation is irrevocable for six months unless the subscription agreement provides a longer or shorter period or all the subscribers agree to revocation.

(b) The board of directors may determine the payment terms of subscriptions for shares that were entered into before incorporation, unless the subscription agreement specifies them. A call for payment by the board of directors must be uniform so far as practicable as to all shares of the same class or series, unless the subscription agreement specifies otherwise.

(c) Shares issued pursuant to subscriptions entered into before incorporation are fully paid and nonassessable when the corporation receives the consideration specified in the subscription agreement.

(d) If a subscriber defaults in payment of money or property under a subscription agreement entered into before incorpora tion, the corporation may collect the amount owed as any other debt. Alternatively, unless the subscription agreement provides otherwise, the corporation may rescind the agreement and may sell the shares if the debt remains unpaid more than 20 days after the corporation sends written demand for payments to the subscriber.

(e) A subscription agreement entered into after incorporation is a contract between the subscriber and the corporation subject to section 6.21.

### 6.21. Issuance of Shares.

(a) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(b) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

(c) Before the corporation issues shares, the board of directors must determine that the consideration received or to be received for shares to be issued is adequate. That determination by the board of directors is conclusive insofar as the adequacy of consideration for the issuance of shares relates to whether the shares are validly issued, fully paid, and non

COMMONWEALTH REGISTER VOLUME 12 NO. 5 MAY 15, 1990 PAGE 6931

#### assessable.

(d) When the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable.

(e) The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect of the shares against their purchase price, until the services are performed, the note is paid, or the benefits received. If the services are not performed, the note is not paid, or the benefits are not received, the shares escrowed or restricted and the distributions credited may be cancelled in whole or part.

### 6.22. Liability of Shareholders.

(a) A purchaser from a corporation of its own shares in not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued (section 6.21) or specified in the subscription agreement (section 6.20).

(b) Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.

### 6.23. Share Dividends.

(a) Unless the articles of incorporation provide otherwise, shares may be issued pro rata and without consideration to the corporation's shareholders or to the shareholders of one or more classes or series. An issuance of shares under this subsection is a share dividend.

(b) Shares of one class or series may not be issued as a share dividend in respect of shares of another class or series unless (1) the articles of incorporation so authorize, (2) a majority of the votes entitled to be cast by the class or series to be issued approve the issue, or (3) there are no outstanding shares of the class or series to be issued.

(c) If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend, it is the date the board of directors authorizes the share dividend.

# 6.24. Share Options.

A corporation may issue rights, options, or warrants for the purchase of shares of the corporation. The board of directors shall determine the terms upon which the rights, options, or warrants are issued, their form and content, and the consideration for which the shares are to issued.

6.25. Form and Content of Certificates.

(a) Shares may but need not be represented by certificates. Unless these Regulations or another statute expressly provides other wise, the rights and obligations of shareholders are identical whether or not their shares are represented by certificates.

(b) At a minimum each share certificate must state on its face:

(1) the name of the issuing corporation and that it is organized under the law of the Commonwealth;

(2) the name of the person to whom issued; and

(3) the number and class of shares and the designation of the series, if any, the certificate represents.

(c) If the issuing corporation is authorized to issue different classes of shares or different series within a class, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences, and limitations determined for each series (and the authority of the board of directors to determine variations for future series) must be summarized on the front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder this information on request in writing and without charge.

(d) Each share certificate (1) must be signed (either manually or in facsimile) by two officers designated in the bylaws or by the board if directors and (2) may bear the corporate seal or its facsimile.

(e) If the person who signed (either manually or in facsimile) a share certificate no longer holds office when the certificate is issued, the certificate is nevertheless valid.

# 6.26. Shares Without Certificates.

(a) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issue of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(b) Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates by section 6.25 (b) and (c), and, if applicable, section 6.27

# 6.27. Restriction on Transfer of Shares and Other Securities.

(a) The articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of the corporation. A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction.

(b) A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by section 6.26 (b). Unless so noted, a restriction is not enforceable against a person without knowledge of the restriction.

(c) A restriction on the transfer or registration of transfer of shares is authorized:

(1) to maintain the corporation's status when it is dependent on the number or identity of its shareholders;

(2) to preserve exemptions under federal, state or Commonwealth securities law;

(3) for any other reasonable purpose.

(d) A restriction on the transfer or registration of transfer of shares may:

(1) obligate the shareholder first to offer the corporation or other persons (separately, consecutively, or simultaneously) an opportunity to acquire the restricted shares;

(2) obligate the corporation
or other persons (separately,
consecutively, or simultaneously) to acquire the restricted
shares;

(3) require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable.

(4) prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable.

(e) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

### 6.28 Expense of Issue.

A corporation may pay the expenses of selling or underwriting its shares, and of organizing or reorganizing the corporation, from the consideration received for shares.

Subchapter C. Subsequent Acquisition of Shares by Shareholders and corporation.

6.30. Shareholder's Preemptive Rights.

(a) The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide. (b) A statement included in the articles of incorporation that "the corporation elects to have preemptive rights" (or words of similar import) means that the following principles apply except to the extent the articles of incorporation expressly provide otherwise:

(1) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board of directors, to provide a fair and reasonable opportunity to exercise the right, the acquire proportional amounts of the corporation's unissued shares upon the decision of the board of directors to issue them.

(2) A shareholder may waive his preemptive right. A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.

(3) There is no preemptive right with respect to:

(i) shares issued as compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates;

(ii) shares issued to satisfy conversion or option rights created to provide compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates;

(iii) shares authorized in articles of incorporation that are issued within six months from the effective date of incorporation;

(iv) shares sold otherwise than for money.

(4) Holders of shares of any class without general voting

rights but with preferential rights to distributions or assets have no preemptive rights with respect to shares of any class.

(5) Holders of shares of any class with general voting rights but without preferential rights to distributions or assets have no preemptive rights with respect to shares of any class with preferential rights to distributions or assets unless the shares with preferential rights are convertible into or carry a right to subscribe for or acquire shares without preferential rights.

(6) Shares subject to preemptive rights that are not acquired by shareholders may be issued to any person for a period of one year after being offered to shareholders at a consideration set by the board of directors that is not lower than the consideration set for exercise of preemptive the rights. An offer at a lower consideration or after the expiration of one year is subject to the shareholder's preemptive rights.

(c) For purposes of this section, "shares" includes a security convertible into or carrying a right to subscribe for or acquire shares.

# 6.31. Corporation's Acquisition of its Own Shares.

(a) A corporation may acquire its own shares and shares so acquired constitute authorized but unissued shares.

(b) If the articles of incor-

poration prohibit the reissue of acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon amendment of the articles of incorporation.

(c) The board of directors may adopt of an amendment under this section without shareholder action, and deliver it to the Registrar of Corporations for filing. The articles must set forth:

(1) the name of the corporation;

(2) the reduction in the number shares, itemized by class and series; and

(3) the total number of authorized shares, itemized by class and series, remaining after reduction of the shares.

Subchapter D. Distributions.

6.40. Distributions to Shareholders.

(a) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (c).

(b) If the board of directors does not fix the record date for determining shareholders entitled to a distribution (other than one involving a purchase redemption, or other acquisition of the corporation's share), it is the date the board of directors authorizes the distribution.

(c) No distribution may be made if, after giving it effect:

(1) the corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) the corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(d) The board of directors may base a determination that a distribution is not prohibited under subsection (c) either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(e) Except as provided in subsection (g), the effect of a distribution under subsection (c) is measured:

(1) in the case of distribution by purchase, redemption, or other acquisition of the corporation's shares, as of the earlier of (i) the date money or other property is transferred or debt incurred by the corporation or (ii) the date the shareholder ceases to be a shareholder with respect to the acquired shares;

(2) in the case of any other

distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) in all other cases, as of (i) the date the distribution is authorized if the payment occurs within 120 days after the date of authorization or (ii) the date the payment is made if it occurs more than 120 days after the date of authorization.

(f) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent subordinated by agreement.

(g) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability for purposes of determination under subsection (c) if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is actually made.

CHAPTER 7. SHAREHOLDERS

Subchapter A. Meetings.

7.01. Annual Meeting.

(a) A corporation shall hold annually at a time in or fixed in accordance with the bylaws a meeting of shareholders.

(b) Annual shareholders' meetings may be held in or out of the Commonwealth at the place stated in or fixed in accordance with the bylaws, annual meetings shall be held at the corporation's principal office.

(c) The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation with a corporation's bylaws does not affect the validity of any corporate action.

### 7.02. Special Meeting.

(a) A corporation shall hold a special meeting of shareholders:

(1) on call of its board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws; or

(2) if the holders of at least 10 percent of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation's secretary one or more written demands for the meeting describing the purpose or purposes for which it is to be held.

(b) If not otherwise fixed under sections 7.03 or 7.07, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

(c) Special shareholders meet

ings may be held in or out of the Commonwealth at the place stated in or fixed in accordance with the bylaws, special meetings shall be held at the corporation's principal office.

1

(d) Only business within the purpose or purposes described in the meeting notice required by section 7.05 (c) may be conducted at a special shareholders' meeting.

### 7.03. Court-Ordered Meeting.

(a) The Commonwealth Superior Court may summarily order a meeting to be held:

(1) on application of any shareholder of the corporation entitled to participate in annual meeting if an annual

meeting was not held within the earlier of 6 months after the end of the corporation's fiscal year or 15 months after its last annual meeting; or

(2) on application of a shareholder who signed a demand for a special meeting valid under section 7.02 if:

(i) notice of the special meeting was not given within 30 days after the date the demand was delivered to the corporation's secretary; or

(ii) the special meeting was not held in accordance with the notice.

(b) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting (or direct that the votes represented at the meeting constitute a quorum for action on those matters), and enter other orders necessary to accomplish the purpose or purposes of the meeting.

### 7.04. Action Without Meeting.

(a) Action required or permitted by these Regulations to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by all the shareholders entitled to vote on the action. The action must be evidenced by one or more written consents describing the action taken, signed by all the shareholders entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) If not otherwise determined under sections 7.03 or 7.07, the record date for determining shareholders entitled to take action without a meeting is the date the first shareholder signs the consent under subsection (a).

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(d) If these Regulations requires that notice of proposed action be given to nonvoting shareholders and the action is to be taken by unanimous consent of the voting shareholders, the corporation must give its nonvoting shareholders written notice of the proposed action at least 10 days before the action is taken. The notice must contain or be accompanied by the same material that, under these Regulations, would have been required to be sent to nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted to the shareholders for action.

### 7.05. Notice of Meeting.

(a) A corporation shall notify shareholders of the date, time, and place of each annual and special shareholder's meeting no fewer than 10 nor more than 60 days before the meeting date. Unless these Regulations or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting.

(b) Unless these Regulations or the articles of incorporation require otherwise, notice of an annual meeting need not include a description of the purpose or purposes for which the meeting is called.

(c) Notice of a special meeting must include a description of the purpose or purposes for which the meeting is called.

(d) If not otherwise fixed under section 7.03 or 7.07, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the day before the first notice is delivered to shareholders.

(e) Unless the bylaws require otherwise, if an annual or special shareholders' meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 7.07, however, notice of the adjourned meeting must be given under this section to persons who are shareholders as of the new record date.

# 7.06. Waiver of Notice.

(a) A shareholder may waive any notice required by these Regulations, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A shareholder's attendance at a meeting:

(1) waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting;

(2) waives objection to consideration of a particular matter at the meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

### 7.07. Record Date.

(a) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(b) A record date fixed under this section may not be more than 70 days before the meeting or action requiring a determination of shareholders.

(c) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting.

(d) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

### Subchapter B. Voting

# 7.20 Shareholders' List for Meeting.

(a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders' meeting. The list must be arranged by voting group (and within each voting group by class or series of shares) and show the address of and number of shares held by each shareholder.

(b) The shareholders' list must be available for inspection by any shareholder, beginning two business days after notice of the meeting is given for which the list was prepared and continuing through the meeting, at principal the corporation's office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholder, his agent, or attorney is entitled on written demand to inspect and, subject to the requirements of section 16.02 (c), to copy the list, during regular business hours and at his expense, during the period it is available for inspection.

(c) The corporation shall make the shareholders' list available at the meeting, and any shareholder, his agent, or attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses

to allow a shareholder, his agent, or attorney to inspect the shareholders' list before or at the meeting (or copy the list as permitted by subsection (b), the Commonwealth Superior Court on application of the shareholder, may summarily order the inspection or copying at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(e) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting.

## 7.21. Voting Entitlement of Shares.

(a) Except as provided in subsection (b) and (c) or unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting. Only shares are entitled to vote.

(b) Absent special circumstances, the shares of a corporation are not entitled to vote if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for directors of the second corporation.

(c) Subsection (b) does not limit the power of a corporation to vote any shares, including its own shares, held by it in a fiduciary capacity.

(d) Redeemable shares are not entitled to vote after notice of redemption is mailed to the holders and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution under an irrevocable obligation to pay the holders the redemption price on surrender of the shares.

#### 7.22. Proxies.

(a) A shareholder may vote his shares in person or by proxy.

(b) A shareholder may appoint a proxy to vote or otherwise act for him by signing an appointment form, either personally or by his attorney-in-fact.

(c) An appointment of a proxy is effective when received by the secretary or other officer or agent authorized to tabulate votes. An appointment is valid for 11 months unless a longer period is expressly provided in the appointment form.

(d) An appointment of a proxy is revocable by the shareholder unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:

(1) a pledgee;

(2) a person who purchased or agreed to purchase the shares.

(3) a creditor of the corporation who extended it credit under terms requiring the appointment;

(4) an employee of the corporation whose employment contract requires the appointment; or

(5) a party to a voting agreement created under section 7.31.

(e) The death or incapacity of the shareholder appointing a proxy do not affect the right of the corporation to accept the proxy's authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises his authority under the appointment.

(f) An appointment made irrevocable under subsection (d) is revoked when the interest with which it is coupled is extinguished.

(g) A transferee for value of shares subject to an irrevocable appointment may revoke the appointment if he did not know of its existence when he acquired the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

(h) Subject to section 7.24 and to any express limitation on the proxy's authority appearing on the face of the appointment form, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the appointment.

### 7.23 Shares Held by Nominees.

(a) A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognition may be determined in the procedure.

(b) The procedure may set forth:

(1) the types of nominees to which it applies;

(2) the rights or privileges that the corporation recognizes in a beneficial owner;

(3) the manner in which the procedure is selected by the nominee;

(4) the information that must be provided when the procedure is selected;

(5) the period for which selection of the procedure is effective; and

(6) other aspects of the rights and duties created.

# 7.24. Corporation's Acceptance of Votes.

(a) If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation if acting in good faith is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder.

(b) If the name signed on a vote, consent, waiver, or proxy appointment do not correspond to the name of its shareholder, the corporation if acting in good faith is nevertheless entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the

act of the shareholder if:

(1) the shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;

(2) the name signed purports to be that of an administrator, executor, guardian, or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment;

(3) the name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment;

(4) the name signed purports to be that of a pledgee, beneficial owner, or attorney-in-fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, consent, waiver, or proxy appointment;

(5) two or more persons are the shareholder as cotenants or fiduciaries and the name signed purports to be the name of at least one of the coowners and the person signing appears to be acting on behalf of all the coowners.

(c) The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate the signature on it or about the signatory's authority to sign for the shareholder.

(d) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this section are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

(e) Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this section is valid unless a court competent jurisdiction determines otherwise.

## 7.25 Quorum and Voting Requirements for Voting Groups.

(a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation or these Regulations provide otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(b) Once a share is represented for any purpose at a meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of the meeting unless a new record date is or must be set for that adjourned meeting.

(c) If a quorum exists, action

on a matter (other than the election of directors) by voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation or these Regulations require a greater number of affirmative votes.

(d) An amendment of articles of incorporation adding, changing, or deleting a quorum or voting requirement for a voting group greater than specified in subsection (b) or (c) is governed by section 7.27.

(e) The election of directors is governed by section 7.28.

### 7.26 Action by Single and Multiple Voting Groups.

(a) If the articles of incorporation or these Regulations provide for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in section 7.25.

(b) If the articles of incorporation or these Regulations provide for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in section 7.25. Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter.

# 7.27 Greater Quorum or Voting Requirements.

(a) The articles of incorporation may provide for a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is provided for by these Regulations.

(b) An amendment to the articles of incorporation that adds, changes, or deletes a greater quorum or voting requirement must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

### 7.28 Voting for Directors; Cumulative Voting.

(a) Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(b) Shareholders do not have a right to cumulate their votes for directors unless the articles of incorporation so provided.

(c) A statement included in the articles of incorporation that "[all] [a designated voting group of] shareholders are entitled to cumulate their votes for directors" (or words of similar import) means that the shareholders designated are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among to two or more candidates.

(d) Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless:

(1) the meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized; or

(2) a shareholder who has the right to cumulate his votes gives notice to the corporation not less than 48 hours before the time set for the meeting of his or her intent to cumulate his votes during the meeting, and if one shareholder gives this notice all other shareholders in the same voting group participating in the election entitled to cumulate their votes without giving further notice.

# Subchapter C. Voting Trusts and Agreements.

## 7.30 Voting Trusts.

(a) One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust (which may include anything consistent with its purpose) and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of the names and addresses of all owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation's principal office.

(b) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee's name. A voting trust is valid for not more than 10 years after its effective date unless extended under subsection (c).

(c) All or some of the parties to a voting trust may extend it for additional terms of not more than 10 years each by signing an extension agreement and obtaining the voting trustee's written consent to the extension. An extension is valid for 10 years from the date the first shareholder signs the extension agreement. The voting trustee must deliver copies of the extension agreement and list of beneficial owners to the corporation's principal office. An extension agreement binds only those parties signing it.

### 7.31 Voting Agreements.

(a) Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A voting agreement created under this section is not subject to the provisions of section 7.30.

(b) A voting agreement created under this section is specifically enforceable. Subchapter D. Derivative Proceedings.

## 7.40 Procedure in Derivative Proceedings.

(a) A person may not commence a proceeding in the right of a domestic or foreign corporation unless he was a shareholder of the corporation when the transaction complained of occurred or unless he became a shareholder through transfer by operation of law from one who was a shareholder at that time.

(b) A complaint in a proceeding brought in the right of a corporation must be verified and allege with particularity the demand made, if any, to obtain action by the board of directors and either that the demand was refused or ignored or why he did not make the demand. Whether or not a demand for action was made, if the corporation commences an investigation of the changes made in the demand or complaint, the court may stay any proceeding until the investigation is completed.

(c) A proceeding commenced under this section may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interest of the corporation's shareholder or a class of shareholders, the court shall direct that notice be given the shareholders affected.

(d) On termination of the proceeding the court may require the plaintiff to pay any defendant's reasonable expenses (including counsel fees) incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause.

(e) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or held by a nominee on his behalf.

CHAPTER 8. DIRECTORS AND OF-FICERS

Subchapter A. Board of Directors.

8.01. Requirement for and Duties of Board of Directors.

(a) Except as provided in subsection (c), each corporation must have a board of directors.

(b) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation.

(c) A corporation having 50 or fewer shareholders may dispense with or limit the authority of a board of directors by describing in its articles of incorporation who will perform some or all of the duties of a board of directors.

## 8.02. Qualifications of Directors.

The articles of incorporation

or bylaws may prescribe qualifications for directors. A director need not be a resident of the Commonwealth or a shareholder of the corporation unless the articles of incorporation or bylaws so prescribe.

# 8.03. Number and Election of Directors.

(a) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(b) If a board of directors has power to fix or change the number of directors, the board may increase or decrease by 30 percent or less the number of directors last approved by the shareholders, but only the shareholders may increase or decrease by more than 30 percent the number of directors last approved by the shareholder.

(c) The articles of incorporation or bylaws may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the shareholders or the board of directors. After shares are issued, only the shareholders may change the range for the size of the board or change from a fixed to a variable-range size board or vice versa.

(d) Directors are elected at the

first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under section 8.06.

## 8.04. Election of Directors by Certain Classes of Shareholders.

If the articles of incorporation authorize dividing the shares into classes, the articles may also authorize the election of all or a specified number of directors by the holders of one or more authorized classes of shares. A class (or classes) of shares entitled to elect one or more directors is a separate voting group for purposes of the election of directors.

## 8.05. Terms of Directors Generally.

(a) The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

(b) The terms of all other directors expire at the next annual shareholders' meeting following their election unless their terms are staggered under section 8.06.

(c) A decrease in the number of directors do not shorten an incumbent director's term.

(d) The term of a director elected to fill a vacancy expires at the next shareholders' meeting at which directors are elected.

(e) Despite the expiration of

a director's term, he continues to serve until his successors is elected and qualifies or until there is a decrease in the number of directors.

### 8.06 Staggered Terms for Directors.

If there are nine or more directors, the articles of incorporation may provide for staggering their terms by dividing the total number of directors into two or three groups, with each group containing one half or one-third of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, and the terms of the third group, if any, expire at the annual shareholders's third meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two years or three years, as the case may be, to succeed those whose terms expire.

#### 8.07. Resignation of Directors.

(a) A director may resign at any time by delivering written notice to the board of directors, its chairman, or to the corporation.

(b) A resignation is effective when the notice is delivered unless the notice specifies a later effective date.

# 8.08. Removal of Directors by Shareholders.

(a) The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(b) If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him.

(c) If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove him exceeds the number of votes cast not to remove him.

(d) A director may be removed by the shareholders only at a meeting called for the purpose of removing him and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.

# 8.09. Removal of Directors by Judicial Proceeding.

(a) The Commonwealth Superior Court may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least 10 percent of the outstanding shares of any class if the court finds that (1) the director

engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation and (2) removal is in the best interest of the corporation.

(b) The court that removes a director may bar the directors from reelection for a period prescribed by the court.

(c) If the shareholders commencea proceeding under subsection(a), they shall make the corporation a party defendant.

#### 8.10 Vacancy on Board.

(a) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(1) the shareholders may fill
the vacancy;

(2) the board of directors may fill the vacancy; or

(3) if the directors remaining in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors remaining in office.

(b) If the vacant office was held by a director elected by a voting group of shareholders, only the holders of shares of that voting group are entitled to vote to fill the vacancy if it is filled by the shareholders.

(c) A vacancy that will occur at a specific later date (by reason of a resignation effec tive at a later date under section 8.07 (b) or otherwise) may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

### 8.11 Compensation of Directors.

Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.

## Subchapter B. Meetings and Action of the Board.

### 8.20 Meetings.

(a) The board of directors may hold regular or special meetings in or out of the Commonwealth.

(b) Unless the articles of incorporation or bylaws provide otherwise, the board of directors may permit any or all directors to participate in а regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

## 8.21 Action Without Meeting.

(a) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by these Regulations to be taken at a board of director's meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken.

(b) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date.

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

#### 8.22 Notice of Meeting.

(a) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

(b) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two day's notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

#### 8.23 Waiver of Notice.

(a) A director may waive any notice required by these Regula-

tions, the articles of incorporation, or bylaws before or after the date and time stated in the notice. Except as provided by subsection (b), the waiver must be in writing, signed by the director entitled to the notice, and filed with the minutes or corporate records.

(b) A director's attendance at or participation in a meeting waives any required notice to him of the meeting unless the director at the beginning of the meeting (or promptly upon his arrival) objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting.

### 8.24 Quorum and Voting.

(a) Unless the articles of incorporation or bylaws require a greater number, a quorum of a board of directors consists of:

(1) a majority of the fixed number of directors if the corporation has a fixed board size; or

(2) a majority of the number of directors prescribed, or if no number is prescribed the number in office immediately before the meeting begins, if the corporation has a variablerange size board.

(b) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than onethird of the fixed or prescribed number of directors determined under subsection (a). (c) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.

(d) A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless: (1) he objects at the beginning of the meeting (or promptly upon his arrival) to holding it or transacting business at the meeting; (2) his dissent or abstention from the action taken is entered in the minutes of the meeting; or (3) he delivers written notice of his dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

#### 8.25 Committees.

(a) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees and appoint members of the board of directors to serve on them. Each committee may have two or more members, who serve at the pleasure of the board of directors.

(b) The creation of a committee and appointment of members to it must be approved by the greater of (1) a majority of all the directors in office when the action is taken or (2) the number of directors required by the articles of incorporation or bylaws to take action under section 8.24.

(c) Sections 8.20 through 8.24, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.

(d) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under section 8.01.

(e) A committee may not, however:

(1) authorize distributions;

(2) approve or propose to shareholders action that these Regulations requires be approved by shareholders;

(3) fill vacancies on the board of directors or on any of its committees;

(4) amend articles of incorporation pursuant to section 10.02;

(5) adopt,amend, or repeal
bylaws;

(6) approve a plan of merger not requiring shareholder approval;

(7) authorize or approve reacquisition of shares, except according to a formula or method prescribed by the board of the directors; or

(8) authorize or approve the issuance or sale or contract

for sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares, except that the board of directors may authorize a committee (or a senior executive officer of the corporation) to do so within limits specifically prescribed by the board of directors.

(f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in section 8.30.

## Subchapter C. Standards of Conduct.

## 8.30. General Standards for Directors.

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

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

(c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

## 8.31 Director Conflict of Interest.

(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one of the following is true:

(1) 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 of directors and the board of directors or committee authorized, approved, or ratified the transaction;

(2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction; or

(3) the transaction was fair to the corporation.

(b) For purposes of this section, a director of the corporation has an indirect interest in a transaction if (1) another entity in which he has а material financial interest or in which he is a general partner is a party to the transaction or (2) another entity of which he is a director, officer, or trustee is a party to the transaction and the transaction is or should be considered by the board of directors of the corporation.

(c) For purposes of subsection (a) (1), a conflict of interest transaction is authorized, apor ratified proved, if it receives the affirmative vote of a majority of the directors on the board of directors (or on the committee) who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a director or indirect interest in the transaction does not affect the validity of any action taken under subsection (a) (1) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection.

(d) For purposes of subsection (a) (2), a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the shares entitled to be counted under this subsection. Shares owned by or voted under the control of a director who has a direct or indirect interest in the transaction, and shares owned by or voted under the control of an entity described in subsection (b)(1), may not be counted in a vote of shareholders to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (a)(2). The vote of those shares, however, is counted in determining whether the transaction is approved under other sections of these Regulations. majority of the shares, Α whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a guorum for the purpose of taking action under this section.

### 8.32. Loans to Directors.

(a) Except as provided by subsection (c), a corporation may not lend money to or guarantee the obligation of director of the corporation unless: (1) the particular loan or guarantee is approved by a majority of the votes represented by the outstanding voting shares of all classes, voting as a single voting group, except the votes of shares owned by or voted under the control of the benefited director; or

(2) the corporation's board of directors determines that the loan or guarantee benefits the corporation and either approves the specific loan or guarantee or a general plan authorizing loans and guarantees.

(b) The fact that a loan or guarantee is made in violation of this section does not affect the borrower's liability on the loan.

(c) This section does not apply to loans and guarantees authorized by statute regulating any special class of corporations.

# 8.33. Liability for Unlawful Distributions.

(a) A director who votes for or assents to a distribution made in violation of section 6.40 or the articles of incorporation is personally liable to the corporation for the amount of distribution that exceeds what could have been distributed without violating section 6.40 or the articles of incorporation if it is established that he did not perform his duties in compliance with section 8.30. In any proceeding commenced under this section, a director has all of the defenses ordinarily available to a director.

(b) A director held liable under section (a) for an unlawful distribution is entitled to contribution;

(1) from every other director who could be liable under subsection (a) for the unlawful distribution; and

(2) from each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of section 6.40 or the articles of incorporation.

(c) A proceeding under this section is barred unless it is commenced within two years after the date on which the effect of the distribution was measured under section 6.40(e) or (g).

### Subchapter D. Officers.

### 8.40. Required Officers.

(a) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(b) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(c) The bylaws or the board of directors shall delegate to one of the officers responsibility for preparing minutes of the directors' and shareholders' meeting and for authenticating records of the corporation.

(d) The same individual may simultaneously hold more than one office in a corporation.

#### 8.41. Duties of Officers.

Each officers has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers.

## 8.42. Standards of Conduct for Officers.

(a) An officer with discretionary authority shall discharge his duties under that authority:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or

(2) legal counsel, public accountants, or other personas as to matters the officer reasonably believes are within the person's professional or expert competence.

(c) An officer is not acting in

good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) An officer is not liable for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section.

## 8.43 Resignation and Removal of Officers.

(a) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is delivered unless the notice specifies a later effective date. If a resignation is made effective at a later date and the corporation accepts the future effective date, its board of directors provides that the successor does not take office until the effective date.

(b) A board of directors may remove any officer at any time with or without cause.

# 8.44. Contract Rights of Officers.

(a) The appointment of an officer does not itself create contract rights.

(b) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer.

### Subchapter E. Indemnification.

#### 8.50 Subchapter Definitions.

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

(2) "Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if his duties to the corporation also impose future on, or otherwise involve services by, him to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.

(3) "Expenses" include counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine (including an excise tax assessed with respect to an employee benefit plan), or reasonable expenses incurred with respect to a proceeding.

(5) "Official capacity" means:

(i) when used with respect to a director, the office of director in a corporation; and (ii) when used with res-

pect to an individual other than a director, as contemplated in section 8.56, the office in a corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. "Official capacity" does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

(6) "Party" includes an individual who was, is, or is threatened to be made a name defendant or respondent in a proceeding.

(7) "Proceeding" mean any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal.

### 8.51 Authority to Indemnify.

(a) Except as provided in subsection (d), a corporation may indemnify an individual made a party to a proceeding because he is or was a director against liability incurred in the proceeding if:

(1) he conducted himself in good faith; and

(2) he reasonably believed:

(i) in the case of conduct in his official capacity with the corporation, that his conduct was in its best interest; and

(ii) in all other cases, that his conduct was at least not opposed to its best interest; and

(3) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful.

(b) A director's conduct with respect to an employee benefit plan for a purpose he reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (a)(2)(ii).

(c) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(d) A corporation may not indemnify a director under this section.

(1) in connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(2) in connection with any other proceeding charging improper personal benefit to him, whether or not involving action in his official capacity, in which he was adjudged liable on the basis that personal benefit was improperly received by him.

(e) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

## 8.52 Mandatory Indemnification.

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which he was a party because he is or was a director of the corporation against reasonable expenses incurred by him in connection with the proceeding.

### 8.53 Advance for Expenses.

(a) A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

(1) the director furnishes the corporation a written affirmation of his good faith belief that he has met the standard of conduct described in section 8.51.

(2) the director furnishes the corporation a written undertaking, executed personally or on his behalf, to repay the advance if it is ultimately determined that he did not meet the standard of conduct; and

(3) a determination is made that the facts then known to those making the determination would not preclude indemnification under this subchapter.

(b) The undertaking required by subsection (a)(2) must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment. (c) Determinations and authorizations of payments under this section shall be made in the manner specified in section 8.55.

## 8.54. Court-Ordered Indemnification.

Unless a corporation's articles of incorporation provide otherwise, a director of the corporation who is a party to a proceeding may apply for indemnification to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court after giving any notice the court considers necessary may order indemnification if it determines:

(1) the director is entitled to mandatory indemnification under section 8.52, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification; or

(2) the director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not he met the standard of conduct set forth in section 8.51 or was adjudged liable as described in section 8.51 (d), but if he was adjudged so liable his indemnification is limited to reasonable expenses incurred.

## 8.55 Determination and Authorization of Indemnification.

(a) A corporation may not indemnify a director under section 8.51 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because he has met the standard of conduct set forth in section 8.51.

(b) The determination shall be made:

(1) by the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(2) if a quorum cannot be obtained under subdivision (1), by majority vote of a committee duly designated by the board of directors (in which designation directors who are parties may participate), consisting solely of two or more directors not at the time parties to the proceeding;

(3) by special legal counsel:

(i) selected by the board of directors or its committee in the manner prescribed in subdivision (1) or (2); or

(ii) if a quorum of the board of directors cannot be obtained under subdivision (1) and a committee cannot be designated under subdivision (2), selected by majority vote of the full board of director (in which selection directors who are parties may participate); or

(4) by the shareholders, but shares owned by or voted under the control of directors who are at the time parties to the proceeding may not be voted on the determination.

(c) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subsection (b)(3) to select counsel.

## 8.56. Indemnification of Officers, Employees, and Agents.

Unless a corporation's articles of incorporation provide otherwise:

(1) an officer of the corporation who is not a director is entitled to mandatory indemnification under section 8.52, and is entitled to apply for courtordered indemnification under section 8.54, in each case to the same extent as a director;

(2) the corporation may indemnify and advance expenses under this subchapter to an officer, employee, or agent of the corporation who is not a director to the same extent as to a director; and

(3) a corporation may also indemnify and advance expenses to an officer, employee, or agent who is not a director to the extent, consistent with public policy, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

### 8.57. Insurance.

A Corporation may purchase and maintain insurance on behalf of

an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit or other enterprise, plan, liability against asserted against or incurred by him in that capacity or arising from his status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify him against the same liability under section 8.51 or 8.52.

## 8.58. Application of Subchapter.

(a) A provision treating a corporation's indemnification of or advance for expenses to directors that is contained in its articles of incorporation, bylaws, a resolution of its shareholders or board of directors, or in a contract or otherwise, is valid only if and to the extent the provision is consistent with this subchapter. If articles of incorporation limit indemnification or advance for expenses, indemnification and advance for expenses are valid only to the extent consistent with the articles.

(b) This subchapter does not limit a corporation's power to pay or reimburse expenses incurred by a director in connection with his appearance as a witness in a proceeding at a time when he has not been made a named defendant or respondent to the proceeding.

#### CHAPTER 9

[Reserved]

CHAPTER 10. AMENDMENT OF AR-TICLES OF INCORPORATION AND BYLAWS

Subchapter A. Amendment of Articles of Incorporation.

#### 10.01. Authority to Amend.

(a) A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation or to delete a provision not required in the articles of incorporation. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

(b) A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend entitlement, or purpose or duration of the corporation.

## 10.02 Amendment by Board of Directors.

Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles of incorporation without shareholder action:

(1) to extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;

(2) to delete the names and addresses of the initial directors;

(3) to delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Registrar of Corporations;

(4) to change each issued and unissued authorized share of an outstanding class into a greater number of whole shares if the corporation has only shares of that class outstanding;

(5) to change the corporate name by substituting the word "corporation," "incorporated," "company," "limited," or the abbreviation "corp," "inc," "co.," or "ltd.," for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution for the name; or

(6) to make any other change expressly permitted by these Regulations to be made without shareholder action.

## 10.03 Amendment by Board of Directors and Shareholders.

(a) A corporation's board of directors may propose one or more amendments to the articles of incorporation for submission to the shareholders.

(b) For the amendment to be adopted:

(1) The board of directors must recommend the amendment to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the amendment; and

(2) the shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (e).

(c) The board of directors may condition its submission of the proposed amendment on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section 7.05. The notice of meeting must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

(e) Unless these Regulations, the articles of incorporation, or the board of directors (acting pursuant to subsection (c) require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by:

(1) a majority of the votes entitled to be cast on the amendment by any voting group with respect to which the amendment would create dissenters' rights; and

(2) the votes required by sections 7.25 and 7.26 by every

other voting group entitled to vote on the amendment.

# 10.04. Voting on Amendments by Voting Groups.

(a) The holders of the outstanding shares of a class are entitled to vote as a separate voting group (if shareholder voting is otherwise required by these Regulations) on a proposed amendment if the amendment would:

(1) increase or decrease the aggregate number of authorized shares of the class;

(2) effect an exchange or reclassification of all or part of the shares of the class into shares of another class;

(3) effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;

(4) change the designation, rights, preferences, or limitations of all or part of the shares of the class;

(5) change the shares of all or part of the class into a different number of shares of the same class;

(6) create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

(7) increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantial-

ly equal to the shares of the class;

(8) limit or deny an existing preemptive right of all or part of the shares of the class; or

(9) cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class.

(b) If a proposed amendment would affect a series of a class of shares in one or more of the ways described in subsection (a), the shares of that series are entitled to vote as a separate voting group on the proposed amendment.

(c) If a proposed amendment that entitles two or more series of shares to vote as separate voting groups under this section would affect those two or more series in the same or a substantially similar way, the shares of all the series so affected must vote together as a single voting group on the proposed amendment.

(d) A class or series of shares is entitled to the voting rights granted by this section although the articles of incorporation provide that the shares are nonvoting shares.

## 10.05. Amendment Before Issuance of Shares.

If a corporation has not yet issued shares, its incorporators or board of directors may adopt one or more amendments to the corporation's articles of incorporation.

## 10.06. Articles of Amendment.

A corporation amending its articles of incorporation shall deliver to the Registrar of Corporations for filing articles of amendment setting forth:

(1) the name of the corporation;

(2) the text of each amendment adopted;

(3) if an amendment provides for an exchange, classification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;

(4) the date of each amendment's adoption;

(5) if an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and that shareholder action was not required;

(6) if an amendment was approved by the shareholders:

(i) the designation, number of outstanding shares, number of votes entitled to be cast by each voting group entitled to vote separately on the amendment, and number of votes of each voting group indisputably represented at the meeting;

(ii) either the total number of votes cast for and against the amendment by each voting group entitled to vote separately on the amendment or the total number of undisputed votes cast for the amendment by each voting group was sufficient for approval by the voting group.

# 10.07. Restated Articles of Incorporation.

(a) A corporation's board of directors may restate its articles of incorporation at any time with or without shareholder action.

(b) The restatement may include one or more amendments to the articles. If the restatement includes an amendment requiring shareholder approval, it must be adopted as provided in section 10.03.

(c) If the board of directors submits a restatement for shareholder action, the corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section 7.05. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles.

(d) A corporation restating its articles of incorporation shall deliver to the Registrar of Corporations for filing articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate setting forth:

(1) whether the restatement contains an amendment to the articles requiring shareholder approval and, if it does not, that the board of directors adopted the restatement; or (2) if the restatement contains an amendment to the articles requiring shareholder approval, the information required by section 10.06.

(e) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(f) The Registrar of Corporations may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the certificate information required by subsection (d).

# 10.08. Amendment Pursuant to Reorganization.

(a) A corporation's articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by section 2.02.

(b) The individual or individuals designated by the court shall deliver to the Registrar of Corporations for filing articles of amendment setting forth:

(1) the name of the corporation;

(2) the text of each amendment approved by the court;

(3) the date of the court's order or decree approving the articles of amendment;

(4) the title of the reorganization proceeding in which the order or decree was entered; and

(5) a statement that the court had jurisdiction of the proceeding under federal statute.

(c) Shareholders of a corporation undergoing reorganization do not have dissenters' rights except as and to the extent provided in the reorganization plan.

(d) This section does not apply after entry of a final decree in the reorganization proceeding even thought the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.

### 10.09. Effect of Amendment.

An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than shareholders of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.

Subchapter B. Amendment of Bylaws.

10.20. Amendment by Board of Directors or Shareholders.

(a) A corporation's board of directors may amend or repeal

the corporation's bylaws unless:

(1) The articles of incorporation or these Regulations reserve this power exclusively to the shareholders in whole or part; or

(2) the shareholders in amending or repealing a particular bylaw provide expressly that the board of directors may not amend or repeal that bylaw.

(b) A corporation's shareholders may amend or repeal the corporation's bylaws even though the bylaws may also be amended or repealed by its board of directors.

## 10.21. Bylaws Increasing Quorum or Voting Requirement for Shareholders.

If authorized by the ar-(a) ticles of incorporation, the shareholders may adopt or amend a bylaw that fixes a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is required by these Regulations. The adoption or amendment of a bylaws that adds, changes, or deletes a greater quorum or voting requirement for shareholders must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

(b) A bylaw that fixes a greater quorum or voting requirement for shareholders under subsection(a) may not be adopted, amended, or repealed by the board of

directors.

10.22. Bylaw Increasing Quorum or Voting Requirement for Directors.

(a) A Bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended or repealed:

(1) if originally adopted by the shareholders, only by the shareholders;

(2) if originally adopted by the board of directors, either by the shareholders or by the board of directors.

(b) A bylaw adopted or amended by the shareholders that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended or repealed only by a specified vote of either the shareholders or the board of directors.

(c) Action by the board of directors under subsection (a)(2) to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors must meet the same requirement be quorum and by the vote adopted same required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

CHAPTER 11. MERGER AND SHARE EXCHANGE

11.01. Merger.

(a) One or more corporations may merge into another corporation if the board if directors of each corporation adopts and its shareholders (if required by section 11.03) approve a plan of merger.

(b) The plan of merger must set forth:

(1) the name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge;

(2) the terms and conditions of the merger; and

(3) the manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving or any other corporation or into cash or other property in whole or part.

(c) The plan of merger may set forth:

(1) amendments to the articles of incorporation of the surviving corporation; and

(2) other provisions relating to the merger.

#### 11.02. Share Exchange.

(a) A corporation may acquire all of the outstanding shares of one or more classes or series of another corporation if the board of directors of each corporation adopts and its shareholders (if required by section 11.03) approve the exchange.

(b) The plan of exchange must set forth:

(1) the name of the corporation whose shares will be acquired and the name of the acquiring corporation;

(2) the terms and conditions

#### of the exchange;

(3) the manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring or any other corporation or for cash or other property in whole or part.

(c) The plan of exchange may set forth other provisions relating to the exchange.

(d) This section does not limit the power of a corporation to acquire all or part of the shares of one or more classes or series of another corporation through a voluntary exchange or otherwise.

#### 11.03. Action on Plan.

(a) After adopting a plan of merger or share exchange, the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger (except as provided in subsection (g) or share exchange for approval by its shareholders.

(b) For a plan of merger or share exchange to be approved:

(1) the board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the plan; and

(2) the shareholders entitled to vote must approve the plan. (c) The board of directors may condition its submission of the proposed merger or share exchange on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section 7.05. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(e) Unless these Regulations, the articles of incorporation, the board of directors or (acting pursuant to subsection (c) require a greater vote or a vote by voting groups, the plan of merger or share exchange authorized must to be be approved by each voting group entitled to vote separately on the plan by a majority of all the votes entitled to be cast on the plan groups is required:

(f) Separate voting by voting groups is required:

(1) on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under section 10.04;

(2) on a plan of share exchange by each class or series included in the exchange, with each class or series constituting a separate voting group.

(g) Action by the shareholders

of the surviving corporation on a plan of merger is not required if:

(1) the articles of incorporation of the surviving corporation will not differ (except for amendments enumerated in section 10.02) from its articles before the merger;

(2) each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after;

(3) the number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversation of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than 20 percent the total number of voting of the surviving corporation outstanding immediately before the merger; and

(4) the number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversation of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than 20 percent total number of participating shares outstanding immediately before the merger.

(h) As used in subsection (g):

(1) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(2) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(i) After a merger or share exchange is authorized, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned (subject to any contractual rights), without further shareholder action, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors.

#### 11.04. Merger of Subsidiary.

(a) A parent corporation owning at least 90 percent of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent shall adopt a plan of merger that sets forth:

(1) the names of the parent and subsidiary; and

(2) the manner and basis of converting the shares of the subsidiary into shares, obligations, or other securities of the parent or any other corporation or into cash or other property in whole or part.

(c) The parent shall mail a copy or summary of the plan of merger to each shareholder of the subsidiary who does not waive the mailing requirement in writing.

(d) The parent may not deliver articles of merger to the Registrar of Corporations for filing until at least 30 days after the date it mailed a copy of the plan of merger to each shareholder of the subsidiary who did not waive the mailing requirement.

(e) Articles of merger under this section may not contain amendments to the articles of incorporation of the parent corporation (except for amendments enumerated in section 10.02).

# 11.05. Articles of Merger or Share Exchange.

(a) After a plan of merger or share exchange is approved by the shareholders, or adopted by the board of directors if shareholder approval is not required, the surviving or acquiring corporation shall deliver to the Registrar of Corporations for filing articles of merger or share exchange setting forth:

(1) the plan of merger or share exchange;

(2) if shareholder approval was not required, a statement to that affect;

(3) if approval of the shareholders of one or more corporations party to the merger or share exchange was required:

(i) the designation, number of outstanding shares, and number of votes entitled to be cast by each voting group entitled to vote separately on the plan as to each corporation; and (ii) either the total number of votes cast for and against the plan by each voting group entitled to vote separately on the plan or the total number of undisputed votes cast for the plan separately by each voting group and a statement that the number cast for the plan by each voting group was sufficient for approval by that voting group.

(b) A merger or share takes effect upon the effective date of the articles of merger or share exchange.

# 11.06. Effect of Merger or Share Exchange.

(a) When a merger takes effect:

(1) every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(2) the title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment;

(3) the surviving corporation has all liabilities of each corporation party to the merger;

(4) a proceeding pending against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;

(5) the articles of incorporation of the surviving corporation are amended to the extent provided in the plan of merger;

(6) the shares of each corporation party to the merger that are to be converted into shares, obligations, or other securities of the surviving or any other corporation into cash or other property are converted, and the former holders of the shares are entitled only to the rights provided in the articles of merger or to their rights under chapter 13.

(b) When a share exchange takes effect, the shares of each acquired corporation are exchanged as provided in the plan, and the former holders of the shares are entitled only to the exchange rights provided in the articles of share exchange or to their rights under chapter 13.

### 11.07. Merger or Share Exchange with Foreign Corporation.

(a) One or more foreign corporations may merge or enter into a share exchange with one or more domestic corporations if:

(1) in a merger, the merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger;

(2) in a share exchange, the corporation whose shares will be acquired is a domestic corporation, whether or not a share exchange is permitted by the law of the state or country under whose law the acquiring corporation is incorporated;

(3) the foreign corporation complies with section 11.05 if it is the surviving corporation of the merger or acquiring corporation of the share exchange, and

(4) each domestic corporation complies with the applicable provisions of sections 11.01 through 11.04 and, if it is the surviving corporation of the merger or acquiring corporation of the share exchange, with section 11.05.

(b) Upon the merger or share exchange taking effect, the surviving foreign corporation of a merger and the acquiring foreign corporation of a share exchange is deemed:

(1) to appoint the Registrar of Corporations as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders of each domestic corporation party to the merger or share exchange; and

(2) to agree that it will promptly pay to the dissenting shareholder of each domestic corporation party to the merger or share exchange the amount, if any, to which they are entitled under chapter 13.

(c) This section does not limit the power of a foreign corporation to acquire all or part of the shares of one or more classes or series of a domestic corporation through a voluntary exchange or otherwise.

### CHAPTER 12. SALE OF ASSETS

12.01. Sale of Assets in Regular Course of Business and Mortgage of Assets.

(a) A corporation may, on the

COMMONWEALTH REGISTER VOLUME 12 NO. 5 MAY 15, 1990 PAGE 6969

and

terms and conditions and for the consideration determined by the board of directors:

(1) sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of business;

(2) mortgage, pledge, dedicate to the repayment of indebtedness (whether with or without recourse), or otherwise encumber any or all of its property whether or not in the usual and regular course of business; or

(3) transfer any or all of its property to a corporation all the shares of which are owned by the corporation.

(b) Unless the articles of incorporation require it, approval by the shareholders of a transaction described in subsection (a) is not required.

## 12.02 Sale of Assets Other Than in Regular Course of Business.

(a) A corporation may sell, lease; exchange, or otherwise dispose of all, or substantially all, of its property (with or without the good will), otherwise that in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approved the proposed transaction.

(b) For a transaction to be authorized:

(1) the board of directors must recommend the proposed transaction to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the submission of the proposed transaction; and

(2) the shareholders entitled to vote must approve the transaction.

(c) The board of directors may condition its submission of the proposed transaction on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders meeting in accordance with section 7.05. 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, the property of the corporation and contain of be accompanied by a description of the transaction.

(e) Unless the articles of incorporation or the board of directors (acting pursuant to subsection (c) require a greater vote or a vote by voting groups, the transaction to be authorized must be approved by a majority of all the votes entitled to be cast on the transaction.

(f) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned (subject to any contractual rights) without further share-

#### holder action.

(g) A transaction that constitutes a distribution is governed by section 6.40 and not by this section.

#### CHAPTER 13. DISSENTERS' RIGHTS

Subchapter A. Right to Dissent and Obtain Payment for Shares.

### 13.01. Definitions.

In this chapter:

(1) "Corporation" means the issuer of the shares held by a dissenter before the corporate action, or the surviving or acquiring corporation by merger or share exchange of that issuer.

(2) "Dissenter" means a shareholder who is entitled to dissent from corporate action under section 13.02 and who exercises that right when and in the manner required by sections 13.20 through 13.28.

(3) "Fair value," with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.

(4) "Interest" means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances.

(5) "Record shareholder"

f....-

means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(6) "Beneficial shareholder" means the person who is a beneficial owner of shares held in a voting trust or by a nominee as the record shareholder.

(7) "Shareholder" means the record shareholder or the bene-ficial shareholder.

### 13.02. Right to Dissent.

(a) A shareholder is entitled to dissent from, and obtain payment of the fair value of his shares in the event of, any of the following corporate actions:

(1) consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by section 11.03 or the articles of incorporation and the shareholder is entitled to vote on the merger or (ii) if the corporation is a subsidiary that is merged with its parent under section 11.04;

(2) consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan;

(3) consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote in the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale for cash pursuant to a plan by which all of substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

(4) an amendment of the articles of incorporation that materially and adversely affects rights in respect of a dissenter's shares because it:

(i) alters or abolishes a preferential right of the shares;

(ii) creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the shares;

(iii) alters or abolishes a preemptive right of the holder of the shares to acquire shares or other securities;

(iv) excludes or limits the right of the shares to vote on any matter, or to cumulate votes, other than a limitation by dilution through issuance of shares or other securities with similar voting rights; or

(v) reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under section 6.04; or

(5) any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are en

ć ...-

titled to dissent and obtain payment for their shares.

(b) A shareholder entitled to dissent and obtain payment for his shares under this chapter may not challenge the corporate action creating his entitlement unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

## 13.03. Dissent by Nominees and Beneficial Owners.

(a) A record shareholder may assert dissenters' right as to fewer than all the shares registered in his name only if he dissents with respect to all shares beneficially owned by any one person and notifies the corporation in writing of the name and address of each person on whose behalf he asserts dissenters' rights. The rights of a partial dissenter under this subsection are determined as if the shares as to which he dissents and his other shares were registered in the names of different shareholders.

(b) A beneficial shareholder may assert dissenters' rights as to shares held on his behalf only if:

(1) he submits to the corporation the record shareholder's written consent to the dissent not later than the time the beneficial shareholder asserts dissenters' rights; and

(2) he does so with respect to all shares of which he is the beneficial shareholder or over which he has power to direct the vote. Subchapter B. Procedure for Exercise of Dissenters' Rights.

13.20. Notice of Dissenters' Rights.

(a) If proposed corporate action creating dissenters' rights under section 13.02 is submitted to a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this chapter and be accompanied by a copy of this chapter.

(b) If corporate action creating dissenters' rights under section 13.02 is taken without a vote of shareholders, the corporation shall notify in writing all shareholders entitled to assert dissenters' rights that the action was taken and send them the dissents' notice described in section 13.22.

# 13.21. Notice of Intent to Demand Payment.

If proposed corporate ac-(a) tion creating dissenters' rights under section 13.02 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights (1) must deliver to the corporation before the vote is taken written notice of his intent to demand payment for his shares if the proposed action is effectuated and (2) must not vote his shrews in favor of the proposed action.

(b) A shareholder who does not satisfy the requirements of

subsection (a) is not entitled to payment for his shares under this chapter.

### 13.22. Dissenters' Notice.

(a) If proposed corporate action creating dissenters' rights under section 13.02 is authorized at a shareholders' meeting, the corporation shall deliver a written dissenters' notice to all shareholders who satisfied the requirements of section 13.21.

(b) The dissenters' notice must be sent no later than 10 days after the corporate action was taken, and must:

(1) state where the payment demand must be sent and where and when certificates for certificated shares must be deposited;

(2) inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(3) supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not he acquired beneficial ownership of the shares before that date;

(4) set a date by which the corporation must receive the payment demand, which date may not be fewer than 30 nor more than 60 days after the date the subsection (a) notice is delivered; and

(5) be accompanied by a copy

#### of this chapter.

### 13.23. Duty to Demand Payment.

(a) A shareholder sent a dissenters' notice described in section 13.22 must demand payment, certify whether he acquired beneficial ownership of the shares before the date required to be set forth in the dissenters' notice pursuant to section 13.22(b)(3), and deposit his certificates in accordance with the terms of the notice.

(b) The shareholder who demands payment and deposits his shares under section (a) retains all other rights of a shareholder until there rights are cancelled or modified by the taking of the proposed corporate action.

(c) A shareholder who does not demand payment or deposit his share certificates where required, each by the date set in the dissenters' notice, is not entitled to payment for his shares under this chapter.

#### 13.24. Share Restrictions.

(a) The corporation may restrict the transfer of uncertificated shares from the date the demand for their payment is received until the proposed corporate action is taken or the restrictions released under section 13.26.

(b) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until these rights are cancelled or modified by the taking of the proposed corporate action.

## 13.25. Payment.

(a) Except as provided in section 13.27, as soon as the proposed corporate action is taken, or upon receipt of a payment demand, the corporation shall pay each dissenter who complied with section 13.23 the amount the corporation estimates to be the fair value of his shares, plus accrued interest.

(b) The payment must be accompanied by:

(1) the corporation's balance sheet as of the end of a fiscal year ending not more than 16 months before the date of payment, an income statement for that a year, a statement of changes in shareholders' equity for that year and the latest available interim financial statements, if any;

(2) a statement of the corporation's estimate of the fair value of the shares;

(3) an explanation of how the interest was calculated;

(4) a statement of the dissenter's right to demand payment under section 13.28; and

(5) a copy of this chapter.

#### 13.26 Failure to Take Action.

(a) If the corporation does not take the proposed action within 60 days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release the transfer restrictions imposed on uncertificated shares. (b) If after returning deposited certificates and releasing transfer restrictions, the corporation takes the proposed action, it must send a new dissenters' notice under section 13.22 and repeat the payment demand procedure.

## 13.27. After-acquired Shares.

(a) A corporation may elect to withhold payment required by section 13.25 from a dissenter unless he was the beneficial owner of the shares before the date set forth in the dissenters' notice as the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action.

(b) To the extent the corporation elects to with payments under subsection (a), after taking the proposed corporate action, it shall estimate the fair value of the shares, plus accrued interest, and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of his demand. The corporation shall send with its offer a statement of its estimate of the fair value of the share, an explanation of how the interest was calculated, and a statement of the dissenter's right to demand payment under section 13.28.

## 13.28. Procedure if Shareholder Dissatisfied with Payment of Offer.

(a) A dissenter may notify the corporation in writing of his own estimate of the fair value

of his shares and amount of interest due, and demand payment of his estimate (less any payment under section 13.25), or reject the corporation's offer under section 13.27 and demand payment of the fair value of his shares and interest due, if:

(1) the dissenter believes that the amount paid under section 13.25 or offered under section 13.27 is less than the fair value of his shares or that the interest due is incorrectly calculated;

(2) the corporation, fails
to make payment under section
13.25 within 60 days after the
date set for demanding payment;
or

(3) the corporation, having failed to take the proposed action, does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within 60 days after the date set for demanding payment.

(b) A dissenter waives his right to demand payment under this section unless he notifies the corporation of his demand in writing under subsection (a) within 30 days after the corporation made or offered payment for his shares.

## Subchapter C. Judicial Appraisal of Shares.

## 13.30. Court Action.

(a) If a demand for payment under section 13.28 remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the 60-day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.

(b) The corporation shall commence the proceeding in the Commonwealth Superior Court.

(c) The corporation shall make all dissenters (whether or not residents of the Commonwealth) whose demands remain unsettled parties to the proceeding as in an action against their shares and all parties must be served with a copy of the petition. Nonresidents may be served by registered or certified mail or by publication as provided by law.

(d) The jurisdiction of the court in which the proceeding is commenced under subsection (b) is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them, or in any amendment to it. The dissenters are entitled to the same discovery rights as parties in other civil proceedings.

(e) Each dissenter made a party to the proceeding is entitled to judgment (1) for the amount, if any, by which the court finds the fair value of his shares, plus interest, exceeds the amount paid by the corporation or (2) for the fair value, elected to withhold payment under section 13.271

# 13.31. Court Costs and Counsel Fees.

(a) The court in an appraisal proceeding commenced under section 13.30 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess costs against all or some of the dissenters, in amounts the court finds equitable, to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment under section 13.28.

(b) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(1) against the corporation and in favor of any or all dissenters if the court finds the corporation did not substantially comply with the requirements of sections 13.20 through 13.28; or

(2) against either the corporation or a dissenter in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter.

(c) If the court finds that the services of counsel for any

dissenter were of substantial benefit to other dissenters similarly situated, and that the fees for those services should not be assessed against the corporation, the court may award to these counsel reasonable fees to be paid out of the amounts awarded the dissenters who were benefited.

#### CHAPTER 14. DISSOLUTION

Subchapter A. Voluntary Dissolution.

14.01. Dissolution by Incorporators or Initial Directors.

A majority of the incorporators or initial directors of a corporation that has not issued shares or has not commenced business may dissolve the corporation by delivering to the Registrar of Corporations for filing articles of dissolution that set forth:

(1) the name of the corporation;

(2) the date of its incorporation;

(3) either (i) that none of the corporation's shares has been issued or (ii) that the corporation has not commenced business;

(4) that no debt of the corporation remains unpaid;

(5) that the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued; and

(6) that a majority of the incorporators or initial directors authorized the dissolution.

#### 14.02. Dissolution by Board of Directors and Shareholders.

(a) A corporation's board of directors may propose dissolution for submission to the shareholders.

(b) For a proposal to dissolve to be adopted:

(1) the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholder; and

(2) the shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (e).

(c) The board of directors may condition its submission of the proposal for dissolution on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with section 7.05. The notice must also state that the purpose, or one of the purposes, of the meeting is to considered dissolving the corporation.

(e) Unless the articles of incorporation or the board of directors (acting pursuant to subsection (c) require a greater vote or a vote by voting groups, the proposal to dissolve to be adopted must be approved by a majority of all the votes entitled to be cast on that proposal.

COMMONWEALTH REGISTER VOLUME 12 NO. 5 MAY 15, 1990 PAGE 6977

#### 14.03. Articles of Dissolution.

(a) At any time after dissolution is authorized, the corporation may dissolve by delivering to the Registrar of Corporations for filing articles of dissolution setting forth:

(1) the name of the corporation;

(2) the date dissolution was authorized;

(3) if dissolution was approved by the shareholders:

(i) the number of votes entitled to be cast on the proposal to dissolve; and

(ii) either the total number of votes cast for and against dissolution or the total number of undisputed votes cast for dissolution and a statement that the number cast for dissolution was sufficient for approval.

(4) If voting by voting groups was required, the information required by subparagraph
(3) must be separately provided for each voting group entitled to vote separately on the plan to dissolve.

(b) A corporation is dissolved upon the effective date of its articles of dissolution.

14.04. Revocation of Dissolution.

(a) A corporation may revoke its dissolution within 120 days of its effective date.

(b) Revocation of dissolution must be authorized in the same manner as the dissolution was authorized unless that authorization permitted revocation by action of the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder action.

(c) After the revocation of dissolution is authorized, the corporation may revoke the dissolution by delivering to the Registrar of Corporations for filing articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:

(1) the name of the corporation;

(2) the effective date of the dissolution that was revoked;

(3) the date that the revocation of dissolution was authorized;

(4) if the corporation's board of directors (or incorporators) revoked the dissolution, a statement to that effect;

(5) if the corporation's board of directors revoked a dissolution authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and

(6) if shareholder action was required to revoke the dissolution, the information required by section 14.03(a)(3) or (4).

(d) Revocation of dissolution is effective upon the effective date of the articles of revocation of dissolution.

(e) When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the

dissolution and the corporation resumes carrying on this business as if dissolution had never occurred.

#### 14.05. Effect of Dissolution.

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

(1) collecting its assets;

(2) disposing of its properties that will not be distributed in kind to its shareholders;

(3) discharging or making provision for discharging its liabilities;

(4) distributing its remaining property among its shareholders according to their interests; and

(5) doing every other act necessary to wind up and liquidate its business and affairs.

(b) Dissolution of a corporation does not:

(1) transfer title to the corporation's property;

(2) prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;

(3) subject its directors or officers to standards of conduct different from those prescribed in chapter 8;

(4) change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;

(5) prevent commencement of a proceeding by or against the corporation in its corporate name;

(6) abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or

(7) terminate the authority of the registered agent of the corporation.

### 14.06. Known Claims Against Dissolved Corporation.

(a) A dissolved corporation may dispose of the known claims against it by following the procedure described in this section.

(b) The dissolved corporation shall notify its known claimants in writing of the dissolution at any time after its effective date. The written notice must:

(1) describe information that must be included in a claim;

(2) provide a mailing address where a claim may be sent;

(3) state the deadline, which may not be fewer than 120 days from the effective date of the written notice, by which the dissolved corporation must receive the claim; and

(4) state that the claim will be barred in not received by the deadline.

(c) A claim against the dissolved corporation is barred:

(1) if a claimant who was given written notice under subsection (b) does not deliver claim to the dissolved corporation by the deadline; (2) if a claimant whose claim was rejected by the dissolved corporation does not commence a proceeding to enforce the claim within 90 days from the effective date of the rejection notice.

(d) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

#### 14.07. Unknown Claims Against Dissolved Corporation.

(a) A dissolved corporation may also publish notice of its dissolution and request that persons with claims against the corporation present them in accordance with the notice.

(b) The notice must:

(1) be published one time in a newspaper of general circulation in the Commonwealth;

(2) describe the information that must be included in al claim and provide a mailing address where the claim may be sent; and

(3) state that a claim against the corporation will be barred unless a proceeding to enforce the claim is commenced within five years after the publication of the notice.

(c) If the dissolved corporation publishes a newspaper notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved corporation within five years after the publication date of the newspaper notice:

(1) a claimant who did not receive written notice under section 14.06;

(2) a claimant whose claim was timely sent to the dissolved corporation but not acted on;

(3) a claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) A claim may be enforced under this section:

(1) against the dissolved corporation, to the extent of its undistributed assets; or

(2) if the assets have been distributed in liquidation, against a shareholder of the dissolved corporation to the extent of his pro rata share of the claim or the corporate assets distribute to him in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to him.

Subchapter B. Administrative Dissolution.

#### 14.20. Grounds for Administrative Dissolution.

(a) The Registrar of Corporations may commence a proceeding under section 14.21 to administratively dissolve a corporation if:

(1) the corporation does not pay within 60 days after they are due any fees or penalties imposed by these regulations or other law; (2) the corporation does not deliver its annual report to the Registrar of Corporations for 60 days or more;

(3) the corporation is without a registered agent, or registered agent or registered office in the Commonwealth for 60 days or more;

(4) the corporation does not notify the Registrar of Corporations within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued;or

(5) the corporation's period of duration stated in its articles of incorporation expires.

#### 14.21. Procedure for and Effect of Administrative Dissolution.

(a) If the Registrar of Corporations determines that one or more grounds exist under section 14.20 for dissolving a corporation, he shall serve the corporation with written notice of his determination under section 5.04.

(b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Registrar of Corporations that each ground determined by the Registrar of Corporations does not exist within 60 days after service of the notice is perfected under section 5.04, the Registrar of Corporations shall administratively dissolve the corporation by signing a certidissolution ficate of that recites the ground or grounds for dissolution and its effec

tive date. The Registrar of Corporations shall file the original of the certificate and serve a copy on the corporation under section 5.04.

(c) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under section 14.05 and notify claimants under sections 14.06 and 14.07.

(d) The administrative dissolution of a corporation does not terminate the authority of its registered agent.

#### 14.22. Reinstatement Following Administrative Dissolution.

(a) A corporation administratively dissolved under section 14.21 may apply to the Registrar of Corporations for reinstatement within two years after the effective date of dissolution. The application must:

(1) recite the name of the corporation and the effective date of its administrative dis-solution;

(2) state that the grounds for dissolution either did not exist or have been eliminated;

(3) state that the corporation's name satisfies the requirements of section 4.01; and

(4) contain a certificate from the Department of Finance reciting that all taxes owed by the corporation have been paid.

(b) If the Registrar of Corporations determines that the application contains the information required by subsection (a) and that the information is correct, he shall cancel the certificate of dissolution and prepare a certificate of reinstatement that recites his determination and the effective date of reinstatement, file the original of the certificate, and serve a copy on the corporation under section 5.04.

(c) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

### 14.23. Appeal From Denial of Reinstatement.

(a) If the Registrar of Corporations denies a corporation's application for reinstatement following administrative dissolution, he shall serve the corporation under section 5.04 with a written notice that explains the reason or reasons for denial.

(b) The corporation may appeal the denial of reinstatement to the Commonwealth Superior court within 30 days after service of the notice of denial is perfected. The corporation appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the Registrar of Corporation's certificate of dissolution, the corporation's application for reinstatement, and the Registrar of Corporation's notice of denial.

(c) The court may summarily order the Registrar of Corporations to reinstate the dissolved corporation or may take other action the court considers appropriate.

(d) The court's final decision may be appealed as in other civil proceedings.

Subchapter C. Judicial Dissolution.

14.30. Grounds for Judicial Dissolution.

The Commonwealth Superior court may dissolve a corporation:

(1) in a proceeding by the attorney general if it is established that:

(i) the corporation obtained its articles of incorporation through fraud; or

(ii) the corporation has continued to exceed or abuse the authority conferred upon it by law;

(2) in a proceeding by a shareholder if it is established that:

(i) the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered, or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;

(ii) the directors or those in control of the corporation have acted, are acting, or

COMMONWEALTH REGISTER VOLUME 12 NO. 5 MAY 15, 1990 PAGE 6982

will act in a manner that is legal, oppressive, or fraudulent;

(iii) the shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired; or

(iv) the corporate assets are being misapplied or wasted;

(3) in a proceeding by a creditor if it is established that:

(i) the creditor's claim has been reduced to judgement, the execution on the judgement returned unsatisfied, and the corporation is insolvent; or

(ii) the corporation has admitted in writing that the creditor's claim's due and owing and the corporation is insolvent; or

(4) in a proceeding by the corporation to have its voluntary dissolution continued under court supervision.

# 14.31. Procedure for Judicial Dissolution.

(a) It is not necessary to make shareholders parties to proceeding to dissolve a corporation unless relief is sought against them individually.

(b) 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 business of the corporation until a full hearing can be held.

#### 14.32. Receivership or Custodianship.

The court in a judicial (a) proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate, or one or more custodians to manage, the business and affairs of the corporation. The court shall hold a hearing, after notifying all parties to the proceeding and any interested persons designated by the court, before appointing a receiver or custodian. The court appointing a receiver or custodian has exclusive jurisdiction over the corporation and all of its property wherever located.

(b) The court may appoint an individual or a domestic or foreign corporation (authorized to transact business in the Commonwealth) as a receiver or custodian. The court may require the receiver or custodian to post bond, with or without sureties, in an amount the court directs.

(c) The court shall describe the powers and duties of the receiver or custodian in its appointing order, which may be amended from time to time. Among other powers:

(1) the receiver (i) may dispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and (ii) may sue and defend in his own name as receiver of the corporation in all courts of the Commonwealth;

(2) the custodian may exercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.

d) The court during a receivership may redesignate the receiver a custodian, and during a custodianship may redesignate the custodian a receiver, if doing so is in the best interests of the corporation, its shareholders, and creditors.

(e) The court from time to time during the receivership or custodianship may order compensation paid and expense disbursements or reimbursements made to the receiver or custodian and his counsel from the assets of the corporation or proceeds from the sale of the assets.

#### 14.33. Decree of Dissolution.

(a) If after a hearing the court determines that one or more grounds for judicial dissolution described in section 14.30 exist, it may enter a decree dissolving the corporation and specifying the effective date of the dissolution, and the clerk of the court shall deliver a certified copy of the decree to the Registrar of Corporations, who shall file it.

(b) After entering the decree of dissolution, the court shall direct the winding up and li quidation of the corporation's business and affairs in accordance with section 14.05 and the notification of claimants in accordance with sections 14.06 and 14.07.

#### Subchapter D. Miscellaneous.

# 14.40. Deposit With Director of the Department of Finance.

Assets of a dissolved corporation that should be transferred to a creditor, claimant, or shareholder of the corporation who cannot be found or who is not competent to receive them shall be reduced to cash and deposited with the Director of the Department of Finance or other appropriate Commonwealth official for safekeeping. When claimant, the creditor, or shareholder furnishes satisfactory proof of entitlement to the amount deposited, the Director of the Department of Finance or other appropriate Commonwealth official shall pay him or his representative that amount.

#### CHAPTER 15. FOREIGN CORPORATIONS

### Subchapter A. Certificate of Authority.

#### 15.01. Authority to Transact Business Required.

(a) A foreign corporation may not transact business in the Commonwealth until it obtains a certificate of authority from the Registrar of Corporations.

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a):

(1) maintaining, defending, or settling any proceeding;

(2) holding meetings of the board of directors or shareholders or carrying on their activities concerning internal corporate affair;

(3) maintaining bank
accounts;

(4) maintaining offices or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositaries with respect to those securities;

(5) selling through independent contractors;

(6) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside the Commonwealth before they become contracts;

(7) creating or acquiring indebtedness, mortgages, and security interests in real or personal property;

(8) securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

(9) owning, without more, real or personal property;

(10) conducting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of a like nature;

(11) transacting business in interstate commerce.

(c) The list of activities in subsection (b) is not exhaustive.

#### 15.02. Consequences of Transacting Business Without Authority.

(a) A foreign corporation transacting business in the Commonwealth without a certificate of authority may not maintain a proceeding in any court in the Commonwealth until it obtains a certificate of authority.

(b) The successor to a foreign corporation that transacted business in the Commonwealth without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in the Commonwealth until the foreign corporation or its successor obtains a certificate of authority.

(c) A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.

(d) A foreign corporation is liable for a civil penalty of \$ 100. for each day, but not to exceed a total of \$ 5,000. for each year, it transacts business in the Commonwealth without a certificate of authority. The attorney general may collect all penalties due under this subsection.

COMMONWEALTH REGISTER VOLUME 12 NO. 5 MAY 15, 1990 PAGE 6985

(e) Notwithstanding subsections (a) and (b), the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in the Commonwealth.

#### 15.03. Application for Certificate of Authority.

(a) A foreign corporation may apply for a certificate of authority to transact business in the Commonwealth by delivering an application to the Registrar of Corporations for filing. The application must set forth:

(1) the name of the foreign corporation or, if its name is unavailable for use in the Commonwealth, a corporate name that satisfies the requirements of section 15.06;

(2) the name of the state or country under whose law it is incorporated;

(3) its date of incorporation and period of duration;

(4) the street address of its principal office;

(5) the address of its registered office in the Commonwealth and the name of its registered agent at that office; and

(6) the names and usual business addresses of its current directors and officers.

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the secretary of state or like official of the state or country under whose law it is incorporated.

# 15.04. Amended Certificate of Authority.

(a) A foreign corporation authorized to transact business in the Commonwealth must obtain an amended certificate of authority from the Registrar of Corporations if it changes:

(1) its corporate name;

(2) the period of its duration; or

(3) the state or country of its incorporation.

(b) The requirements of section 15.03 for obtaining an original certificate of authority apply to obtaining an amended certificate under this section.

# 15.05. Effect of Certificate of Authority.

(a) A certificate authorizes the foreign corporation to which it is issued to transact business in the Commonwealth subject, however, to the right of the Commonwealth to revoke the certificate as provided in these Regulations.

(b) A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by these Regulations are subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(c) These Regulations do not authorize the Commonwealth to regulate the organization or internal affairs of a foreign corporation authorized to transact business in the Commonwealth:

#### 15.06. Corporate Name of Foreign Corporation.

(a) If the corporate name of a foreign corporation does not satisfy the requirements of section 4.01, the foreign corporation to obtain or maintain a certificate of authority to transact business in the Commonwealth:

(1) may add the word "corporation," "incorporated," "company," or "limited," or the abbreviation "corp," "inc.," "inc.," "co.," or "ltd.," to its corporate name for use in this; or

(2) may use a fictitious name to transact business in the Commonwealth if its real name is unavailable and it delivers to the Registrar of Corporations for filing a copy of the resolution of its board of directors, certificated by its secretary, adopting the fictitious name.

(b) Except as authorized by subsections (c) and (d), the corporate name (including a fictitious name) of a foreign corporation must be distinguishable upon the records of the Registrar of Corporations from:

(1) the corporate name of a corporation incorporated or authorized to transact business in the Commonwealth:

(2) a corporate name reserved or registered under section 4.02. or 4.03;

(3) the fictitious name of another foreign corporation

authorized to transact business in the Commonwealth; and

(4) the corporate name of a not-for-profit corporation incorporated or authorized to transact business in the Commonwealth.

(c) A foreign corporation may apply to the Registrar of Corporations for authorization to use in the Commonwealth the name of another corporation (incorporated or authorized to transact business in this) that is not distinguishable upon his records from the name applied for. The Registrar of Corporations shall authorize use of the name applied for if:

(1) the other corporation consents to the use in writing and submits an undertaking in form satisfactory to the Registrar of Corporations to change its name to a name of the applying corporation; or

(2) the applicant delivers to the Registrar of Corporations a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in the Commonwealth.

(d) A foreign corporation may use in the Commonwealth the name (including the fictitious name) of another domestic or foreign corporation that is used in the Commonwealth if the other corporation is incorporated or authorized to transact business in the Commonwealth and the foreign corporation:

(1) has merged with the other corporation;

(2) has been formed by reor-

ganization of the other corporation; or

(3) has acquired all or substantially all of the assets, including the corporate name, of the other corporation.

(e) If a foreign corporation authorized to transact business in the Commonwealth changes its corporate name to one that does not satisfy the requirements of section 4.01, it may not transact business in the Commonwealth under the changed name until it adopts a name satisfying the requirements of section 4.01 and obtains an amended certificate of authority under section 15.04.

#### 15.07. Registered Office and Registered Agent of Foreign Corporation.

Each foreign corporation authorized to transact business in the Commonwealth must continuously maintain in the Commonwealth:

(1) a registered office that may be the same as any of its places of business; and

(2) a registered agent, who may be:

(i) an individual who resides in the Commonwealth and whose business office is identical with the registered office;

(ii) a domestic corporation or not-for-profit domestic corporation whose business office is identical with the registered office; or

(iii) a foreign corporation or foreign not-for-profit corporation authorized to transact business in the Commonwealth whose business office is identical with the registered office.

#### 15.08. Change of Registered Office or Registered Agent of Foreign Corporation.

(a) A foreign corporation authorized to transact business in the Commonwealth may change its registered office or registered agent by delivering to the Registrar for filing a statement of change that sets forth:

(1) its name;

(2) the street addresses of its current registered office;

(3) if the current registered office is to be changed, the street address of its new registered office;

(4) the name of its current registered agent;

(5) if the current registered agent is to be changed, the name of its new registered agent and the new agent's written consent (either on the statement or attached to it) to the appointment; and

(6) that after the change or changes are made, the street addresses of its registered office and the business office of its registered agent will be identical.

(b) If a registered agent changes the mailing address or locations of his business office, he may change the mailing address or location of the registered office of any foreign corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Registrar of Corporations for filing a statement of change that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

#### 15.09. Resignation of Registered Agent of Foreign Corporation.

(a) The registered agent of a foreign corporation may resign his agency appointment by signing and delivering to the Registrar of Corporations for filing the original and two exact or conformed copies of a statement of resignation. The statement of resignation may include a statement that the registered office is also discontinued.

(b) After filing the statement, the Registrar of Corporations shall attach the filing receipt to one copy and mail the copy and receipt to the registered office if not discontinued. The Registrar of Corporations shall mail the other copy to the foreign corporation at its principal office address shown in its most recent annual report.

(c) The agency appointment is terminated, and the registered office discontinued if so provided, on the 31st day after the date on which the statement was filed.

15.10. Service on Foreign Corporation.

(a) The registered agent of a foreign corporation authorized to transact business in the Commonwealth is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation.

(b) A foreign corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the foreign corporation at its principal office shown in its application for a certificate of authority or in its most recent annual report if the foreign corporation:

(1) has no registered agent or its registered agent cannot with reasonable diligence be served;

(2) has withdrawn from transacting business in the Commonwealth under section 15.20; or

(3) has had its certificate of authority revoked under section 15.31.

(c) Service is perfected under subsection (b) at the earliest of:

(1) the date the foreign corporation receives the mail:

(2) the date shown on the return receipt, if signed on behalf of the foreign corporation; or

(3) five days after its deposit in the United States Mail, as evidenced by the postmark if mailed postpaid and correctly addressed.

#### Subchapter B. Withdrawal.

#### 15.20 Withdrawal of Foreign Corporation.

(a) A foreign corporation authorized to transact business in the Commonwealth may not withdraw from the Commonwealth until it obtains a certificate of withdrawal from the Registrar of Corporations.

(b) A foreign corporation authorized to transact business in the Commonwealth may apply for a certificate of withdrawal by delivering an application to the Registrar of Corporations for filing. The application must set forth:

(1) the name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) that it is not transacting business in the Commonwealth and that it surrenders its authority to transact business in the Commonwealth;

(3) that it revokes the authority of its registered agent to accept service on its behalf and appoints the Registrar of Corporations as its agent for service of process in any proceeding based on a cause of action during the time it was authorized to transact business in the Commonwealth;

(4) a mailing address to which the Registrar of Corporations may mail a copy of any process served on him under subdivision (3); and

(5) a commitment to notify the Registrar of Corporations in the future of any change in its mailing address.

(c) After the withdrawal of the corporation is effective, service of process on the Registrar of Corporations under this section is service on the foreign corporation. Upon receipt of process, the Registrar of Corporations shall mail a copy of the process to the foreign corporation at the mailing address set forth under subsection (b).

#### Subchapter C. Revocation of Certificate of Authority.

#### 15.30. Grounds for Revocation.

The Registrar of Corporations may commence a proceeding under section 15.31 to revoke the certificate of authority of a foreign corporation authorized to transact business in the Commonwealth if:

(1) the foreign corporation does not deliver its annual report to the Registrar of Corporations within 60 days after it is due;

(2) the foreign corporation does not pay within 60 days after they are due any fees or penalties imposed by these Regulations or other law;

(3) the foreign corporation is without a registered agent or registered office in the Commonwealth for 60 days or more;

(4) the foreign corporation does not inform the Registrar of Corporations under section 15.08 or 15.09 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation, or discontinuance;

(5) an incorporator, director, officer, or agent of the foreign corporation signed a document be delivered to the Registrar of Corporations for filing;

(6) the Registrar of Corporations receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger.

# 15.31. Procedure for and Effect of Revocation.

(a) If the Registrar of Corporations determines that one or more grounds exist under section 15.30 for revocation of a certificate of authority, he shall serve the foreign corporation with written notice of his determination under section 15.10.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Registrar of Corporations that each ground determined by the Registrar of Corporations does not exist within 60 days after service of the notice is perfected under section 15.10, the Registrar of Corporations may revoke the foreign corporation's certificate of authority by signing a certificate of revocation that recites the ground or grounds for revocation and its effective date. The Registrar of Corporations shall file the original of the certificate and serve a copy on the foreign corporation under section 15.10.

(c) The authority of a foreign corporation to transact business in the Commonwealth ceases on the date shown on the certificate revoking its certificate of authority.

(d) The Registrar of Corporations's revocation of a foreign corporation's certificate of authority appoints the Registrar of Corporations the foreign corporation's agent for service of process in any proceeding based on a cause of action which arose during the time the foreign corporation was authorized to transact business in the Commonwealth. Service of process on the Registrar of Corporations under this subsection is service on the foreign corporation. Upon receipt of process, the Registrar of Corporations shall mail a copy of the process to the secretary of the foreign corporation at its principal office shown in its most recent annual report or in any subsequent communication received from the corporation stating the current mailing address of its principal office, or, if none are on file, in its application for a certificate of authority.

(e) Revocation of a foreign corporation's certificate of authority does not terminate the authority of the registered agent of the corporation.

#### 15.32. Appeal From Revocation.

(a) A foreign corporation may appeal the Registrar of Corporations's revocation of its certificate of authority to the [name or describe] court within 30 days after service of the certificate of revocation is perfected under section 15.10. The foreign corporation appeals by petitioning the court to set aside the revocation and attaching to the petition copies of its certificate of authority and the Registrar of Corporations's certificate of revocation.

(b) The court may summarily order the Registrar of Corporations to reinstate the certificate of authority or may take any other action the court considers appropriate.

(c) the court's final decision may be appealed as in other civil proceedings.

CHAPTER 16. RECORDS AND REPORTS

Subchapter A. Records.

16.01. Corporate Records.

(a) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.

(b) A corporation shall maintain appropriate accounting records.

(c) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.

(d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(e) A corporation shall keep a copy of the following records at its principal office:

(1) its articles or restated articles of incorporation and all amendments to them currently in effect;

(2) its bylaws or restated bylaws and all amendments to them currently in effect;

(3) resolutions adopted by its board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding;

(4) the minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years;

(5) all written communications to shareholders generally within the past three years, including the financial statements furnished for the past three years under section 16.20;

(6) a list of the names and business addresses of its current directors and officers; and

(7) its most recent annual report delivered to the Registrar of Corporations under section 16.22.

### 16.02 Inspection of Records by Shareholders.

(a) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in section 16.01 (e) if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.

(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy;

(1) excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under section 16.02 (a);

(2) accounting records of the corporation; and

(3) the records are directly connected with his purpose.

(d) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.

(e) This section does not affect:

(1) the right of a shareholder to inspect records under section 7.20 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant;

(2) the power of a court, independently of these Regulations, to compel the production of corporate records for examination.

(f) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by nominee on his behalf.

#### 16.03. Scope of Inspection Right.

(a) A shareholder's agent or attorney has the same inspection and copying rights as the shareholder he represents.

(b) The right to copy records under section 16.02 includes, if reasonable, the right to receive copies made by photographic, xerographic, or other means.

(c) The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the shareholder. The charge may not exceed the estimated cost of production or reproduction of the records. (d) The corporation may comply with a shareholder's demand to inspect the record of shareholders under section 16.02
(b) (3) by providing him with a list of its shareholders that was compiled no earlier than the date of the shareholder's demand.

I

#### 16.04. Court-ordered Inspection.

(a) If a corporation does not allow a shareholder who complies with section 16.02(a) to inspect and copy any records required by that subsection to be available for inspection, the Commonwealth Superior court may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the shareholder.

(b) If a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with section 16.02 (b) and (c) may apply to the Commonwealth Superior court for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

(c) If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs (including reasonable counsel fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.

(d) If the court orders inspection and copying of the records demanded, if may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder.

#### Subchapter B. Reports.

#### 16.20. Financial Statements for Shareholders.

(a) A corporation shall furnish its shareholders annual financial statements, which may be consolidated or combined statements of the corporation and one or more of its subsidiaries, as appropriate, that include a balance sheet as of the end of the fiscal year, an income statement for that year, and a statement of changes in shareholders' equity for the year unless that information appears elsewhere in the financial statements. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis.

(b) If the annual financial statements are reported upon by a public accountant, his report must accompany them. If not, the statements must be accompanied by a statement of the president or the person responsible for the corporation's accounting records:

(1) stating his reasonable

belief whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and

(2) describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the proceeding year.

(c) A corporation shall mail the annual financial statements to each shareholder within 120 days after the close of each fiscal year. Thereafter, on written request from a shareholder who was not mailed the statements, the corporation shall mail him the latest financial statements.

#### 16.21. Other Reports to Shareholders.

(a) If a corporation indemnifies or advances expenses to a director under section 8.51,8.52, or 8.54 in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to the shareholders with or before the notice of the next shareholders' meeting.

(b) If a corporation issues or authorizes the issuance of shares for promissory notes or for promises to render services in the future, the corporation shall report in writing to the shareholders the number of shares authorized or issued, and the consideration received by the corporation, with or before the notice of the next share holders' meeting.

#### 16.22. Annual Report for Registrar of Corporations.

(a) Each domestic corporation, and each foreign corporation authorized to transact business in the Commonwealth, shall deliver to the Registrar of Corporations for filing an annual report that sets forth:

(1) the name of the corporation and the state or country under whose law it is incorporated;

(2) the mailing address and location of its registered office and the name of its registered agent at that office in the Commonwealth;

(3) the mailing address and location of its principal office;

(4) the names and business addresses of its directors and principal officers;

(5) a brief description of the nature of its business, including all lines of business and including the four digit codes for Principal Businesses and Professional Activity setforth on the latest Schedule C of tax form 1040CM;

(6) the total number of authorized shares, itemized by class and series, if any, within each class;

(7) the total number of issued and outstanding shares, itemized by class and series, if any, within each class; and

(8) if the corporation has less than 15 shareholders, for each shareholder state the name, citizenship, and the number and class or series of shares held. (b) Information in the annual report must be current as of the date the annual report is executed on behalf of the corporation.

(c) The first annual report must be delivered to the Registrar of Corporations within 90 days after a domestic corporation was incorporated or a foreign corporation was authorized to transact business. Subsequent annual reports must be delivered to the Registrar of Corporations between January 1 and March 1 of the following calendar years.

(d) If an annual report does not contain the information required by this section, the Registrar of Corporations shall promptly notify the reporting domestic or foreign corporation in writing and return the report to it for correction. If the report is corrected to contain the information required by this section and delivered to the Registrar of Corporations within 30 days after the effective date of notice, it is deemed to be timely filed.

Chapter 17. TRANSITION PROVI-SIONS

# 17.01. Application to Existing Domestic Corporations.

These Regulations applies to all domestic corporations in existence on its effective date that were incorporated under any general statute of the Commonwealth providing for incorporation of corporations for profit.

#### 17.02. Application to Qualified Foreign Corporations.

A foreign corporation authorized to transact business in the Commonwealth on the effective date of these Regulations is subject to these Regulations but is not required to obtain a new certificate of authority to transact business under these Regulations.

#### 17.03. Saving Provisions.

(a) Except as provided in subsection (b), the repeal of a regulation by these Regulations do not affect:

(1) the operation of the regulation or any action taken under it before its repeal;

(2) any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the regulations before its repeal;

(3) any violation of the regulation, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal;

(4) any proceeding, reorganization, or dissolution commenced under the regulation before its repeal, and the proceeding, reorganization, or dissolution may be completed in accordance with the regulation as if it had not been repealed.

(b) If a penalty or punishment imposed for violation of a regulation repealed by these Regulations is reduced by these Regulations, the penalty or punishment if not already imposed shall be imposed in accordance with these Regulations.

#### 17.04. Severability.

If any provision of these Regulations or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of the Act are severable.

#### 17.05. Repeal.

The following regulations and parts of regulations are repealed: Trust Territory Regulations, Title 37, Chapter 1, Sections 1.1 through 2.8, Sections 2.11 through 7.2, Chapter 2, Parts 1 and 2, and Chapter 3.

#### 17.06. Effective Date.

These Regulations take effect upon adoption by the Registrar of Corporations and compliance with 1 CMC § 9101 <u>et</u>. <u>seg</u>.

COMMONWEALTH REGISTER VOLUME 12 NO. 5 MAY 15, 1990 PAGE 6997

#### April 23, 1990

#### PUBLIC NOTICE

#### PROPOSED AMENDMENTS TO THE COASTAL RESOURCES MANAGEMENT RULES AND REGULATIONS OF 1985

The Administrator of the Coastal Resources Management Office in accordance with 2 CMC 1512 (1) and 1531 (d) is proposing to promulgate amendments to the Coastal Resources Management Rules and Regulations.

The proposed amendment is to repeal sections for height restrictions, variances, and intervention; to provide for clarification of the application process and procedure; to increase the fee for permits, and to change the enforcement provisions for violations of permit conditions regulations, and administrative orders.

The proposed amendments may be inspected at the Coastal Resources Management Office, 6th Floor Nauru Building, Susupe, Commonwealth of the Northern Mariana Islands, Saipan 96950. The amendments are published in the Commonwealth Register. Copies of the Register may be obtained from the Attorney General's Office.

The Office of Coastal Resources Management Office is soliciting views opinions facts and data for or against the proposed amendments to the Coastal Resources Management Rules and Regulations from the general public.

Anyone interested in commenting on the proposed amendments to the Coastal Resources Management Rules and Regulations may do so by submitting in writing to the Administrator of the Coastal Resources Management Office, 6th Floor, Nauru Building, Saipan, MP 96950 not later than thirty (30) days from the date of its publications in the Commonwealth Register.

DATED THIS 27 DAY OF Opril, 1990.

Issued by :

D. C. Auda-VICENTE C. ALDAN

Acting Administrator, CRMO

Concurred by:

LORENZO I. DE LEON GUERRERO

Governor

MAY 15, 1990

#### Abriid 23, 1990

### ARONGORONGOL TOWLAP FFÉÉRÚL LLIIWEL MELLÓL ALLÉGHÚL COASTAL RESOURCES MANAGEMENT 1985

Samwoolul Bwulasiyool Coastal Resources Management, reel igha ebwe tabweey ayleewal 2 CMC 1512 (1) me 1531 (d), nge e mwuschál ebwe ayoora lliiwel mellól Alléghúl Coastal Resources Management.

Fféérúl lliiwel kkaal, nge ebwe liwiliiló tálil we e apasaawow reel llangal, tappal, akkayúló me ngáre pilipiii: ebwe ayoora ammataf reel mwóghútúghútúl fféérúl application: attchówuutá abwóssul lisensiya: me rebwe ghi kke amwuri fischiiy ngáre aramas re attabweey akkúleyal Bwulasiyo yeel reel mwóghútúghútúl kkapasal lisensiya.

Tiliighil fféérúl lliiwel kkaal, nge emmwel schagh bwe aramas ye e mwuschál ebwe lo amwuri me areghi mellól Bwulasiyool Coastal Recources Management, 6th Floor Nauru Building, Susupe, Commonwealth of the Northern Mariana Islands, Saipan 96950. Tiliighil lliiwel kkaal, nge aa yoor tiliighil llól Commonwealth Register. Kkoopiyal Register yeel, nge emmwel schagh rebwe ló bweibwogn sángi Bwulasiyool Attorney General.

Bwulasiyool Coastal Resources Management, ekke tingór ngáliir towlap bwe iraalong meta tipeer, mangemangiir, milikka re ghuleey bwe welewelil ngáre schéschéél me rál, ngáre re tipáli me rese tipáli lliiwel kkaal mellől Alléghul Coastal Resources Management.

Inaamwo iyo aramas ye e tipáli bwe ebwe apasaawow meta tipal ngáre mááfiyal reel lliiwel kkaal, nge emmwel schagh bwe ebwe ischiitiw nge aa afanga ngáli Samwoolul Coastal Resources Management, 6th Floor, Nauru Building, Saipan, MP 96950 llól eliigh (30) rál sángi maram, rál me ráagh ye e toowow arongorong yeel mellól Commonwealth Register.

E fféér llól ráálil ye 27 Maram April 1990

Isáliiyalwow:

and ACCENTE C. ALDAN Acting Administrator, CRMO

Alleqhuyal:

**GUERRERO** I. DE LEON LORENZO Gobenno

### ABRIT 23, 1990

#### NUTISIAN PUPBLIKU

### I MANMAPROPOPONI SIHA NA AMENDASION GI I 1985 NA AREKLAMENTO YAN REGULASION I COASTAL RESOURCES MANAGEMENT

I Atministradot i Caostal Resources Management Office sigon i 2 CMC 1512 (1) YAN 1531 (d) ha propoponi mama'tinas amendasion siha gi i areklamento yan regulasion i Coastal Resources Management.

I mapropoponi na amendasion para u diroga i seksiona siha put i regulasion ni dumitetmimina i linekka' guma' siha, i petmision ni para u difirensiao kontra i ginagagao na areklamento, yan i seksiona ni prumibebeni i direcho nai siña un taotao na u pitision i disision put enteres otro; kosaki siña na u na'guaha klarifikasion gi i areklamento yan regulasion aplikasion; para u aomenta i apas lisensia, yan para u tulaika i ma'emplamentan-ñiha i guaha na probension put kontradiksion siha gi kondision i regulasion lisensia, yan otro siha na otdin atministrasion.

I manmapropoponi siha na amendasion siña manma'ina gi i Coastal Resources Management Office, 6th Floor, Nauru Building, Susupe, Saipan MP 96950. I amendasion siha manma'emprenta gi halom i Rehistran Commonwealth, Kopian i Rehistra siña manmachuchule' ginen i ufisinan i Attorney General. I ufisinan i Coastal Resources Management Office ha solisisita komento, upinion, fakto yan enfotmasion siha para sino' kontra i manmapropoponi na amendasion gi i areklamento yan regulasion i Coastal Resources Management ginen i pupbliku hinerat.

Todu ayu i manggai enteres manmama'tinas komento put i manmapropoponi na amendasion gi areklamento yan regulasion i Coastal Resouces Management siña mantugigi'i i atministradot i Coastal Resources Management Office gi 6th Floor, Nauru Building, Saipan, MP 96950 sin mas di trenta (30) días despues di i fecha anai manma'emprenta gi halom i Rehistran Commonwealth.

Mafecha gi este i mina<sup>27</sup> na ha'ani gi <u>Abrit</u>, 1990.

Malaknos ginen as:

VICENTE C. ALDAN Acting Administrator, CRMO

Inaprueba nu as:

Men

LORENZO I. DELEON GUERRERO

Governor

COMMONWEALTH REGISTER VOLUME 12 NO. 05 MAY 15, 1990

PAGE 7001

W. <u>"Major siting"...</u>

(x). Any other proposed project which, by consensus of the CRM Agency Officials, has the potential for causing a direct and significant impact on coastal resources <u>including any</u> <u>projects using in excess: 500 kilowatts per day and/or 3,500</u> gallons of water per day as established by CUC demand rates for <u>particular projects</u>.

\* \* \* \* \* \*

XX. <u>"Minor developments"</u> means:

\* \* \* \* \* \*

(c) Temporary, <u>not to exceed six (6) months</u>, pala pala construction for fund-raising, carnival, or cultural activities;

YY. Aggrieved person <u>means any person who has been</u> adversely affected by the decision of the Coastal Resources <u>Management Agencies Directors and can demonstrate that she/he</u> <u>participated in the CRMO hearing process either by submitting</u> <u>written comments or making oral statements during any hearing</u> <u>held on the project and that these comments were not adequately</u> <u>addressed by the final permit decision.</u>

Section 7. Exceptions to CRM Permit Requirements

\*

\* \* \* \*

B. Delete variance Section 7 B

C. (ii) If any proposed project, <u>current building or</u> <u>expansion if any pre-existing building that was</u> exempted by Section 7(C)(i) may have a direct and significant impact <u>as</u> <u>determined by the CRM Administrator</u> then the project proponent <u>or</u> <u>owner shall</u> be required <u>to fill out a CRM application</u>.

\*

D. <u>Permits for Minor Developments Under Expedited</u> <u>Procedures.</u>

(iv). CRM minor permit <u>review process shall require an</u> evaluation <u>all</u> impacts of the project <u>including a site inspection</u> <u>before a permit is granted.</u>

(v). The CRM Coastal Coordinator assigned to Tinian or Rota shall review all minor permit applications for their respective island, and submit a recommendation to the CRM Administrator for final certification and action. [delete remaining sentence in this paragraph] Section 8. <u>CRM Standard Permit Application Process.</u> <u>Any</u> person proposing to conduct <u>an</u> activity <u>that could potentially be</u> <u>a major siting or is located within an APC</u> must apply for a CRM Permit. <u>All CRM permit applications shall be governed by the</u> <u>following procedures</u>.

<u>A. Preapplication.</u> A preapplication conference shall be <u>held</u> with <u>a CRM</u> staff <u>person and the applicant for projects. At the</u> <u>discretion of the CRM Administrator, preapplication conference</u> <u>shall be held with the CRM Agency Officials and the applicant.</u>

(i) The applicant shall be required to discuss the proposed activity, and

(ii) The CRM shall provide the applicant with necessary information of the CRMO goals, policies, and requirements and answer all the questions of the applicant pertaining to the same.

B. <u>Application</u>. <u>The application shall include the following</u>:

(i). <u>Filing Location. CRM</u> permit <u>applications</u> shall be <u>filed in the CRM office on the respective island of the proposed</u> <u>activity. If there is not CRM office on the island of the</u> proposed activity, the application shall be filed in the Saipan <u>CRM office</u>.

(ii). <u>Copies.</u> The applicant shall file an original application and six copies with <u>all</u> exhibits and attachments.

(iii). Certification. <u>The applicant shall certify by</u> <u>declaration under penalty of perjury or affidavit that all</u> <u>information contained in the application is true.</u>

(iv). <u>Application.</u> <u>The application shall contain all</u> <u>attachments necessary to fulfill the requirements of Section</u> <u>8(A)(vii).</u>

(v). <u>Fees. All applicants shall pay a non-refundable</u> <u>application fee to the Commonwealth Treasurer in accordance with</u> <u>this fee schedule:</u>

(a) No fee for government projects.

(b) \$25.00 fee for minor developments.

(c) \$500.00 annual fee for jet ski operating permits.

(d) All other project fees are based on appraisal of the construction plans for structures affixed to the ground.

Fee Amount Size\_of\_Project

 $\underline{\$100.00}$  Less than or equal to  $\underline{\$50,000}$ 

\$200.00 Less than or equal to \$100,000.00

- <u>\$750.00</u> <u>Greater than \$100,000.00 but less</u> than \$500,000.00
- <u>\$1,500.00</u> Greater than \$500,000.00 but less than \$1,000,000.00

For each million increment in the project costs, there shall be an assessment of \$2,000.00 per million.

(vi). Performance Bond. The CRM Administrator may require a performance bond or equivalent surety to ensure that the project is completed and performed in accordance with the permit. In the event that the project cannot be completed as proposed, the applicant shall forfeit the bond or surety equivalent, or the applicable portion, needed to mitigate any damage caused by such failure of performance. Any monies obtained from the bond or surety may be used to complete the site preparation and infrastructure requirements, restore the natural appearance and biological character of the project site and its impacts on adjacent properties, or correct any adverse impacts to the environment.

(vii). <u>Information</u>. <u>The applicant shall submit the</u> <u>following information</u>:

- (a) name of applicant;
- (b) name of any representative, if applicable;
- (C) owner of any real property;
- (d) lessee of any real property;
- (e) owner of the project, if different from applicant;
- (f) representative of owner, if applicable;
- (g) <u>copies of construction plans including CNMI</u> <u>certified engineering and architect designs; and</u> <u>floor plans</u>
- (h) <u>plans for excavation, earthmoving, and stormwater</u> <u>control</u>
- (i) <u>map showing the distance of all structures from</u> the mean high water, and wetlands if applicable.

- (j) proposed budget for all improvements; to the property
- (k) <u>copies of other permits including business license</u> and submerged lands lease, license, or use permit;
- names of adjacent property owners and <u>copies of</u> <u>letters sent to them notifying them of this</u> <u>proposed project;</u>
- (m) <u>adjacent property</u> descriptions;
- (n) <u>estimates of demands for infrastructure</u> requirements including daily water and power <u>usage;</u>
- (o) map of the vicinity;
- (q) elevation <u>plans of the project</u>, <u>including a side</u> <u>profile of the project</u>;
- (r) <u>title documents to all real property and submerged</u> <u>lands, including lease(s) or use permits from</u> <u>appropriate persons; and</u>
- (s) <u>affidavit or declaration made under penalty of</u> <u>perjury that the application is a statement of</u> <u>truth by the principal or authorized agent.</u>
- (t) <u>Environmental Assessments for all CRM Major siting</u> projects shall include:
  - 1. <u>Project summary including justification</u>, <u>location</u>, and size.
  - Describe existing environment of site including vegetation, wildlife, land uses, historic and cultural resources, soils, geology, topography, weather, and air guality.
  - 3. <u>Describe socio-economic factors of site</u> <u>including, income and employment, education,</u> <u>infrastructure, law enforcement, fire</u> <u>protection, hospital and medical facilities</u>.
  - 4. <u>Discussion of alternatives evaluated (other</u> <u>sites and/or project size/design) and how</u> <u>preferred alternative was selected</u>.

- 5. Describe the environmental and socio-economic effects (both positive and negative) which may result from project (i.e. air quality, noise levels, dust levels, sedimentation, erosion, plant and wildlife populations, infrastructure capacity in the short term (construction phase), long term (operation) and cumulative.
- 6. <u>Proposed mitigation to offset adverse</u> <u>environmental and socio-economic effects of</u> <u>project</u>.
- 7. <u>Submit evidence proving that the project will</u> not have a significant adverse impact.
- 8. <u>Discuss adverse effects of project which</u> <u>cannot be avoided or mitigated</u>.

[The last sentence is deleted from the section due to the inclusion of subsection (w).]

(viii). <u>Certification of Completion of Application</u>. <u>Upon receipt of all the information requested in Section 8(A)(i)-(vii)</u>, the CRM Administrator shall review the application and he or she may certify it complete or <u>notify the applicant if any</u> <u>additional information is needed</u>.

(B) <u>Published Notice.</u> CRMO shall publish notice of an application within fifteen (15) days of receipt in a newspaper of general circulation within the Commonwealth. The notice shall state the type of project, its location, name of applicant, the date the application was received by CRMO. The notice shall also invite the public to comment, give information on how to request a public hearing, and state the procedure how to intervene into the permit decision making.

(C) <u>Review of Application.</u> The CRM Administrator and the CRM Agency officials <u>must grant or deny or condition a CRM</u> <u>application within sixty (60) days from the date the application</u> <u>is certified complete in accordance with 2 CMC section 1532(a).</u> <u>This Section requires a decision "within 60 days from the receipt</u> <u>of any request for review".</u> [Delete third sentence of the <u>section.]</u> <u>CRM Agency Officials shall provide technical</u> <u>assistance in their area of expertise to CRMO concerning impacts</u> <u>of the proposed project.</u> <u>CRMO shall incorporate this information</u> <u>into permits in the form of written findings and conditions.</u>

D. <u>Permit Application Hearing.</u>

(i). The CRM Administrator shall schedule a CRM public hearing prior to certifying an application complete if either:

(a) The proposed project is determined to be a major siting by the CRM Agency Officials; or

Í

(b). A petition signed by at least five people requesting a public hearing is received by the CRM administrator within fourteen days of the date the application is published in the newspaper; or

(c). A CRM Agency Official requests a hearing.

(ii). <u>Permit Hearing Notice.</u> <u>The CRM Administrator</u> <u>shall schedule the hearing, inform all parties and the adjacent</u> <u>property owners, of the hearing date, and publish two notices of</u> <u>the hearing in a newspaper of general circulation.</u> <u>The first</u> <u>notice shall be at least fourteen days prior to the hearing; the</u> <u>second notice shall be no less than five days before the hearing.</u> <u>Notice of the hearing shall also be broadcast on a local radio</u> <u>station for three (3) consecutive days before the hearing.</u>

(iii). <u>Public Hearing Procedure.</u> The hearing shall be open to the public. The CRM Administrator or his/her designee shall preside at the hearing. The presiding officer of the hearing may limit evidence and testimony in any manner that is reasonably just and efficient. Evidence need not conform to any prescribed rules of evidence.

(iv). Location. Public hearings shall be held on the island where the proposed project is located.

(v). Appearances. Any person may appear and testify at a public hearing.

(vi). Record. CRMO shall provide for audio recording of the hearings. Any person requesting a transcription of the hearing will be provided a copy of the tape to have it transcribed at his or her own cost. A copy of the tapes of the hearing shall be made available for listening at the CRMO office for any person.

(vii). The CRM Agency Officials or their designee from their agency shall be present at public hearings. If a CRM Agency Official is unable to attend a hearing, s/he shall listen to the tape of the hearing or read a transcript of the hearing prior to rendering a decision on the application.

[Section E is modified and incorporated in Section F Appeals.]

[Section F is deleted. A potentially aggrieved party will not have to intervene first to appeal the decision on a CRM application. A person only needs to file a petition to appeal after the decision has been rendered.]

PAGE 7007

E. Decision on CRM Application. The CRM Agency Officials shall review the application, the hearing transcript, CRMO technical findings, all supporting documentation, relevant laws, and then issue a decision to grant, deny, or grant with conditions, a CRM permit. The decision must be by consensus and supported by written findings of fact and conclusions of law. The decision shall be incorporated into a CRM permit if granted or conditionally granted. The CRM Administrator shall then certify that the permit is in compliance with all CRM laws. CRM permit shall be signed by all CRM Agency Officials and the CRM Administrator. The CRM Agency Officials are required to conform to the conflict of interest provisions of these regulations in Section 8 E V. Should there be no consensus prior to the sixty (60) days review period lapsing, the CRM Administrator shall refer the application and all documents reviewed by the CRM Agency Officials to the Governor within ten (10) days following the Administrator's determination that there is a deadlock.

(ii). If a deadlock is solely due to a denial of certification of compliance with CRM laws, the CRM Administrator shall provide the Governor with a statement of the Administrator's objections.

(iii). If a deadlock results from a dispute among CRM Agency Officials, the CRM Agency Officials shall provide the Governor with statements reflecting the divergent views on the application.

(iv). The Governor shall decide to grant, deny, or grant with conditions a CRM permit within thirty (30) days of receipt of all the above documentation. The decision must be supported by written findings of facts and conclusions of law.

(v). <u>CRM Agency Officials shall not participate in</u> <u>decisions on CRM Permits where there exists an appearance of bias</u> <u>or where actual bias may prevent them from exercising independent</u> <u>judgment</u>.

(vi). <u>The decision of the Governor is final and may be</u> <u>appealed to the CRM Appeals Board pursuant to Section F</u>.

F. Appeals. Any aggrieved person as defined in Section 5 may appeal the decision on a permit application by filing a petition with the CRM Appeals Board within ten (10) days after the decision has been published in the newspaper.

(i) All documents filed for an appeal shall conform to the following standards.

(a) Pleading and briefs shall be typewritten upon white paper eight and one-half inches by eleven inches (8 1/2"x 11') in size. Text shall appear only on one side of the paper and shall be double-spaced. (b) All documents shall show the name of the project, the assigned CRM application number, and the name and address of the party or attorney.

(c) The party or the attorney shall sign in ink the original of all documents.

(d) The party or the attorney shall file the original and five copies of each document.

(ii). The petition to appeal shall contain the following:

(a). The nature of the person's interest in the permit;

(b). The effect of the decision on the petitioner's interest;

(c). The extent that the petitioner's interest is not represented by existing parties;

(d). The extent that the petitioner's interest differs from that of existing parties;

(iii) Service of Papers. All parties shall serve all other parties with papers required to be filed on the same date they are filed with CRMO.

(vi). Response pleading. Any existing party or aggrieved person shall submit any response statement or brief to the notice of appeal within ten (10) calendar days from the date the documents are filed in CRMO.

(v). Oral Argument. The petitioner or aggrieved party may request the CRM Administrator to schedule an oral argument before the CRM Appeals Board. Oral arguments shall be heard within ten (10) days after the submission of the notice of appeal.

(v). Record before the CRM Appeals Board. The following shall be received and reviewed by the CRM Appeals Board.

(a). All documents in the CRM permit file except privileged information including the application, the permit, the tapes of the public hearing or transcript if applicable;

(b). Statements and evidence filed with CRMO by any petitioning aggrieved party; and

(c). Any other documents, correspondence, or testimony considered in the permit decision-making process.

(vi). CRM Appeals Board Decision. The CRM Appeals Board consisting of a quorum of at least two (2) members shall issue a written decision based on the statutory authority to review in 2 CMC Section 1541 within thirty (30) calendar days of when the notice of appeal was filed with CRMO. The scope of review is limited by the statutory authority of the Coastal Resources Management Act in 2 CMC 1541. CRM Appeals Board members shall issue decisions in an impartial manner and are subject to the conflicts of interest regulation outlined in Section 8 E V.

(vii). Automatic Affirmance. The CRM Administrator shall issue a notice of summary affirmance of the CRM Permit decision if the CRM Appeals Board fails to issue a decision within thirty (30) calendar days after the notice of appeal was filed with CRMO. Any aggrieved person or party may then appeal directly to the Commonwealth Superior Court for judicial review of a final administrative action.

Section 9 A. <u>Adverse impacts are defined in Section 5</u>. <u>delete</u> <u>next five sentences D-f</u>.

The Height Restriction for all buildings constructed outside CRMO's Shoreline APC is repealed.

<u>Section 9 D Height, Density, Setback, Coverage, and Parking</u> <u>Guidelines</u>.

i. <u>Application</u> - A Project must meet all of the guidelines unless the CRM Directors with concurrence by the CRMO Administrator <u>find by written consensus that an exception should</u> <u>be granted</u>. <u>An exception may only be granted when the applicant</u> <u>can demonstrate that there will be no significant impact on</u> <u>scenic, cultural, historic, coastal or ground water resources</u>.

ii. Shoreline Setback - <u>All</u> shoreline setback shall be measured inland from the mean high water level. Side yards setbacks shall be 10' from all roads and side property. <u>For</u> <u>purposes of these quideline the front of any lot shall be that</u> <u>side parallel to the coastline and/or ocean</u>. <u>A setback of 1.0</u> <u>foot horizontal to 1 foot vertical shall be measured from the</u> <u>average elevation of a line though the entire property parallel</u> <u>to the shoreline 100' feet inland from mean high tide</u>.

iii. Setback and Height Regulation Policy

All high rise development, defined as structure more than six (6) stories or more than sixty (60) foot from grade are encouraged to locate in areas of exiting high rise development. High rise construction is permissible subject to the following conditions.

PAGE 7010

1) <u>High rise structure proposed seaward of any</u> <u>coastal road must strictly comply with all setbacks front, back</u> <u>and side yard. Exceptions shall only be granted under 9 D (i).</u>

2) <u>The longest lateral dimension of any high rise</u> <u>structure must be oriented perpendicular to the beach or coastal</u> <u>waters</u>.

3) The project design shall incorporate substantial landscaping and tree planting to reduce/screen the visual bulk and mass of buildings as seen from public places such as roads, schools parks and other public viewing areas.

4) The applicant shall prepare a view corridory plan which shall include an inventory of existing views, impacts on existing views and mitigation measures proposed to protect scenic views.

Section 14 (Replaces Section 14 & 15)

Enforcement of CRM Regulations, Policies and Permit Conditions.

A. <u>The CRM Administrator may issue an order to enforce CRM</u> <u>policies, regulations, and/or permit conditions</u>. <u>The order may</u> <u>require any person/permittee to do any of the following</u>:

- 1. <u>To cease and desist from the violation;</u>
- 2. <u>To take mitigating measures to correct the violation,</u> <u>or</u>
- 3. <u>To pay a civil fine of not more than \$10,000.00 for</u> <u>each violation</u>.

B. <u>The Administrator may institute a civil action to seek any</u> <u>lawful remedy including exemplary damages and contempt for</u> <u>failing to abide by an order issued under this section</u>. <u>The</u> <u>Commonwealth Superior Court shall have jurisdiction</u>.

C. <u>The Administrator may modify, suspend or revoke any permit</u> <u>issued under CRM regulations for failing to abide by an order</u> <u>issued pursuant to this section</u>.

D. Any person subject to civil penalties shall be informed by written notice of the nature of the violation and may, request a hearing before the CRM Administrator. The request shall be in writing, and it shall state the facts and arguments that will be relied on during the hearing, and it shall be served upon the CRM Administrator within 10 days of service of the enforcement order. The Administrator may compromise any penalty. She/He shall issue a written decision setting forth findings of fact and conclusions of law within 10 days, the proposed sanction shall be imposed. E. In addition to any civil penalties imposed, the Administrator may seek criminal sanctions against any person who knowingly and willfully commits any act prohibited by the Coastal Resources Management Act of 1983, P.L. 3-47 by submitting a report of the violation to the Attorney General for review and action. Violations shall be punishable by a fine of not more than \$2000,00 or by imprisonment of not more than five (5) years or both.

F. Any person who knowingly and willfully makes a false statement, representation or certification in any application or in any record, plan or document filed or required to be maintained by any regulation or permit shall be subject to permit revocation, suspension, and/or civil fine of not more than \$10,000.00 per violation.

G. Each day continued violation is a separate offense.

H. The CRM Administrator shall in his or her sound discretion set fines in an amount calculated to compel compliance with applicable law and shall consider the value of the existing and potential value of the damage to the environment proximately caused by the violation. Such fines shall not exceed the ceiling imposed by Section 12 of P.L. 3-47.

I. <u>CRM Administrator's decision may be appealed within 30 days</u> to the Commonwealth Superior Court pursuant to the Administrative Procedure Act 1 CMC, Div. 9, 9112.



000

D

0

Ø

0

0

# COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS DEPARTMENT OF COMMERCE AND LABOR SAIPAN, MARIANA ISLANDS 96950

FAX (670) 322-4008 PHONE: (670) 322-8711 (670) 322-8712 (670) 322-8713 (670) 322-8714 (670) 322-4324

# NOTICE OF EMERGENCY AND PROPOSE PERMANENT REGULATIONS AMENDING CERTAIN SECTIONS OF THE ALIEN LABOR RULES AND REGULATIONS RELATING TO LABOR IDENTIFICATION CERTIFICATE AND APPLICATION FEES

The Director of Commerce and Labor finds pursuant to 1 CMC 9104(b) that the public interest requires the adoption upon less than thirty (30) days' notice of regulations extending the expiration date of labor identification certificates and increasing the application fees for two-year work permits. These amendatory regulations, which will take effect upon publication in the Commonwealth Register, will allow the Department to timely process applications in accordance with applicable law.

These amendatory regulations are issued under the authority conferred by 3 CMC 4435(b).

Date:

S. TORRES

pirector of Commerce and Labor

Concurred: LORENZO I. DE LEON GUERRERO Governor

Date of Filing: 5-11-90

SOLEDAD B. SASAMOTO **Registrar of Corporations** 

Date:



2 °° °°

D

0

° 0 °

# COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS DEPARTMENT OF COMMERCE AND LABOR SAIPAN, MARIANA ISLANDS 96950

FAX (670) 322-4008 PHONE: (670) 322-8711 (670) 322-8712 (670) 322-8713 (670) 322-8714 (670) 322-4324

NOTISIA POT EMERGENCY YAN I MAPROPOPOSITO NA PETMANENTI NA REGULASION NI PARA UMA'AMENDA GUAHA SIHA NA SEKSION GI AREKLAMENTO YAN REGULASION I TIMANRESIDENTI SIHA NA HOTNALERO POT I CERTIFIKUN IDENTIFICASION I HOTNALERO

J Direktot i Commetsio yan Hotnalero hasoda sigun gi i lai l CMC 9104(b) na i interes i publiku hanasisita na uma'adopta i menus di trenta dias na notisia gi regulasion para uma'extendi i uttimun i fechan i certifikun identificasion i hotnalero yan para umahat'sa i apas i applikasion ni para dos anos na certifikun hotnalero. Este siha na tinilaikan i regulasion, ni para umana effectibu sigun nu i mapublikana gi Commonwealth Register, machogue para usedi i depattamento para unachadig muna huyung i applikasion sigun i ginagagao gi presente na lai.

Este siha na tinilaikan i regulasion man'manafanhuyung ginen i atoridad i 3 CMC 4435(b).

Date: 5/9/90

**J0**) S TORRES (ITN

Director of Commerce and Labor

Date:

Concurred: LORENZO I. DE LEON GUERRERO Governor

Date of Filing: <u>5-11-90</u>

SOLEDAD B. SASAMOTO Registrar of Corporations

# EMERGENCY AND PROPOSE PERMANENT REGULATIONS AMENDING ALIEN LABOR RULES AND REGULATIONS

- Authority. The Director, Department of Commerce and Labor, Section 1. pursuant to its powers, duties, and authorities under Public Laws 1-8 and 3-66, as amended, issues the following Alien Labor Rules and Regulations amendments to the published in Volume 10, No. 4 of the Commonwealth These amendments shall take effect upon Register. publication in the Commonwealth Register.
- Section 2. Purpose and Findings. The Director finds that the number of nonresident worker applications has increased over the last two years without a corresponding increase in the number of staff assigned to process applications within the time limit set by law. Discretionary issuance of a two-year permit for jobs that are difficult to fill with resident workers would permit the department to make proper, timely and effective review of applications.
- Section 3. Section II(D)(2) of the Alien Labor Rules and Regulations is hereby amended to read as follows:
  - "2. The identification certificate shall be issued for a period not to exceed one year, provided that the Director may, at his discretion, authorize the issuance of certificates for more than one year."
- Section 4. Section VII(A) of the Alien Labor Rules and Regulations is hereby amended to read as follows:

"A. Application for new and renewal of Labor Identification Certificate:

One year .....\$ 75.00 Two years .....\$ \$300.00

Date: 0/9/90

JOAOUIN S. TORRES

Director of Commerce and Labor

Concurred:		$ \geq $	tu	me	
$\mathcal{C}$	LORENZO	I.	DE	LEON	GUERRERO
	Governo	r			

Date of Filing: 5-11-90

SOLEDAD B. SASAMOTO Registrar of Corporations

#### NOTICE OF EMERGENCY AND PROPOSE PERMANENT REGULATIONS

ISSUANCE OF BUSINESS LICENSES TO GARMENT MANUFACTURERS ISSUANCE OF CERTIFICATES OF ORIGIN BY DIVISION OF CUSTOMS SERVICES PROCESSING OF APPLICATIONS FOR ALIEN WORK PERMITS FOR GARMENT INDUSTRY PROCESSING OF APPLICATIONS FOR ENTRY PERMITS FOR ALIEN GARMENT WORKERS

#### DEPARTMENT OF COMMERCE AND LABOR

The Director of Commerce and Labor finds pursuant to 1 CMC 9104(b) that the public interest requires the adoption upon less than thirty (30) days' notice of regulations to provide a limited exemption permitting the establishment of garment factories on the Island of Rota to alleviate unemployment by encouraging private sector growth. These amendatory regulations, which take effect immediately, are based upon the Director's authority to license businesses under 1 CMC 2453(d), to regulate the issuance of work certificates under 3 CMC 4435(b), and to adopt emergency regulations under the rule making authority conferred by 1 CMC 2454.

#### DEPARTMENT OF FINANCE

The Director of Finance finds pursuant to 1 CMC 9104(b) that the public interest requires the adoption upon less than thirty (30) days' notice of regulations to provide a limited exemption permitting the establishment of garment factories on the Island of Rota to alleviate unemployment by encouraging private sector growth. These amendatory regulations, which take effect immediately, are based upon the Director's authority to regulate customs under 1 CMC §2533(d) and (i) and to adopt emergency regulations under the rule making authority conferred by 1 CMC §2557.

#### CHIEF OF IMMIGRATION

The Acting Chief of Immigration finds pursuant to 1 CMC 9104(b) that the public interest requires the adoption upon less than thirty (30) days' notice of regulations to provide a limited exemption permitting the establishment of garment factories on the Island of Rota to alleviate

unemployment by encouraging private sector growth. These amendatory regulations, which take effect immediately, are based upon the authority of the Chief of Immigration to regulate the issuance of entry permits to non-immigrant aliens under 3 CMC §§4311(3), 4331 and to adopt emergency regulations under the rule making authority conferred by 3 CMC §4331.

18/90 10/90 Date: DIRECTO COMMERCE AND LABOR ៍កាធ Date: 5 DIRECTOR OF FINANCE Date: ACTING CHIEF **MMIGRATION** ÓF uma Concurred: Date: / 990 LORENZO I. DE LEON GUERRERO Governor 5/11/90 Date of Filing: SOLEDAD B. SASAMOTO Registrar of Corporations

### NOTICIA POT I EMERGENCY YAN I MAPROPOPOSITON I PETMANENTI NA REGULASION

POT I PARA MANNAE LICENSIAN BUSINESS PARA FACTERIAN MAGAGO POT I PARA MANNAE CERTIFIKUN GINEN-MANU GINEN I DIVISION I CUSTOM POT I PROCESSING I APPLIKASION SIHA PARA I CERTIFIKUN PARA MACHOCHU PARA I TIMAN RESIDENTI SIHA GINEN I FACTERIAN MAGAGO NA BUSINESS POT I PROCESSING I APPLIKASION SIHA PARA I CERTIFIKUN PARA MUNA'HALOM PARA I TI MANRESIDENTI SIHA NA HOTNALERON I FACTERIAN MAGAGO

#### DEPATTAMENTON I COMMETSIO YAN HOTNALERO

I Direktot i Commetsio yan Hotnalero hasoda na sigun gi lai 1 CMC 9104(b) i interes i publiku hanesisita na umaadopta i menus di trenta dias na noticia pot i areklamenton i para umanasina umaestablesi facterian magago siha giya islan Luta para u enayuda i timanma empleleya siha yan para umasoyu ya umaadelanta gi bandan i business siha. Este siha na tinilaikan i areklamento ni para umana effectibu insigidas, pumosibble ginen i atoridad i Direktot ni para ufanlicencia business gaigi gi papa i lai 1 CMC §2453(d), yan para i areklamenton para mannae certifikun machochu gaigi gi papa i lai 3 CMC §4435(b), yan para i ufanadopta emergency na regulasion siha gaigi gi papa i lai 1 CMC §2454.

#### DEPATTAMENTON FINANCE

I Direktot Financiat hasoda na sigun gi lai 1 CMC 9104(b) i interes i publiku hanesisita na umaadopta i menus di trenta dias na noticia pot i areklamenton i para umanasina uma establesi facterian magago siha giya islan Luta para u inayuda i timanma empleleya siha yan para umasoyu ya uma adelanta gi bandan business siha. Este siha na tinilaikan i areklamento ni para umana effectibu insigidas, pumosibble ginen i atoridad i Direktot ni para ufanarekla gi bandan customs gaigi gi papa i lai 1 CMC §2533(d) yan (i), yan i para ufanadopta emergency na regulasion siha gaigi gi papa i lai 1 CMC §2557.

#### DIVISION I IMMIGRATION

I Acting Chief Immigration hasoda na sigun gi lai 1 CMC 9104(b) i interes i publiku hanesisita na umaadopta i menus di trenta dias na noticia pot i areklamenton i para umanasina uma establesi facterian magago siha giya islan Luta para u inayuda i timanma empleleya siha yan para umasoyu ya uma adelanta gi bandan i business siha. Este siha na tinilaikan i areklamento ni para umana effectibu insigidas, pumosibble ginen i atoridad i Chief of Immigration ni para ufanarekla gi mannae certifikun humalom para este siha i timan residenti gaigi gi papa i lai 3 CMC §§4311(3), 4331 yan i para ufanadopta emergency na regulasion siha gaigi gi papa i lai 3 CMC §4331.

Date: \_\_\_\_\_\_\_\_\_\_

Date: \_

10/90 Date:

DIRECTOR COMMERCE AND LABOR OF DIRECTOR OF FINANCE ACTING CHIEF OF MMIGRATION

LORENZO I. DE LEON GUERRERO Concurred: Governor

Date: MA

Date of Filing: 5/11/90

SOLEDAD B. SASAMOTO Registrar of Corporations

EMERGENCY AND PROPOSE PERMANENT REGULATIONS AMENDING REGULATIONS RESTRICTING THE ISSUANCE OF BUSINESS LICENSE TO GARMENT MANUFACTURERS AND THE PROCESSING OF APPLICATIONS FOR WORK CERTIFICATES FOR ALIEN GARMENT WORKERS

- Section 1. <u>Authority</u>. These regulations are issued: (1) under the authority of the Director of Commerce and Labor to regulate business conferred by 1 CMC §2453(d) and to issue work certificates for alien workers conferred by 3 CMC 4435(b); (2) under the authority of the Director of Finance to regulate customs conferred by 1 CMC §2553(d); and (3) under the authority of the Chief of Immigration to regulate the issuance of entry permits for non-immigrant aliens conferred by 3 CMC §4311(3) and §4331.
- Section 2. <u>Purpose and Findings</u>. The Textile Panel finds that the request of the people of Rota for a limited exemption permitting the establishment of garment factories on the Island of Rota is in the public interest in that it will provide substantial economic opportunities for a majority of its resident population. This amendment encourages economic growth by permitting limited exemption for the Island of Rota.
- Section 3. Amendment. Section 4 of the Regulations Restricting the Issuance of Business License to Garment Manufacturers and the Processing of Applications for Work Certificates for Alien Garment Workers filed with the Registrar of Corporations on January 18, 1988 is hereby amended by adding a new paragraph (e) as follows:
  - "(e) Limited Exemption for the Island of Rota. Notwithstanding the provisions of Section 4(a) thru (d), the Department of Commerce and Labor is authorized to issue up to a maximum of three (3) business licenses for the manufacture of garments Island of Rota provided that garment on the manufacturers operating under such licenses shall not employ more than 250 alien garment workers shall be issued based on the each. Licenses following criteria: (1) amount of capital investment; (2) number of resident workers to be employed in management, supervisory and non-supervisory positions; (3) wages to be paid and benefits offered to resident employees; (4)

ownership offered and the degree to which the applicant will improve infrastructure and other utility needs." Date: DIRECTOR COMMERCE AND LABOR Ų, Date: S DIRECTOR OF FINANCE Date: ACTING CHIEF OF AMMIGRATION rent co 1<u>99</u>D Concurred: Date: MA LORENZO I. DE LEON GUERRERO Governor Date of Filing: <u>5-11-90</u> SOLEDAD B. SASAMOTO Registrar of Corporations

training programs offered; and (5) the degree of local

COMMONWEALTH REGISTER VOLUME 12 NO. 05 MAY 15, 1990

(

PAGE 7021

# NOTICE OF EMERGENCY ADOPTION

# CERTIFICATE OF NEED REGULATIONS

**EMERGENCY:** Existing law at 3 CMC §§ 2421-2429 provides that health care providers and facilities must receive permission, in the form of a certificate of need, from the Commonwealth Health Planning & Development Agency (CHPDA) to (1) make any capital expenditures over \$50,000, (2) initiate any new health services regardless of cost, or (3) make certain other changes. CHPDA was established in the Office of the Governor by 1 CMC §§ 2071-2074 and was formerly funded entirely by U.S. federal funds but is no longer functioning due to the termination of the federal funding program. Applications for certificates of need have been received by the Commonwealth Government which cannot presently be acted upon.

The Governor hereby finds for the reasons given above and pursuant to 1 CMC § 9104(b) that the public interest requires the adoption of emergency regulations which establish a procedure for reviewing and determining applications for certificates of need.

The Governor also finds that the public interest requires that these regulations shall become effective immediately upon filing with the Registrar of Corporations pursuant to 1 CMC § 9105(b)(2) for the reasons given above. They shall remain effective for 120 days pursuant to 1 CMC § 9104(b).

**CONTENT:** The emergency regulations provide detailed guidance on which types of expenditures and service changes are subject to the certificate of need requirement. They also establish procedures for filing and reviewing applications, and for granting or denying The emergency regulations are published certificates of need. following this notice.

**PUBLIC COMMENTS:** Comments on the content of these regulations may be sent to the Office of the Governor, Second Floor, Administration Building, Saipan, MP 96950.

**AUTHORITY:** These regulations are promulgated under the authority of 1 CMC § 2074.

Certified by

Mine LORENZO DE LEON GUERRERO Governor

Filed/ Registrar of Corporations

4/21/90

PAGE 7022

# NUTISIA PUT I GOTPE NA INADAPTAN REGULASION SIHA PARA I SETTIFIKU PUT NISISIDAT

**GOTPE NA NISISIDAT:** I eksisiste na lai gi 3 CMC § § 2421-2429 ha pribebeni na todu ayu i manmanana'i setbisio put inadahen hinemlo' yan fasilidat siha debi di u marisibi petmision, tat komo ayu i settifiku put nisisidat sino' <u>certificate of need</u>, ginen i Commonwealth Health Planning & Development Agency (CHPDA) yanggen para u fansiña (1) manmangasta capitat hulo' asta \$50,000, (2) manmanutuhon nuebo na setbision hinemlo' gi maseha hafa na gasto, pat (3) manmama'tinas otro siha na tinilaika. I CHPDA ma'establesi gi halom i Ufisinan i Gubietno nu i 1 CMC § § 2071-2074 ya ginen mafondo enteramente nu i U.S. Federal Funds, lao esta ti kumalalamten sa' put i mana'para i <u>federal funding</u> na programa. Guaha siha aplikasion para settifiku put nisisidat manmarisibi nu i Gubietnamenton i Commonwealth ni ti siña na u fanma'atende gi prisente.

I Gubietno ginen este ha sodda' na put i rason siha ni manmalista gi sanhilo' yan sigon gi 1 CMC § 9104(b) na i enteres pupbliku ha gagagao i ma'adaptan i gotpe na regualsion siha ni umestableblesi i areklamento para maninan yan mandetetminan aplikasion para settifiku put nisisidat.

I Gubietno lokkue' ha sodda' na i enteres pupbliku ha dimamanda na este siha na regulasion u fanifektibu ensigidas despues di manmasatmiti guato gi Rehistradot Kotporasion sigon gi 1 CMC § 9105(b) (2) put i sanhilo' siha na rason. Este siha na regulasion u fanefektibu 120 dias sigon gi 1 CMC § 9104(b).

**FONDAMENTO:** I regulasion siha put gotpe na nisisidat para i <u>certificate of</u> <u>need</u> ha pribebeni kabales na giha gi put hafa siha na klasen gasto yan tinilaikan setbisio maninafefekta nu i kondision para i settifiku put nisisidat. I manmapropoponi siha na regulasion lokkue' ha estableblesi areklamenton muna'halom yan maninan aplikasion yan para i mana'en pat marinunsia settifiku put nisisidat. I regulasion siha ni manmapropoponi put gotpe na nisisidat para u fanmapupblika gi despues di este na nutisia.

**UPINION PUPBLIKU:** Upinion put i fondamenton este siha na regulasion siña manmasatmimiti guato gi Office of the Governor, Second Floor, Administration Building, Saipan, MP 96950.

**ATORIDAT:** Este siha na regulasion manmalaknos sigon gi atoridat ni mapribeni gi papa' i A CMC § 2074.

Masettifika nu as ORENZO DE LEON SUERRERO Gubietno Masatmiti <del>nu as</del>: Rehistradot Kotporasion

4-25-90 Fecha

(

# ARONGORONGOL EMERGENCY ADOPTION, REEL ALLEGHUL TILIGHIIL NISISIDOOD

Emergency: Allégn ye' 3 CMC §§ 2421-2429 e ailééw bwe aramas kka rekke amwulaar malsumway me leliyeer malsumway nge rebwe ghal aiyegh mwo reel yayaal tilighiil nisisidood sangi Commonwealth Health Planning me Developement Agency (CHPDA) reel (1) rebwe ayoora llapal selaapi ye rebwe yaaya, iye ebwe lap sangi \$50,000, (2) ayoora akkaaw tappal sedbisyo kka e ffééta inaamwo efaisúl abwossul (3)rebwe ayoora akkaaw lliiwel. Re ayoorata mille CHPDA mellól Bwulasiyool Gobenno sangi 1 CMC §2071-2074 nge U.S. Federal Funds mille e ghal ayoora ngáli selaapi, nge esóórolo ighila igna aa úuló progroomal federal funding yeel. Gobennool Commonwealth aa risibi application-il Tilighiil Nisisidood, nge esóor meta emmwel rebwe féérú ngalil ighila.

Gobenno e schuungi bwe rosoon kka weilang reel aylééwal 1 CMC § 9104 (b) bwe, gnatchuur towlap mille re ayoora mille emergency adoption reel ebwe yooy ffeerul mwognutughutul rebwe amwuril me mangiiy ebwe efaisul tilighiil nisisidood.

Gobenno e bwal schuungi bwe reel rebwe ghatch towlap, nge ebwe alégheléghelő Allégh kkaal igha schagh e toolong reel Commonwealth Registrar of Corporations sángi aylééwal 1 CMC § 9105 (b) (2) reel rósoon kkewe weiláng. Ebwe allégheló llól ebwúúghúw ruweigh (120) rál reel aylééwal 1 CMC § 9104 (b)

<u>Ówutol</u>: Alléghúl emergency yeel nge ebwe ayoora milikka rebwe tabweey reel llapal selaapi ye aramas rebwe yááli me lliiwelil sedbisyo reel requirement-il Tilighiil Nisisidőód, Re bwal ayoora milikka rebwe tabweey reel rebwe féérúl me amwuri fischiiy alongal application, iyo ye emmwel me ese mmwel rebwe ngalleer tappal tiliigh yeel. Alléghúl Emergency nge ebwe alléghéló ngáre aa rongoló.

<u>Mangemangiir Towlap</u>; Mangemang me tiip reel allegh yeeı **qg**e emmwel schagh bwe rebwe ischiiy nge raa afanga ngali Office of the Governor, Second Floor, Administrative Building Saipan, MP 96950.

Bwang: Re ayoora Allegh yeel \_\_\_\_\_ sangi bwangil 1 CMC & 2074

Alleghuuyal: ORENZO DE LEON GUERRERO Gobennb Riled: Registrar of Corporations

#### CERTIFICATE OF NEED REGULATIONS

# TABLE OF CONTENTS

# Rule 1

# General Provisions

- 1.1 SCOPE
- 1.2 REPEALER
- 1.3 CONSTRUCTION OF RULES
- **1.4** DEFINITIONS
- 1.5 OFFICE OF THE GOVERNOR
- 1.6 PUBLIC INFORMATION
- 1.7 PROCEEDINGS BEFORE THE GOVERNOR

Rule 2

Expenditures and Changes Covered

- 2.1 SCOPE
- 2.2 DETERMINATION OF EXPENDITURES OVER \$50,000
- 2.3 DETERMINATION OF CHANGE OF SERVICE
- 2.4 DETERMINATION OF CHANGE OF BEDS
- 2.5 RULING ON WHETHER AN EXPENDITURE OR CHANGE IS SUBJECT TO REGULATION

# Rule 3

# Issuing Certificates of Need

- 3.1 SCOPE
- 3.2 LETTERS OF INTENT
- 3.3 FILING OF APPLICATION
- 3.4 CATEGORIES OF APPLICATIONS
- 3.5 REVIEW PROCESS
- 3.6 TIME FOR REVIEW
- 3.7 SUPPORTING DOCUMENTATION
- 3.8 CRITERIA
- 3.9 WRITTEN NOTICES
- 3.10 WRITTEN FINDINGS
- 3.11 REQUIRED FINDINGS
- 3.12 CONDITIONAL CERTIFICATION
- 3.13 DENIAL OF APPLICATIONS
- 3.14 REQUESTS FOR RECONSIDERATION
- 3.15 EXTENSION OF CERTIFICATE OF NEED
- 3.16 REVOCATION OF CERTIFICATE OF NEED
- 3.17 PERIODIC REPORTS BY SUCCESSFUL APPLICANTS
- 3.18 WAIVERS AND MODIFICATIONS

# Exhibit A

Part 1 STANDARD CATEGORIES OF HEALTH CARE SERVICES

Part 2 HEALTH CARE SERVICES WITHIN THE STANDARD CATEGORIES

COMMONWEALTH REGISTER VOLUME 12 NO. 05 MAY 15, 1990

# CERTIFICATE OF NEED REGULATIONS

#### Rule 1

#### General Provisions

#### 1.1 SCOPE

These rules govern procedure relating to the issuance of certificates of need by the Office of the Governor, pursuant to the Commonwealth Health Care Certificate of Need Act, 3 CMC §§ 2421-2429 and are promulgated to provide for the efficient administration thereof.

#### 1.2 REPEALER

The Commonwealth Health Planning and Development Agency regulations for the administration of the certificate of need program which were promulgated by publication in Commonwealth Register Vol. 5, No. 6 dated June 30, 1983 at pages 2208-2239 are hereby repealed in their entirety.

## 1.3 CONSTRUCTION OF RULES

- The rules shall be liberally construed to promote Α. mandatory planning for care facilities and services in Commonwealth, including the the provision of information necessary for such planning to the Office of the Governor, in order to provide for the development of hospitals and other health care facilities of a desirable and practicable location and commitment to meet the health care needs of the Commonwealth.
- B. Rule 1 sets forth general provisions applicable to the issuance of certificates of need by the Office of the Governor and shall be construed in conjunction with the special rules, Rules 2 and 3, governing the particular proceeding described in the caption of the special rules. In any conflict between a provision in Rule 1 and a special rule, the special rule shall govern.

#### **1.4 DEFINITIONS**

As used in these rules and in proceedings brought under these rules, unless the context clearly requires otherwise:

- A. "Applicant" means any person who applies for a certificate of need under these rules;
- B. "Capital expenditure" means any purchase or transfer for money or anything of value, or enforceable promise or agreement to purchase or transfer for money or anything of value, incurred by or on behalf of any person, in the areas of health and medicine, and includes the values of facilities and equipment obtained under donation or lease or comparable arrangements as though such items had been acquired by purchase;
- C. "Certificate of need" means an authorization, when required pursuant to law, to construct, expand, alter, or convert a health care facility or to initiate, expand, develop, or modify a health care service;
- D. "Construct", "expand", "alter", "convert", "develop", "initiate", or "modify"' includes the erection, building, reconstruction, modernization, improvement, purchase or establishment of a health care facility or health care service; the purchase or acquisition of equipment attendant to the delivery of a health care service and the instruction or supervision therefor; the arrangement or commitment for financing the offering or development of a health care facility or health care service; and studies, surveys, design, plans, working drawings, specifications, procedures, and other actions necessary for any such undertaking, which will:
  - 1. Result in a total capital expenditure in excess of \$50,000, or
  - 2. Substantially modify, decrease, or increase the scope or type of health service rendered, or
  - 3. Increase, decrease, or change the class of usage of the bed complement of a health care facility;
- E. "Emergency situation" means a situation, as determined

by the Governor, where (1) the public health has been injured or there is a clear and present danger of such injury, or (2) an existing health care facility has been destroyed or otherwise substantially damaged or there is a clear and present danger of such damage so that the facility is or will be unable to provide its existing range and quantity of health services.

- F. "Health care facility" and "health care service" include any program, institution, place, building, or agency, or portion thereof, private or public, whether organized for profit or not, and which is used, operated, or designed to provide medical diagnosis, treatment, nursing, rehabilitative, or preventive care to any person or persons. The terms include, but are not limited to, health care facilities and health care services commonly referred to as hospitals, psychiatric hospitals, extended care and rehabilitative centers, nursing homes, skilled nursing facilities, intermediate care facilities, kidney disease treatment centers (including freestanding hemodialysis units), outpatient clinics, private clinics, organized ambulatory health care facilities, emergency care facilities and centers, special treatment facilities, home health agencies, health maintenance organizations, and others providing similarly organized services regardless of nomenclature.
- G. "Health maintenance organization" means a public or private organization which:
  - Provides or otherwise makes available to enrolled participants health care services, including at least the following services: usual physician services, hospitalization, laboratory, x-ray, emergency, and preventive services, and out-of area coverage;
  - 2. Is compensated, except for co-payments for the provisions of the basic health care services listed above, by enrolled participants on a predetermined periodic rate basis; and
  - 3. Provides physicians' services primarily through physicians who are either employees or partners of such organization, or through arrangements with individual physicians or one or more groups of

physicians, organized on a group practice or individual practice basis.

- H. "Home health agency" means a public agency or private organization, or a subdivision of such an agency or organization, which is primarily engaged in providing to individuals who are under the care of a physician, on a visiting basis in the places of residence of such individuals, one or more of the following services or items:
  - Part-time or intermittent nursing care provided by or under the supervision of a registered professional nurse;
  - 2. Physician, occupational, or speech therapy;
  - Medical social services under the direction of a physician;
  - 4. Part-time or intermittent services of a home health aide;
  - 5. Medical supplies other than drugs and biologicals, and the use of medical appliances; or
  - 6. Medical services provided by an intern or resident in-training of a hospital under a teaching program of such hospital.
- I. "Major Medical Equipment" means medical equipment which is used to provide medical and other health services and which costs in excess of \$50,000.
- "Organized ambulatory health care facility" means a J. facility not part of a hospital, which is organized and operated to provide health services to outpatients. This term includes the following facilities: clinical health centers; diagnostic centers; treatment centers; family planning centers; family health centers; neighborhood health centers; ambulatory surgical facilities, including centers for dental surgery; cosmetic surgery centers; dental clinics; medical clinics; optometric clinics; community mental health facilities; prenatal clinics; drug abuse or alcoholism treatment centers; facilities for the provision of outpatient physical therapy services including speech

PAGE 7031

pathology; rehabilitation facilities; any provision of medical or health services by a provider of medical or health services organized as a not-for-profit or business corporation other than a professional corporation; and any provider of medical or health services which describes itself to the public as a "center", "clinic", or by any name other than the name of one or more of the practitioners providing these services.

- K. "Special treatment facility" means a structured therapeutic residential program for two or more persons who are socially, emotionally or developmentally disabled, e.g., the mentally ill, the socially or emotionally distressed, alcohol abusers, alcoholics, drug abusers, and drug addicts. In addition to room and board, treatment and rehabilitation/habilitation services are provided by such facilities, within the context of a group living experience, to each resident based upon an individualized treatment plan.
- L. "Substantially modify, decrease, or increase the scope or type of health service" refers to the addition of a clinically related, i.e., preventive, diagnostic, curative, or rehabilitative service not previously provided or the termination of such a service which had previously been provided, and includes the initiation of services by a newly-established health facility, but does not include the termination of a service or services by a provider of health care services which is ceasing its entire operation.

# 1.5 OFFICE OF THE GOVERNOR

- A. Purpose. The Governor shall administer the certificate of need program by prescribing application forms, reviewing completed applications, and granting or denying certificates of need.
- B. Records. The Governor, or his designee, shall have charge of official certificate of need records, including papers, transcripts of testimony, and exhibits filed in proceedings, decisions, rules and regulations, and approved forms. The Governor and any person acting for him under his authority shall receive all documents required to be filed and shall promptly

stamp the time and date upon papers filed.C. Appearance before the Governor.

- 1. Any party to a certificate of need proceeding before the Governor may appear in person, or be represented by an officer, partner or regular employee of the party.
- 2. Any party may be represented by or with counsel or another person chosen as a representative. The Governor may at any time require any person transacting business before the Governor in a representative capacity to show his authority and qualification to act in such capacity.

# 1.6 PUBLIC INFORMATION

- A. The term "public record" as used in these rules includes all rules, regulations, written statements of policy or interpretations formulated, adopted or used by the Governor, all applications for certificates of need filed with the Office of the Governor, written comments regarding such applications received by the Governor, all final decisions and orders, and any other materials filed with the Governor, unless accorded confidential treatment pursuant to law.
- B. Inspection and copies of public records. All public records shall be available for inspection. Copies of public records shall be furnished to any person upon request and upon payment of prescribed fees where appropriate.

#### 1.7 PROCEEDINGS BEFORE THE GOVERNOR

- A. Filing of Documents.
  - 1. Place of filing. All applications, requests for opinion, submittals, reports, memoranda and other paper required or permitted to be filed in any proceeding shall be filed with the Office of the Governor.
  - 2. Date of Filing Documents. The date on which the papers are actually received by the Office of the

Governor shall be deemed the date of filing.

- 3. Form of Documents. All papers filed with the Office of the Governor shall be plainly legible.
- 4. Signature; Certificate of Truth. All papers must be signed in ink by the party or his authorized agency or attorney. The signature of the person signing the document constitutes a certification that he has read the document; that to the best of his knowledge, information and belief every statement contained in the instrument is true and no such statements are misleading; and that it is not interposed for delay.
- 5. Number of Copies. Except as otherwise specifically provided by a particular rule, regulation, or order of the Governor, only an original of all papers shall be filed.
- 6. Name, Address on Documents. The initial document filed by any person in any proceeding shall state on the first page thereof the name and mailing address of the person or persons who may be served with any documents filed in the proceedings.
- B. Computation of Time
  - 1. In computing any period of time prescribed or allowed by these rules, order of the Governor, or any applicable statute, the day of the act, event or default, after which the designated period of the time is to run, shall not be included. The last day of the period computed shall be included unless it is a Saturday, Sunday, or a holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.
  - 2. Whenever an applicant or a party to a proceeding has the right or is required to do some act or initiate some proceedings within a prescribed period after the service of the notice or other paper is served upon him, and the notice or paper is served upon him by mail, two days shall be added to the prescribed time.

- C. Continuance or Extension of Time. Whenever a party has a right or is required to take action within a period prescribed or allowed by these rules, by notice given under these rules, or by an order of the Governor, the Governor, may (1) before the expiration of the prescribed period, with or without notice, extend such period; or (2) upon motion, permit the act to be done after the expiration of a specified period where the failure to act is clearly shown to be excusable.
- D. Retention of Documents by the Agency. All documents filed with or presented to the Office of the Governor shall be retained in the files of the Office of the Governor for the period required by law.
- E. Consolidation. The Governor, on his own initiative or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues which are the same or closely related, if he finds that such consolidation or contemporaneous hearing will be conducive to the proper dispatch of the matter and to the ends of justice and will not unduly delay the proceedings.

# Rule 2

# Expenditures and Changes Covered

# 2.1 SCOPE

This rule sets forth definitions to clarify the undertakings which require a person to secure and to hold a certificate of need.

# 2.2 DETERMINATION OF EXPENDITURES OVER \$50,000

A. Individual Items Less Than \$50,000. In the case of capital expenditures or the acquisition of equipment less than \$50,000 per item, the total cost of all items to be obligated for or purchased within a twelve-month period for a program, service, or plan are included in computing the amount of the capital expenditure.

- B. Cost of Design Phase Plans and Drawings. Design phase plans such as schematic drawings, preliminary drawings, and working drawings, regardless of cost, require a certificate of need if the facility being designed would result in capital expenditures or the acquisition of equipment of a total cost in excess of \$50,000.
- D. Cost of Installation, Training and Instruction. In the case of acquiring equipment or capital items, the cost of installation and the cost of initial training and instruction attendant to the use of equipment or capital items are included in the calculation of the expenditure incurred.
- D. Change in Project Cost.
  - 1. Any increase in cost of an approved project in excess of 15% or \$50,000, whichever amount is less, inclusive of a 5% contingency if it is so indicated in the application for certificate of need, shall require the approval of the Governor.
  - 2. Any increase in cost exceeding the provision in Rule 2.2.D.1. shall require an additional certificate of need if so directed.
- E. Obligation for A Capital Expenditure. An obligation for capital expenditure shall be deemed to have been incurred by or on behalf of a health care or health maintenance organization:
  - When an enforceable contract is entered into by such facility or organization or by a person proposing such capital expenditure on behalf of such facility or organization for the construction, acquisition, lease, or financing of a capital asset; or
  - 2. Upon the formal internal commitment of funds by such facility or organization for a force account expenditure which constitutes a capital expenditure, or
  - 3. In the case of donated property, the date on which the gift is vested.

# F. Exemptions.

- 1. In the case of acquiring equipment or capital items, the operating costs beyond the cost of installation and initial training and instructions are not included in calculating the amount of the capital expenditure.
- 2. Equipment which is not used for diagnosis or treatment, such as office equipment, office and waiting room furniture, and the usual equipment involved in doing business is exempt from the calculation.
- 3. Normal inventories of supplies, such as glassware, chemicals, drugs, linens, and papers, are exempt.
- 4. Studies, surveys, and plans which cost less than \$50,000 and which are preliminary to design phase plans such as schematic drawings, preliminary drawings, and working drawings are exempt.
- 5. The renewal of a lease on substantially the same terms as the previous lease is exempt. This specifically excludes initial leases, which shall be treated the same as purchases.
- 6. The following research-related activities are exempt:

Acquisition of major medical equipment by a health care facility to be used solely for research, institutional health services to be offered solely for research, or the obligation of a capital expenditure to be made solely for research, if the acquisition, offering, or obligation does not: (1) affect the charges of the facility for the provision of medical or other patient care services other than the services which are included in the research; or (2) substantially change the bed capacity of the facility, or substantially change the medical or other patient care services of the facility which were offered before the acquisition, offering, or obligation.

# 2.3 DETERMINATION OF CHANGE OF SERVICE

- A. The standard categories of health services are listed in Exhibit A, Part 1. The addition of any of these services will require a certificate of need. Part 2 of Exhibit A is a sample listing of components of health services which lie within the standard categories. If any facility proposes a change of service not clearly included in one of the standard categories, the Governor shall determine whether such change is a change of service requiring a certificate of need.
- B. Change in Location. A change of location of a health service shall be considered a change of service requiring a certificate of need unless the Governor determines that the change does not significantly affect the delivery of service to the target group. In making this determination, the Governor shall consider:
  - 1. The distance from the old location to the new location.
  - 2. The number of hours per week the service is offered.
  - 3. The accessibility and acceptability of the new location to the target group.
  - 4. Other factors deemed relevant by the Governor.
- C. Mobile Service. The addition or deletion of a mobile service shall require one certificate of need only.
- D. **Exemption.** The termination of a service or services by a provider of health care services that is ceasing its entire operation shall not require a certificate of need. A provider of health care services that is ceasing its entire operation shall notify the agency at least ten days before services are terminated.

# 2.4 DETERMINATION OF CHANGE OF BEDS

A. Permanent Change. A change in the class of usage of the bed complement includes any change which results in a permanent increase or decrease in and class of beds.

- B. Classes of Beds. The categories of classes of beds are those listed in Exhibit A, Part 1.A.
- C. Exemption. Any temporary change, not to exceed ninety days, in the total number of beds in various classes is exempt.

# 2.5 RULING ON WHETHER AN EXPENDITURE OR CHANGE IS SUBJECT TO REGULATION

A person uncertain as to whether he is required to apply for a certificate of need may request a ruling from the Governor.

# Rule 3

#### Issuing Certificates of Need

#### 3.1 SCOPE

This rule covers the procedure for issuing or denying certificates of need.

# 3.2 LETTERS OF INTENT

A person proposing a project requiring a certificate of need shall submit to the Governor a letter of intent in such detail as may be necessary to inform the Governor of the scope and nature of the project at the earliest possible opportunity in the course of planning.

# 3.3 FILING OF APPLICATION

An applicant for a certificate of need shall file an application with the Office of the Governor. Rule 3.4 establishes various categories of applications. Standard application forms, as amended from time to time, may be obtained from the Office of the Governor.

# 3.4 CATEGORIES OF APPLICATIONS

The following categories of applications are established for those projects which require a certificate of need because they involve a capital expenditure in excess of \$50,000 or a change of beds or a change of service:

- A. Emergency. Emergency circumstances such as disasters and equipment failure which jeopardize a facility's ability to deliver its existing range of health services.
- B. Minor Service Change. A change in service involving less than \$50,000 in capital expenditures and an annual operating cost of less than \$50,000.
- C. Equipment Replacement. The replacement of existing equipment that is old, outdated, outmoded, defective, in poor working condition, or which is no longer the best technology, as long as the cost does not exceed \$200,000.
- D. Code Deficiencies. Renovations or improvements to any existing health care structure to correct safety code or building code deficiencies.
- E. Renewal of Lapsed Certificates. Renewal of a certificate of need which has not been implemented within twelve months of the date of issuance, provided that the applicant demonstrates that the circumstances of need have not substantially changed and that satisfactory progress toward implementation of the project has been made.
- F. Design Phase Plans. Design phase plans, such as schematic drawings which cost less than \$50,000 but which are part of a project which will have an overall capital cost of \$50,000 or more.
- G. Change in Ownership. A change in ownership of, or a lease agreement regarding a health facility.
- H. Expenditures of Less than \$200,000 Not Changing Beds or Services. An expenditure of more than \$50,000 but less than \$200,000 which will not result in a bed change or service change.

- I. Change of Service or Beds at a Cost Below \$50,000. A change of service or beds which costs less than \$50,000 and which does not fit into Category B.
- J. **Termination of Service.** The termination of a service where the termination eliminates an existing duplication of services and the applicant demonstrates that the duplication is unjustified.
- K. Any other project which requires a certificate of need, including new health services or facilities to be established.

#### 3.5. **REVIEW PROCESS**

The certificate of need review process for the various categories of applications shall be as follows:

- A. Category A: Emergency.
  - 1. In the case of emergency as defined in Rule 1.3.F and Rule 3.4.A, an applicant may submit an application on a form provided by the Office of the Governor and request the issuance of a certificate of need under this part.
  - If the Governor determines that an emergency exists he may issue of finding of emergency and may:
    - a. Issue a certificate of need, or
    - b. Disapprove the certificate of need.
  - 3. If the Governor determines that an emergency does not exist, he shall disapprove the certificate of need.
  - 4. Any applicant denied a certificate of need under Rule 3.5.A.3 or Rule 3.5.A.4 may resubmit his application under any other appropriate category.
- B. Category B: Minor Service Change.
  - 1. In the case of a minor change as described in Rule 3.4.B, the applicant may submit an application on

forms provided by the Office of the Governor and request the issuance of a certificate of need under this part.

2. Complete Application. An application shall not be accepted for review until it is complete and all necessary information required under Rule 3.7 is provided. If the Governor determines that the application is incomplete, he shall inform the applicant of the additional information required to complete the application.

# C. Categories C through K

- 1. In the case of categories C through K, as described in Rule 3.4, the applicant may submit an application on a form provided by the Office of the Governor and request the issuance of a certificate of need under this part.
- 2. Complete Information. An application shall not be accepted for review until it is complete and all necessary information required under Rule 3.7 is provided. If the Governor determines that the application is incomplete, he shall inform the applicant of the additional information required to complete the application.

## 3.6 TIME FOR REVIEW

To the extent practicable, no review shall take longer than forty-five days from the date that notification is sent to affected persons until a decision is made by the Governor and written findings are made. Criteria for determining when it would be necessary to extend the review period to ninety days include, but are not limited to, applications involving:

- A. Any capital expenditure over \$200,000.
- B. New technology with a capital expenditure over \$200,000 or an annual operating cost over \$100,000.
- C. Equipment over \$200,000.
- D. Concurrent applications from other facilities proposing

a similar project.

E. Any new service not previously offered in the Commonwealth or Guam.

#### 3.7 SUPPORTING DOCUMENTATION

To demonstrate that an application meets the Commonwealth's criteria as established in Rule 3.0, every applicant shall provide the Governor with information and supporting documentation required on the application form. The Governor may revise the form periodically and may have different forms for different categories of projects. The burden of proof is on the applicant, who must demonstrate that his application meets the certificate of need criteria. As part of the supporting documentation, the applicant may be required to submit a schedule of implementation showing phases of the project, expected starting dates, expected dates of obligation of funds for each phase, and expected dates of completion of each phase.

#### 3.8 CRITERIA

The criteria which will be considered by the Governor in his determinations on certificate of need applications include, but are not limited to, the following:

- A. The health care needs of the population to be served.
- B. The relationship of the proposal to the Commonwealth Health Plan.
- C. The relationship of the proposal of the long-range development plan of the proponent.
- D. The relationship of the proposal to the existing health care system of the area.
- E. The availability of less costly or more effective alternative methods of providing service.
- F. The quality of the health care services proposed.
- G. The accessibility of the health care services proposed.

- H. The immediate and long-term financial feasibility of the proposal, as well as the probable impact of the proposal on the costs of and charges for providing health services by the proponent.
- I. The availability of resources, including manpower funds for capital and operating needs, for the provision of the services proposed to be provided, and the availability of alternative uses of such resources for the provision of other health services.
- J. The relationship of the services proposed to ancillary or support services.
- K. The special needs and circumstances of those entities who provide a substantial portion of their services to people who live outside the Commonwealth.
- L. The special needs and circumstances of health maintenance organizations.
- M. The special needs and circumstances of biomedical and behavioral research projects which are designed to meet a national need and for which local conditions offer special advantages.
- N. In the case of a construction project:
  - 1. The costs and methods of the proposed construction, including the costs and methods of energy provision, and the consideration of alternative energy sources; and
  - 2. The probable impact of the construction project reviewed on the costs of providing health services by the proponent.
  - 3. Impact on government infrastructure and utilities.
- Q. The availability of mechanisms for supplying information to the health planning agency.

### 3.9 WRITTEN NOTICES

In his discretion, and as he thinks necessary, the Governor may provide written notification to affected persons of the

Page 20

beginning of a review of an application in categories C through K. "Affected persons" includes the person whose proposal is being reviewed, the elected representatives of the island(s) affected by the proposal, health care facilities and health maintenance organizations located in the area which the Governor determines is the primary target area of the application, any agency which establishes rates for health care facilities or health maintenance organizations in the Commonwealth, and members of the public.

#### 3.10 WRITTEN FINDINGS

The Governor shall provide written findings stating the basis for his final decision. These findings shall be sent to the applicant and made available to others upon request.

# 3.11 REQUIRED FINDINGS

In the case of any certificate of need application proposing the provision of health services to inpatients, the Governor shall not grant a certificate of need or otherwise make a finding that the proposal is needed unless:

- A. The Governor makes written findings as to:
  - 1. The efficiency and appropriateness of using existing inpatient facilities providing inpatient services similar to those proposed as an alternative.
  - 2. The capital and operating costs (and their potential impact on patient charges), efficiency, and appropriateness of the proposed new institutional health services.
- B. The Governor also makes each of the following findings in writing:
  - 1. That superior alternatives to such inpatient services in terms of cost, efficiency, and appropriateness do not exist and that the development of such alternatives is not practicable; and

- 2. That, in the case of new construction, alternatives to new construction (e.g., modernization or sharing arrangements) have been considered to the maximum extent practicable; and
- 3. That patients will experience serious problems in terms of costs, availability, or accessibility, or such other problems as may be identified by the reviewing agency, in obtaining inpatient care of the type proposed in the absence of the proposed new service; and
- 4. That, in the case of a proposal for the addition of beds for the provision of skilled nursing or intermediate care, the relationship of the addition to the plans of other agencies of the Commonwealth responsible for providing and financing such services has been considered.

# 3.12 CONDITIONAL CERTIFICATION

The Governor may grant conditional certification to applications which by modification of specific items of the application would successfully meet the criteria for approval. The Governor shall notify the applicant in writing of the modifications required and establish a time period within which the applicant must certify that the required changes have been met. The Governor shall not issue a certificate of need until the changes have been made and shall deny any application in which changes are not made within the period specified.

#### 3.13 DENIAL OF APPLICATIONS

If an application for a certificate of need is denied, the Governor shall give notice to the applicant in writing stating the grounds for denial.

#### 3.14 REQUESTS FOR RECONSIDERATION

Any person may, for good cause shown, request in writing a reconsideration of a certificate of need decision. For purposes of this subparagraph, a request for reconsideration shall be deemed by the Governor to be proper if it (1) presents significant relevant information not previously considered by the Governor, (2) demonstrates that there have been significant changes in factors or circumstances relied upon by the Governor in reaching his decision, (3) demonstrates that the Governor has materially failed to follow adopted procedures in reaching his decision, or (4) provides such other bases for reconsideration as the Governor determines constitutes good cause. То be effective, a request for reconsideration shall be received thirty days after the Governor's decision. The Governor shall make written findings which state the basis for his decision or reconsideration. A decision of the Governor under this subparagraph shall be considered a decision of the Governor for purposes of issuing a certificate of need.

#### 3.15 EXTENSION OF CERTIFICATE OF NEED

Each certificate of need is valid for a period of one year from the date of issuance unless the period is extended for good cause by the Governor. If a facility does not submit evidence within the year that the approved project has been completed, or evidence that obligations for capital expenditures have been incurred, the certificate shall lapse. Extension of the certificate of need may be requested by submitting a Category E (Rule 3.4) application under the procedure described in Rule 3.5.C.

#### 3.16 REVOCATION OF CERTIFICATE OF NEED

The Governor may revoke a certificate of need if he determines that (1) the start of the project or the obligation of funds for different phases is more than eighteen months behind schedule or (2) the project being implemented by the facility differs substantially from that which was approved by the Governor.

#### PERIODIC REPORTS BY SUCCESSFUL APPLICANTS 3.17

Providers of health services who have received approval of certificate of need applications shall submit periodic reports respecting the development of their projects and supply such information as the Governor shall request, including, within one year from the date of issuance of the certificate of need, evidence that the approved project has been completed or evidence that obligations for capital expenditures have been incurred.

#### WAIVERS AND MODIFICATIONS 3.18

The Governor, for good cause, may with the exception of procedures for denial of application, waive or modify the regulations setforth herein.

MAY 15, 1990

#### EXHIBIT A

#### Part 1

## STANDARD CATEGORIES OF HEALTH CARE SERVICES

The addition or deletion of any of the specified health care services, as shown below, will require a certificate of need. Please refer to Part 2 of Exhibit A for a sample listing of all health services which lie within these standard categories.

A. Bed Related

#### Acute

- 1. Medical/Surgical
- 2. Obstetrics
- 4. Pediatrics
- 5. Neonatal Intensive Care
- 6. Psychiatric

#### Long Term

- 7. Psychiatric
- 8. Tuberculosis
- 9. Mentally Retarded
- 10. Leprosy
- 11. Children's Orthopedics
- 12. Rehabilitation
- 13. SNF (Nursing Home)
- 14. ICF
- 15. SNF/ICF
- 16. ICF-MR
- 17. Special Treatment Facility
- 18. Home Care

#### B. Non-Bed Related

- 1. Outpatient and Clinic Services
- 2. Emergency Room Services
- 3. Prevention and Detection
- 4. Physical Medicine
- 5. Vocational/Disability Services
- 6. Outpatient Surgery (Surgicenter)
- 7. Diagnostic Radiology

- 8. Nuclear Medicine
- 9. Ultra Sound
- 10. Laboratory Services
- 11. Social Services
- 12. Pharmacy
- 13. Home Health Agency
- 14. Drug Rehabilitation
- 15. Alcohol Rehabilitation
- 16. Free-Standing Recompression Centers
- 17. Free-Standing Health Screening Centers
- 18. Free-Standing Mental Health Centers
- 19. Free-Standing Family Planning Centers
- 20. Free-Standing Prenatal or Abortion Clinics
- 21. Dentistry
- 22. Ambulance Service

## C. Special Services

- 1. Renal Division
- 2. Cardiac Catherization
- 3. Burn Center
- 4. Neurosurgery
- 5. Open Heart Surgery
- 6. Organ Transplant
- 7. Therapeutic Radiation
- 8. Organ Bank
- 9. Blood Bank
- 10. Hemophilia Services

#### EXHIBIT A

#### Part 2

## HEALTH CARE SERVICES WITHIN THE STANDARD CATEGORIES

The health care services shown below as sub-elements of the standard categories of Part 1 of this exhibit are considered to be the component parts of such categories. If any health facility or organization is currently providing one or more component services within a standard category, the addition or deletion of other component services within that standard category shall not be regarded as the institution of a new health care service.

#### A. Bed Related

Acute

## 1. Medical

Allergy Communicable Disease Dermatology Endocrinology Gastroenterology Cardiac Care (Non-CCU) Physical and Medical Evaluation Family Practice Internal Medicine Pulmonary Function and Inhalation Therapy Geriatric Urology Eye, Ear, Nose, Throat Neurology

Surgical

General Ophthalmology Thoracic Otorhinolaryngology Proctology Orthopedic Urology Cystoscopy Oral Plastic

- 2. Obstetrics
- 3. Pediatric
- 4. Neonatal Intensive Care
- 5. Critical Care

(All critical care beds including, but not limited to, cardiac care, surgical intensive care, medical intensive care and respiratory intensive care.)

6. Psychiatric

Partial Hospitalization Program Psychological Evaluation Shock Therapy

Long Term

- 7. Psychiatric
- 8. Tuberculosis
- 9. Mentally Retarded
- 10. Leprosy
- 11. Children's Orthopedics
- 12. Rehabilitation
- 13. SNF
- 14. ICF
- 15. SNF/ICF
- 16. ICF/MR
- 17. Special Treatment Facility
- 18. Home Care

## B. Non-Bed Related

## 1. Outpatient and Clinic Services

This category is intended to include the range of services normally provided by individual physicians engaged in the private practice of medicine, or by a group of physicians providing the usual range of services found in a group practice setting.

It is to be distinguished from free-standing or specialized services even though those services or elements of those services may be elements of outpatient and clinic services.

Allergy Arthritis Cardio-Vascular Cerebral Palsy Cystic Fibrosis Dermatology Diabetes Electroencephalography Emergency Endocrinology Eye, Ear, Nose, Throat Family Planning Genito-Urinary Glaucoma Gynecology Health Education Hearing Hypertension Laboratory Mental Health Muscular Dystrophy Neurology **Obstetrics** Office Surgery (Non-Surgicenter) Parasitology Pediatrics Pharmacy Physical Medicine Podiatry Prevention and Detection Proctology

Psychiatric Sickle Cell Anemia Social Services Speech Thoracic Toxemia Tuberculosis Tumor Cancer Ultra Sound Venereal Disease Vocational Disability Diagnostic and Preventive Medicine Outreach

## 2. Emergency Room Service

### 3. Prevention and Detection

Immunization Well Person Maintenance Multi-Phasic Screening Condition-Specific Screening

## 4. Physical Medicine

Physical Therapy Occupational Therapy Speech Therapy Recreational Therapy Audiology Prosthetics, Brace Fitting

## 5. Vocation Services

Vocational Evaluation Vocational Counseling Pre-Vocational Experiences Special Education Services Vocational Training Sheltered Employment Travel Training for the Blind

Disability Services

Deafness Blindness

PAGE 7054

Tuberculosis Cardiac Conditions Orthopedic Conditions Neurology

## 6. Outpatient Surgery (Surgicenter)

A surgicenter will be that free-standing surgical unit defined by the American College of Surgeons unless such definition is superseded by Commonwealth law or regulations.

## 7. Diagnostic Radiology

Diagnostic X-Ray Cinefluorography Ventriculography Angio-Cardiology Thermography Computed Axial Tomography Special Procedures

### 8. Nuclear Medicine

- 9. Ultra Sound
- 10. Laboratory Services

Microbiology Clinical Chemistry Serology Hematology Pathology Histopathology Autopsy

- 11. Pharmacy
- 12. Social Services

Social Casework Department Family Planning Services Recreation (Non-Medical) Social Study and Evaluation Social Group Work

- 13. Home Health Agency
- 14. Drug Rehabilitation
- 15. Alcohol Rehabilitation
- 16. Free-Standing Recompression Center
- 17. Free-Standing Health Screening Centers
- 18. Free-Standing Mental Health Centers
- 19. Free-Standing Family Planning Clinics
- 20. Free-Standing Prenatal or Abortion Clinics
- 21. Dentistry

Oral Surgery Operative/Restorative Dentistry Endodontia Prosthodontia Periodontia Orthodontia Prophylaxis

- 22. Ambulance Services
- C. Special Services
  - 1. Renal Dialysis
  - 2. Cardiac Catherization
  - 3. Burn Center
  - 4. Neurosurgery
  - 5. Open Heart Surgery
  - 6. Organ Transplant
  - 7. Therapeutic Radiation

X-Ray Therapy Orthovoltage X-Ray Therapy Radium Megavoltage X-Ray Therapy Gamma Beam Therapy

- 8. Organ Bank
- 9. Blood Bank
- 10. Hemophilia Services

Certified by:

PAGE 7057

### NOTICE OF PROPOSED

#### CERTIFICATE OF NEED REGULATIONS

The Office of the Governor, pursuant to the authority provided by 1 CMC § 2074 and the Administrative Procedures Act, hereby notifies the public of its intention to adopt rules and regulations. The proposed regulations govern the issuance of certificates of need under the Commonwealth Health Care Certificate of Need Act, 3 CMC §§ 2421-2429.

The proposed certificate of need regulations will provide detailed guidance on which types of expenditures and service changes are subject to the certificate of need requirement. They also establish procedures for filing and reviewing applications and for granting or denying certificates of need. The proposed regulations are published following this notice.

The Office of the Governor urges the public to submit written comments and recommendations regarding the proposed regulations within thirty days after the first publication in the Commonwealth Register to the following address:

> Office of the Governor Second Floor, Administration Building Saipan, MP 96950

LORENZO DE LEON GUERRERO Governor

4/21/90 Date

PAGE 7058

# NUTISIA PUT I MANMAPROPOPONI SIHA NA REGULASION PARA I SETTIFIKU PUT NISISIDAT

I Ufisinan i Gubietno, sigon gi atoridat ni mapribeniyi nu i 1CMC § 2074 yan i Administrative Procedures Act, ginen este ha nutitisia i pupbliku nu i entension-ña para u fanadapta areklamento yan regulasion siha. I manmapropoponi siha na regulasion ha despoponi i mana'en settifiku put nisisidat sino' <u>certificate of need</u> gi papa' i Commonwealth Health Care Certificate of Need Act, 3 CMC § § 2421-2429.

I manmapropoponi siha na regulasion para i settifiku put nisisidat para u pribeni kabales na giha gi put hafa siha na klasen gasto yan tinilaikan setbisio maninafefekta nu i kondision para i settifiku put nisisidat. I manmapropoponi siha na regulasion lokkue ha estableblesi areklamenton muna'halom yan maninan aplikasion yan para i mana'en pat marinunsia settifiku put nisisidat. I manmapropoponi siha na regulasion para u fanmapupbliku gi despues di este na nutisia.

I Ufisinan i Gubietno na sosoyo' i pupbliku na u fana'halom tinige' siha na komento yan rekomendasion put i manmapropoponi na regulasion gi halom trenta dias despues di i primet na ma'emprenta-ñiha este siha na regulasion gi halom i Rehistran Commonwealth guato gi sigiente na address:

> Office of the Governor Second Floor, Administration Building Saipan, MP 96950

ORENZÓ DE LEO GUERRERO Gubietho

## ARONGORONG REEL FFÉERUL ALLÉGHUL TILIGHIIL NISISIDÓOD

Bwulasiyool Gobenno, igha eyoor bwangil sangi aylééwal 1 CMC § 2074 me Administrative Procedures Act, e mwuschal ebwe arongaar towlap igha ekke mangiiy ebwe ayoora allégh. Allégh yeel, nge reel mwoghútúghútúl fféérúl Allégh reel isisiiwowul tilighiil nisisdóód sangi ayleewal Commonwealth Health Care Certificate of Need Act 3 485 2421-2429.

Tiligniil Nisisidood yeel, nge ebwe ayoora mille rebwe attabweey reel llapal selaapi ye aramas re yaali me lliwelil sedbisyo reel requirement- il Tilighiil Nisisidood. Re bwal ayoora milikka rebwe tabweey reel rebwe feerul me amwuri fischiiy alongal application, iyo ye emmwel me esemmwel rebwe ngalleer tappal tiligh yeel. Allegh yeel nge ebwe aléghéléghélo ngáre aa takkal rongolo.

Bwulasiyool Gobenno ekke tingór ngáliir towlap bwe rebwe ischito llól bwulasiyo yeel reel meta mángemángiir reel allégh yeel, eliigh (30) rál sángi maram, rál, me ráágh ye e toowow arongorong yeel mellól Commonwealth Register reel address yeel: Office of the Governor

Second Floor, Administrative Building Saipan, MP 96950

GUERRERO 1 F0 Gobenno

25 40

## COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS DEPARTMENT OF FINANCE

IN RE:

NO. 90-01 PRIVATE TAX RULING

X CORPORATION and Y CORPORATION

### I. REQUEST FOR RULING

Pursuant to 4 CMC 1707, X Corporation and Y Corporation have requested a private letter ruling regarding the applicability to certain facts of the withholding tax imposed by Sections 881 and 1442 of the United States Internal Revenue Code ("IRC"), as mirrored in the Commonwealth of the Northern Mariana Islands ("CNMI") under the Northern Marianas Territorial Income Tax ("NMTIT").

II.

## **ISSUES**

Based on the facts set forth in Part III below, X Corporation and Y Corporation have requested a ruling that:

1. "Dividends and interest paid to shareholders and/or other foreign entities are subject to a withholding tax at the source of payment; NMTIT Sec. 881."

2. "Income taxes withheld at the source on dividends and interest payments will be subject to rebate provisions of 4 CMC, Division 1, Chapter 7, Section 1708."

X Corporation and Y Corporation have also requested approval of a two step procedure whereby: (a) any withholding tax due under IRC 881 and IRC 1442, determined after crediting the amount of the CNMI Business Gross Revenue Tax ("BGRT") owed, as authorized by 4 CMC 1709, would be abated in advance by the amount of the NMTIT rebate computed under 4 CMC 1708, and (b) the net amount remaining due would be paid to the CNMI by the recipients of the payments, rather than being withheld at the source by X Corporation, the payor.

# III.

## FACTS

X Corporation is incorporated and doing business in the CNMI, and is a wholly owned subsidiary of Y Corporation. Y Corporation is incorporated in the United States. Y Corporation is ultimately owned by nationals foreign to both the United States and the CNMI. X Corporation has accumulated substantial earnings which approximate its accumulated earnings and profits. Any dividends paid by X Corporation to Y Corporation or to any other future shareholders of X Corporation would be of the non-liquidating variety, and any interest paid by X Corporation to Y Corporation or to any other foreign creditors would be at current market rates.

#### IV.

## RULING

1. X Corporation and Y Corporation are not subject to the 30% CNMI withholding tax imposed by IRC 881 and IRC 1442 insofar as X Corporation makes dividend or interest payments to Y Corporation. Consequently, the issues posed with regard to the NMTIT rebate and the proposed special tax payment procedure are irrelevant as to such payments.

2. The Director of Finance concurs with Y Corporation's position that Y Corporation is subject to the BGRT on dividends and interest paid to it by X Corporation.

3. No ruling can be issued as to dividend or interest payments made by X Corporation to non-CNMI payees other than Y Corporation because the parties have not disclosed sufficient facts to make such a ruling.

#### v.

## LEGAL ANALYSIS

The IRC is applicable in the CNMI in the same manner as it is applicable in the Territory of Guam. Section 601 of the Covenant, U.S. Public Law 94-241; 4 CMC 1700 -1702; 48 U.S.C. 1421i. Known in the CNMI as the NMTIT, it is mirrored by substituting "CNMI" for "United States" and by making other appropriate substitutions. 4 CMC 1701(e). References to Guam in the IRC shall be deemed also to apply to the CNMI. Section 601(c) of the Covenant; 4 CMC 1701(f). The CNMI was authorized by the U.S. Congress to rebate the receipt of NMTIT payments, and the CNMI has implemented this authority by enacting local rebate legislation. 4 CMC 1708.

IRC 881 and IRC 1442 are part of the NMTIT applicable in the CNMI. 4 CMC 1702. Subsection (a) of IRC 881 and subsection (a) of IRC 1442, when taken together, require a CNMI payor to withhold, as a tax, 30% of the amount of any dividends or interest paid to a foreign corporation from sources within the CNMI, and to pay the amount withheld over to the CNMI government. IRC 1461 & 6301; Regs. 1.1461-2 & 3, 1.6302-2, 1.1441-7; 4 CMC 1708(d); Sec. 4.1818.1, Rev. and Tax. Reg. 8301. A foreign corporation is a corporation incorporated in a jurisdiction other than the CNMI. IRC 7701(a)(4) & (5). A corporation incorporated in the United States is as much a foreign corporation vis a vis the CNMI as is a corporation incorporated in France or Japan.

In 1972, IRC 881 and IRC 1442 were amended by adding subsection (b) to IRC 881 and subsection (c) to IRC 1442, to wit:

"Exception for Guam Corporations. - For purposes of [IRC 881 and IRC 1442], the term 'foreign corporation' does not include a corporation created or organized in Guam or under the law of Guam."

The amendments to IRC 881 and IRC 1442 were made by U.S. Public Law 92-606. The legislative history of Public Law 92-606 states that IRC 881 and IRC 1442 are to be applied literally by the United States and on a mirrored basis by Guam. In the case of Guam, this means that "United States" is to be substituted for "Guam". Thus, IRC 881(b) and IRC 1442(c) exclude from the 30% withholding tax any dividend or interest payments made by U.S. payors to Guam and CNMI corporations and any dividend or interest payments.

"One of the tax problems which has arisen from the application of the 'mirror image' system relates to the imposition of an additional 30-percent Guam tax on certain U.S. corporate income. As a result of the 'mirror image' system, corporations which are not created or organized in Guam are treated as foreign corporations (sec. 7701(a)(4) and (5)). This means that a domestic U.S. corporation is treated as a foreign corporation for purposes of Guam tax laws. Similarly, a Guam corporation is treated as a foreign of U.S. tax law.

Under the 'mirror image' system (secs. 881 and 1442), a foreign corporation is taxed by Guam at the rate of 30percent on certain passive types of income received from This income includes interest, sources within Guam. dividends, rents, and other fixed or determinable annual or periodic income which is not effectively connected with the conduct of a business in Guam. This tax is withheld at its source and is imposed on the gross amount of the income without allowance of any deductions. Since a U.S. corporation is treated as a foreign corporation under the Guam tax laws, the rules described above treat payments from Guam to U.S. corporations as payments to 'foreign corporations' and if the income is of any of the specified types, Guam imposes a 30-percent tax on the gross amount of this income. Since no deductions are allowed, the tax on this income, in many cases, is higher than the regular corporate tax would be if deductions Even though the United States allows a were allowed. foreign tax credit for taxes paid to its possessions (including Guam), this tax rate, since it is on a gross basis, is likely to be higher than the regular U.S. corporate tax rate. The fact that this income now is usually taxed at higher rate than similar income earned in the United States has had the effect of seriously retarding investments by U.S. corporations in Guam.

To eliminate the disincentive described above, your committee's bill amends the U.S. tax laws (section 1(e) of the bill) to provide that Guamanian corporations are not to be treated as foreign corporations for purposes of the 30-percent tax (sec. 881) or for the purpose of the provisions (sec. 1442) providing for the withholding of that tax. Since Guam's tax law is the 'mirror image' of the U.S. law, this means that under their tax law U.S. corporations will not be treated as foreign corporations for purposes of the 30-percent tax (sec. 881) or for purposes of the withholding of that tax (sec. 1442). As a result of this change, U.S. corporations will not be subject to the 30-percent Guam tax on their Guam source passive income which is not effectively connected with a Guam business. However, a U.S. corporation which has business in Guam will remain subject to Guam tax at the regular corporate rates on that income.

Under U.S. tax law the types of passive income involved (interest, dividends, rents, etc.) received from Guam will continue to be treated as foreign source income. However, a foreign tax credit generally will no longer be available for this type of Guamanian income since, under the bill, it will no longer be subject to Guam tax. As a result, this income will be taxed at the regular corporate rates by the jurisdiction in which the corporate recipient is organized. In other words, except for the fact that the 30-percent tax (and its withholding) is not to apply, existing law will continue to apply for purposes of the income taxes on the U.S. corporations."

U.S. Code Cong. and Adm. News, 1972, pages 5402 and 5403. See also <u>Vitco v. Government of Virgin Islands</u>, 560 F.2d 180 (3rd Cir. 1977); <u>Sayre v. Riddell</u>, 395 F.2d 407 (9th Cir. 1968).

In 1984, IRC 881(b) and IRC 1442(c) were amended by U.S. Public Law 98-369 as follows:

IRC 881:

"(b) Exception for Certain Guam ... Corporations.-

(1) <u>In General</u>. - For purposes of this section,

4

a corporation created or organized in Guam ... or under the law of Guam ... shall not be treated as a foreign corporation for any taxable year if-

> (A) at all times during such taxable year less than 25 percent in value of the stock of such corporation is owned (directly or indirectly) by foreign persons, and

> (B) at least 20 percent of the gross income of such corporation is shown to the satisfaction of the Secretary to have been derived from sources within Guam ... for the 3-year period ending with the close of the preceding taxable year of such corporation (or for such part of such period as the corporation has been in existence).

(2) <u>Paragraph (1) Not to Apply to Tax Imposed</u> <u>in Guam.-</u>

(A) Paragraph (1) shall not apply, and

(B) for purposes of this section, the term 'foreign corporation' does not include a corporation created or organized or under the law of Guam.

(3) Definitions-

(A) <u>Foreign Person</u>. - For purposes of paragraph (1), the term 'foreign person' means any person other than-

(i) a United States person, or

(ii) a person who would be a United States person if references to the United States in section 7701 included references to a possession of the United States.

(B) <u>Indirect Ownership Rules</u>. - For purposes of paragraph (1), the rules

of section 318(a)(2) shall apply except that '5 percent' shall be substituted for '50 percent' in subparagraph (C) thereof.

IRC 1442:

"(c) Exception for Certain Guam ... Corporations .-

(1) <u>In General</u>.- For purposes of this section, the term 'foreign corporation' does not include corporation created or organized in Guam ... or under the law of Guam ... if the requirements of subparagraphs (A) and (B) of section 881(b)(1) are met with respect to such corporation.

(2) <u>Paragraph (1) Not to Apply to Tax Imposed</u> <u>in Guam.</u> – For purposes of applying this subsection with respect to income tax liability incurred to Guam-

(A) paragraph (1) shall not apply, and

(B) for purposes of this section, the term 'foreign corporation' does not include a corporation created or organized in Guam or under the law of Guam."

The 1984 amendments to IRC 881(b) and IRC 1442(c) placed restrictions on the previous absolute right of Guam and CNMI corporations to receive interest and dividend payments from U.S. sources free of the U.S. 30% withholding tax. Under the amendments, distributions of U.S. source interest and dividends to Guam and CNMI corporations are subject to the 30% U.S. withholding tax <u>unless</u> (a) at all times during the taxable year less than 25% in value of such corporation is owned directly or indirectly by foreign persons, and (b) at least 20% of the gross income of such corporation for a three year period is derived from sources within Guam or the CNMI. These restrictions were designed to make it difficult for foreign corporations to use Guam and CNMI corporations as conduits to obtain payments of passive U.S. source income free of U.S., Guam and CNMI tax. U.S. Code Cong. and Adm. News, 1984, pages 1342 -1344.

The 1984 amendments to IRC 881(b) and IRC 1442(c) do not apply on a mirrored basis to transfers of passive source income in the opposite direction, i.e., to transfers of passive Guam and CNMI source income to United States corporations. The 1972 amendments to IRC 881(b) and IRC 1442(c) remain in effect and continue to be mirrored as to such transactions. Thus, distributions of Guam and CNMI source dividends and interest to U.S. corporations remain free of the Guam and CNMI 30% withholding taxes without any restrictions. U.S. Code Cong. and Adm. News, 1984, pages 1342-1344.

"The bill makes it clear that this rule is not 'mirrored.' That is, the bill does not affect the tax imposed by Guam, the Marianas, or the Virgin Islands (under the 'mirror Code') on payments of interest, dividends, and certain other income from possessions sources to U.S. corporations. Such payments from sources in Guam and the Marianas will remain free of tax in those possessions, regardless of the U.S. corporation's owners or the source of its other income."

U.S. Code Cong. & Adm. News, 1984, pg. 1344. Also: Rev. Rul. 83-9; T.D. 8108, repealing Temp. Reg. 4a.861-1 (T.D. 7865).

IRC 881(b) and IRC 1442(c) were amended again in 1986 under the Tax Reform Act. Sections 1273(b), U.S. Public Law 99-514. The amendments to IRC 881(b) and IRC 1442(c) strengthened the restrictions under which passive U.S. source income can be paid to Guam and CNMI corporations free of the U.S. 30% withholding tax. Also, in anticipation of Guam and the CNMI achieving tax autonomy from the U.S. tax system, as authorized by the Tax Reform Act, the provisions of IRC 881(b) and IRC 1442(c) allowing passive Guam and CNMI source income to be paid to U.S. corporations free of the Guam and CNMI 30% withholding taxes were eliminated. U.S. Code Cong. and Adm. News, 1986, pages 1115, 1116, 1119-1122.

The 1986 amendments to IRC 881(b) and IRC 1442(c) will apply "only if (and so long as) an implementing agreement is in effect between the United States and such possession". Sections 1271(b) & 1277(b), U.S. Public Law 99-514. Since no implementation agreement is in effect between the CNMI and the United States, the 1986 amendments to IRC 881(b) and IRC 1442(c) do not apply to the CNMI. Accordingly, IRC 881(b) and IRC 1442(c), as amended in 1984, remain in effect.

When the present state of IRC 881(b) and IRC 1442(c) are applied to the facts set forth in Part III above, it is apparent that dividends or interest paid by X Corporation, a CNMI corporation, to Y Corporation, a United States corporation, would be free of the 30% CNMI withholding tax as a matter of law. Since no tax can be withheld, the issues raised by X Corporation and Y Corporation with respect to the NMTIT rebate and the proposed special payment method are irrelevant.

The Director of Finance concurs with Y Corporation's position that Y Corporation would be subject to the BGRT on any dividends or interest that X Corporation may pay to Y Corporation. 4 CMC 1103(c) & (k), 4 CMC 1301.

However, no ruling can be made at this time as to whether the 30% CNMI withholding tax would apply to dividends or interest paid by X Corporation to any non-CNMI distributees other than Y Corporation. The reasons are twofold.

First, the parties have failed to disclose the identities and places of residence/incorporation of any other potential "entities" to whom dividends or interest may be paid, and have failed to disclose any additional information concerning the composition of such "entities" or details of any proposed distributions to be made to them, as required by 4 CMC 1701. For instance, X Corporation may acquire shareholders besides Y Corporation to whom dividends may be paid, and these shareholders might be non-U.S. foreign Or, X Corporation may become indebted and pay interest persons. to a creditor who might be a non-U.S. foreign person. Distributions of passive CNMI source income to such "entities" would likely be subject to the CNMI 30% withholding tax unless an exemption Although the exemption contained in IRC 881(b) and IRC applied. 1442(c) for distributions made to U.S. corporations would not apply, one of the other exemptions, referred to below, might apply. Thus, without obtaining more information, no ruling can be made. Rulings can be made only as to specific and known facts.

Second, the 30% CNMI withholding tax applies only to dividend and interest payments made to foreign corporations from CNMI source Although IRC 861(a)(1) & (2) generally sources dividend income. and interest payments where the payor is domiciled/incorporated, there are exceptions. Exceptions are found in IRC 861(a)(1)(A)-(D) as to interest and in IRC 861(a)(2)(A) as to dividends, modifying the previous 80/20 rules. Also, specific exemptions are found in IRC 881(d) and IRC 871(i). See General Explanation of the Tax Reform Act of 1986, prepared by the Staff of the Joint Committee on Taxation, pages 936 - 941. These rules are complex, and their application to potential non-CNMI distributees of X Corporation is beyond the facts and the legal contentions disclosed by the parties. Perforce, any ruling on future distributions can be made only on a transaction by transaction basis after full disclosure of the facts has been made.

DATED THIS 29th DAY OF MARCH, 1990.

Issued:

Concur:

ELOY S. INOS Director of Finance Stephen A. Cohen STEPHEN A. COHEN Special Ass't. Att'y. Gen'l.

8

## PUBLIC NOTICE

## A.G. OPINIONS PUBLISHED

January 15, 1990 to May 15, 1990

Number	Date	<u>Subject</u>
90-01	01/26/90	Membership on CUC Board and Municipal Council
90-02	02/14/90	Public Law 6-41 Retirement Fund - Refunds for Employees who Separate from Government Service
90-03	03/12/90	Public Law 7-1 : Section 601 Authority of the Budget Officer to allot less than 25% of an agencies budgeted amount.
90-04	04/23/90	Eligibility of Military Veterans for Creditable Service for Leave Purposes, Pursuant to Personnel Service System Rule VII.A.2, for Service Outside the Trust Territory.
Date: May 15,	1990	$\bigcap_{n \in \mathcal{N}} \bigcap_{n \in \mathcal{N}} \bigcap_{$

Work L. Araza () ROBERT C. NARAJA

ROBERT C. NARAJA Attorney General