



July 27, 2022

MEMORANDUM

TO: BRCC Committee

CC: Carl T.C. Gutierrez  
President & CEO

Ron Aguon  
UOG Associate Professor of Public Administration and Legal Studies

Jeff Jones  
Board Director

Joe McDonald  
Legal Counsel

GVB Board of Directors

FROM: Gerry Perez  
Vice President

Re: **BRCC Summary Report**

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Håfa Adai All:

We are making good progress (see attached Summary Report to date) in the review of our bylaws and the enabling statute. Our work is detailed and meticulous, which might make it seem like it is slow-going. We are, nonetheless, diving deeper into other material issues of relevance, including the Board's committee policies and procedures, as they emerge from our review. In the attached, we provide our first set of findings. We shall share all our important findings and recommendations in due course. Our effort shall continue despite travel schedules, holidays, and the time required to obtain material information. Your patience and understanding are appreciated.

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**BUSINESS RISK COMPLIANCE AND CONTROL**

The GM is the bureau's chief administrator with primary responsibility for development, operation, maintenance, and administration of the bureau's business affairs. The GM created the Business Risk Compliance and Control Committee (BRCC) to help oversee his ultimate administrative responsibility on behalf of the bureau. The BRCC consists of GVB Director Jeff Jones, President, CEO & General Manager Carl T. C. Gutierrez, and Vice President & Deputy General Manager Gerry Perez, and advised by UOG Professor Ron Aguon and GVB Counsel Joe McDonald. The BRCC provides oversight for the Bureau's corrective actions.

**CORRECTIVE ACTION PLANNING**

Corrective Action Planning is used by the BRCC as control oversight of material risks to the bureau. It identifies specific corporate, administrative, regulatory, legal, and compliance/control risks and assigns a level of materiality to them. Higher-level risks need ongoing monitoring and immediate corrective action. Lower-level risks less so.

Individual matters undergoing Corrective Action Planning (such individual matters referred to herein as "CAPs") fall within the administrative oversight of the BRCC. Individual CAPs are formally designated for purposes of internal administrative review and disposition. CAPs, therefore, provide the bureau's position on identified risks, issues, and corrective action to be taken on them. As part of the planning process, CAPs schedule target dates for important milestones to controlling risks, including the date that a control over the identified risk is implemented. The BRCC assists the GM in his chief administrative officer role by creating continuing oversight of the bureau's control over its CAPs.

The BRCC does not play a direct role in the members' governance over issues, risks, or corrective action associated with director elections and the Board's bylaws. Any such undertaking is the membership's, within the corporate structure provided for in the enabling act. Corporate governance through GVB's bylaws and its board of directors begins and ends with the members. The enabling law permits members to meet to conduct membership business. That business includes elections of 4 directors to the Board. Members are also authorized to adopt, amend, repeal, and enact bylaws. However, members may delegate this authority to a board of directors by a 2/3 vote.

**ANALYSIS OF THE SECOND AMENDED BYLAWS**

Counsel has completed an analysis of the currently applicable bylaws (the Second Amended Bylaws; the "Bylaws") against GVB's enabling law, relevant administrative law, and relevant and applicable provisions of Guam's General Corporation Law (GCL).

*Scope; Subject Matter*

The Bylaws were passed through corporate action but were not promulgated pursuant to the Administrative Adjudication Law (AAL). Accordingly, for there to be lawful authority for Board action in the Bylaws, such authority must be derived from the enabling laws, the

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administrative laws and the GCL. Board promulgation of authority outside of these sources of law would not be legal.

The following 11 subject matter are expressly authorized to the Board by the enabling act including relevant provisions of the GCL (“Express Board Subject Matter” or “EBSM”):

- (i) Authority upon vote of 2/3 of the membership, pursuant to GCL § 2204 to enact or amend bylaws.
- (ii) The duties stated in § 9107 (a).
- (iii) Determination of the duties and compensation of the GM.
- (iv) The fiscal authority to approve the annual budget, 9113 (b) prior to disbursement of funds by DOA.
- (v) If delegated by the membership; the authority to agree to a membership match as a condition to the payments of sums appropriated by the Legislature.
- (vi) The responsibility to promulgate personnel rules and regulations, § 9110 and 4 GCA §§ 4105 (a), (e).
- (vii) The duty to correct discrepancies and recover unlawful or incompliant expenditures, § 9113 (d).
- (viii) The prior approval authority for purchase orders \$25,000 and over, § 9111.
- (ix) The authority to issue stamps under § 9202.
- (x) Authority to access 50% of the Rainy Day Fund by resolution, § 9304 and to resolve to request the legislature for a greater proportion of the RDF.
- (xi) Authority to give indication of the Bureau’s clear strategic plans and policy recommendations to either move forward or to suspend any further efforts in developing a cruise ship industry on Guam, § 9501 (b) (2) (F).

Provisions falling outside of the EBSM are not authorized to the board pursuant to the enabling act and are, therefore, illegal.

The following are authorized to the members/directors for adoption or enactment of provisions of the bylaws (express provisions found in the enabling law (XBLP)):

- Conduct and administration of the Bureau’s activities is responsibility of the GM as CAO, including any duties assigned to the GM by the board;
- Performance of duties and exercise of authorities conferred or imposed on the board (EBSM).
- Provisions governing the exercise of Bureau powers, authorized by rule or regulation giving such to a committee of the board pursuant to § 9105 (k).

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The following are relevant governance provisions under the GCL—all subject to the enabling law and applicable administrative law (GCLGP):

- The time, place, and manner of calling and conducting regular or special meetings of directors, and the time and manner of calling and conducting regular or special meetings of members.
- The qualifications, duties, and compensation of directors and officers.
- The time for holding the annual election of directors and the mode and manner of giving notice thereof.
- The manner of election and the term of office of all officers other than directors and those elected by the directors.
- The penalties for violation of bylaws, not exceeding in any case the sum of one hundred dollars (\$100.00).
- Such other matters not otherwise provided for in the foregoing as may be necessary for the proper or convenient transaction of the business of the corporation.

*Review of Articles*

From the foregoing scope the following conclusions are provided:

PROVISION	DESCRIPTION	REVIEW/COMMENT
Art. I. Purpose for corporation	Re-iteration of the purpose for GVB in the enabling law.	Art. I is not related to an express bylaws provision under the enabling act (XBLP) or a governance provision in the GCL (GCLGP) and should be repealed.
Art. II. Nonprofit, nonstock corporation	Re-iteration of § 9102 of the enabling act.	Art. II is not XBLP or GLCGP and should be repealed.
Art. III. Offices	Sec. 1 location of principal office. Sec. 2 Board authority to establish and locate GVB offices.	Sec. 1, 2 are not XBLP or GCLGP and should be repealed. Additionally, transfer of an interest in Gov Guam land is subject to legislative approval under 21 GCA § 60112; <i>see also YTK case.</i>
Art. IV. Members	Sec. 1-3 Eligibility, classes. Sec. 4 Procedure for maintaining records. Sec. 5 A Automatic Termination of membership. Sec. 5B Procedure for involuntary termination of membership.	Sec. 1-3 is not XBLP or GCLGP and should be repealed.  Sec.4 is permissible as GCLGP.  Sec. 5. A is permissible as GCLGP.  Sec. 5 B. is not XBLP or GCLGP and should be repealed.
Art. V Member Meetings.	Sec. 1-. Place of member meetings. Sec. 2. Annual meetings. Sec. 3. Quarterly meetings. Sec. 4. Election meetings. Sec. 5. Special meetings. Sec. 6 Notice of	Sec. 1, 2, 3, 4, 5, 6A, 6B, 7, 8, 9, 10 are permissible as GCLGP, in compliance with the OGL. Because member meetings for which a quorum is required in order to

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<b>PROVISION</b>	<b>DESCRIPTION</b>	<b>REVIEW/COMMENT</b>
	<p>meetings, procedure. Sec. 6 (B)            Notice of any meeting. Sec. 7            Consent to meeting. Sec. 8            Quorum. Sec. 9 Cumulative voting.            Sec. 10 Proxies.</p>	<p>conduct bureau business, including (i) discussion and deliberation towards a vote; (ii) the exercise of voting power; (iii) the adoption, repeal, amendment of bylaws; and (iv) election of directors, member meetings are subject to the OGL, including its notice, livestream, reporting, and minute-keeping provisions.</p>
<p>Art. VI Directors</p>	<p>Sec. 1 Powers of directors. Sec. 2 Classes of directors. Sec. 3 Number of directors. Sec. 4 Election and term. Sec. 5 Nomination. Sec. 6A Resignation. Sec. 6B Removal. Sec. 7 Vacancies. Sec. 7A Elected directors. Sec. 7B Appointed directors. Sec. 7C Twelfth director. Sec. 7D Legislative director. Sec. 7E Vacancy. Sec. 8 Alternate director. Sec. 9 Place of meetings. Sec. 10 Directors' election meetings. Sec. 11 Regular meetings. Sec. 12 Special meetings. Sec. 13 Notice of meetings. Sec. 14 Waiver of notice. Sec. 15 Notice of adjournment. Sec. 16 Quorum. Sec. 17 No action without a meeting. Sec. 18 Proxies.</p>	<p>Sec. 1 is not XBLP and should be repealed. Sec. 1 is contrary to § 9106 (a) of the enabling law to the extent it purports to give the authority for, and exercise of, corporate powers to the board. Powers may only be exercised through a rule or regulation providing for the establishment of a committee of the board and delegation of a bureau power to that committee. Sec. 1 is inconsistent with § 9108 (b) because it gives control of the business and affairs of the corporation to the board (ostensibly pursuant to GCL § 2205), but under the enabling act, the primary responsibility for business affairs is the GM's.</p> <p>Sec. 2, 3, 4 are not XBLP or GCLGP and should be repealed.</p> <p>Sec. 5 is permissible GCLGP.</p> <p>Sec. 6 A is XBLP, however, it should be within the administrative responsibility of the GM as the chief administrative officer.</p> <p>Sec. 6 B is permissible XBLP; GCL § 2209 also affords the power to remove directors to the members.</p> <p>Sec. 7 A, 7 B, 7 C, 7 D, 7 E, 8 are not XBLP or GCLGP and should be repealed.</p> <p>Sec. 9 is permissible GCLGP but the provision that meetings are valid on written consent communicated by directors outside of a public meeting is an OGL risk because resolutions concerning the validity of a meeting should be</p>

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		<p>presented as an agenda item under the OGL.</p> <p>Sec. 10, 11, 12, 13, 14, 15 are permissible GCLGPs.</p> <p>Sec. 16's provision that "[a]ny resolution of the Board shall require concurrence of the majority of the directors present at any properly held meeting of the Board" is inconsistent with § 9106 (i) which requires that resolutions be duly passed on 8 votes and should be repealed.</p> <p>Sec. 17, 18 are permissible XBLP.</p>
Art. VII Officers	<p>Sec. 1 Board officers. Sec. 2 Appointment and election. Sec. 3 Subordinate officers. Sec. 4 Removal and resignation. Sec. 5 Vacancies. Sec. 6 Chairperson. Sec. 7 Gen. Manager. Sec. 8 Dep. Manager. Sec. 9 Secretary. Sec. 10 Treasurer.</p>	<p>Sec. 1, 2, 3, 4, 5 are permissible GCLGPs and XBPLs.</p> <p>Sec. 6, 7, 8 is permissible XBLP but not to the extent it confers or imposes a power on an officer outside of a delegation under § 9105 (k). Use of "Power" should be avoided since it may connote an authority to act that is conferred or imposed on the Bureau but not on the board or the chairperson, vice chairperson, GM or DGM.</p> <p>Sec. 9 is permissible GCLGP (duties of directors and officers; matters necessary for the proper or convenient transaction of the business of the corporation).</p> <p>Sec. 10 contains provisions that are inconsistent with the enabling act. The keeping and maintaining of accounts and financial transactions are within the GM's primary responsibility and are probably provided for in the financial controller's job description. Disbursement of funds under § 9113 of the enabling act is the responsibility of the Dept. of Administration. The Board's fiscal authority (budget approval), purchase order approval authority, duty to correct expenditure discrepancies and recover unlawful expenditure, authority to access the Rainy Day Fund are what may be</p>

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		provided for as EBSMs. If the treasurer be a director, no supervisory “powers” are provided to a treasurer in the enabling act; only board-level directives to employees are permissible pursuant to a duly passed resolution of the Board.
Art. VIII Committees	Sec. 1 Executive committees. Sec. 2 Other committees.	<p>Sec. 1 to the extent it purports to delegate powers is inconsistent with §§ 9105, 9106 and 9108 and should be repealed. Other problematic/ inconsistent provisions: (a) Appropriation of funding is pursuant to the Executive Budget Law and is not XBLP or GCLGP; (b) approval of funding is legislative privilege, and disbursement of funds is the responsibility of DOA; (c) bureau business conducted through committee action that includes directors must comply with the OGL; (d) the board may only prescribe EBSM to a committee; (e) votes at committee are subject to § 9106 (i) while power of the bureau may be delegated pursuant to § 9105 (k).</p> <p>Sec. 2 should be amended to conform to these parameters.</p>
Art. IX Records	Sec. 1 Records. Sec. 2 Inspection of Books and Records. Sec. 3 Certification and inspection of bylaws. Sec. 4 Checks, drafts, etc. Sec. 5 Contracts, how executed. Sec. 6 Annual membership dues. Sec. 7 Government funds.	<p>Sec. 1 is permissible GCLGP to the extent permitted under GCL § 4201.</p> <p>Sec. 2 is governed by, and public records may be provided or accessed through, the Sunshine Reform Act of 1991 (SRA) and should be repealed.</p> <p>Sec. 3 is permissible GCLGP but should be amended to provide for the SRA.</p> <p>Sec. 4 is inconsistent with enabling law § 9106 (a) to the extent the board or members purport to grant signature or endorsement authority for payment instruments, § 9105 to the extent it relates to organization and management of the bureau, and § 9108 to the extent it conflicts with the GM’s operational and</p>

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PROVISION	DESCRIPTION	REVIEW/COMMENT
		<p>administrative responsibilities and should be amended or repealed to remove reference to the Treasurer (who is presumed to be a director). However, if an employee in the position of the financial controller is designated as the Treasurer, the provision is permissible. Because the GM has primary responsibility for the bureau's business affairs, Board resolution is insufficient to give power to other persons to discharge duties of the treasurer, so that part of Sec. 4 should be repealed.</p> <p>Sec. 5 has a number of inconsistencies. Contractual authority arises pursuant to the Procurement Law, but no procurement authority has been conferred or imposed on the board. Procurement is an administrative procedure which places primary responsibility for contracts with the GM. However, Sec. 5 conflates the board's fiscal authority under § 9113 (b) for yearly budget &amp; plan approval and the board's purchase order approval authority for expenditures under § 9111 then wrests away the GM's administrative responsibility under § 9111 and purports to grant delegation of this administrative authority to the Board. Although all directors are subject to conflict of interests standards, elected directors are not subject to financial disclosure requirements that apply to appointed directors. This technically permissible nondisclosure creates risk that an elected director may violate the ethical standards because of an undisclosed interest in a vendor having a contract or agreement with the bureau. Moreover, because such conflicted elected director has no legal duty to disclose his interest, there are no controls over this risk. Taxpayer lawsuits, fraud/misrepresentation/ good faith &amp; fair dealing claims, administrative enforcement of the</p>



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		ethical standards by the Ethics Commission, and or debarment of the vendor by the OPA may result. Sec. 5 should be amended or repealed.  Sec. 6 is permissible GCLGP.  Sec. 7 is permissible XBLP under § 9113 (c) if 2/3 of the membership delegates this authority to the board.
Art. X Rights	Sec. 1 Immunity. Sec. 2 Indemnification. Sec. 3	Sec. 1, 2 is not XBLP or GCLGP and should be repealed.
Art. XI Fiscal Year	To run from Oct. 1 to Sep. 30.	Art. XI is not XBLP or GCLGP and should be repealed.
Art. XII Corporate Seal	How it must look.	Art. XII is not XBLP or GCLGP and should be repealed.
Art. XIII Amendment of bylaws.	Sec. 1 Amendment by members. Sec. 2 Amendment by directors. Sec. 3 Record of amendments.	Sec. 1 is inconsistent with GCL § 2204 and should be repealed because it requires a 2/3 vote of the members but the enabling act only requires a majority vote.  Sec. 2, 3 are permissible GCLGP.
Art. XIV Rules and regulations	How adopted by the board.	Art. XIV is inconsistent with the XBPLs and GCLGPs and should be repealed. The board's enactments are subject to the enabling act and the GCL and not vice-versa.
Art. XV Miscellaneous	Sec. 1 Construction and definitions. Sec. 2 Parliamentary procedures.	Sec. 1, 2 are permissible GCLGP.

Counsel's analysis is under review by the BRCC for adoption and potential recommendations for corrective action.

### RISK CATEGORIES

*Corporate Governance—lawful authority/jurisdiction over the business affairs of the Bureau*

GVB was created to grow, develop, promote and celebrate Guam, its cultural history and local industry, through its tourism sector. GVB's enabling act takes precedence in conducting the bureau's business affairs to accomplish those purposes. Procedures and steps from important administrative laws, like the Open Government Law, next take precedence. Finally, Guam's General Corporations Law, may determine procedures and ministerial matters pertaining to corporate governance of the bureau's affairs.

Specific funding sources, including the Tourist Attraction Fund (TAF) and other legislatively created funds, support GVB's operations and initiatives. GVB members' rights in corporate

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governance of the bureau, directly through the bylaws and indirectly-representatively through the board, must always conform to the enabling law, especially when public moneys are involved.

*Specifically Identified Risks*

The enabling act states that the GM is the bureau’s chief administrative officer with primary responsibility for development, operation, maintenance and administration of the bureau’s affairs. The board is to establish the GM’s duties. However, in order for the board or a director to have the authority to give a directive to an employee, it must be voted on through a resolution introduced at a public meeting and must pass by 8 or more director votes. In 2021, the GM and DGM observed that the board played a direct and active part in the management of the bureau and reflected that this board practice violated longstanding norms. The board historically took a mostly hands-off approach to managing the employees of the bureau, but convention had evolved to where one or more directors of the board, as well as invited, full-paying members of the corporation, were engaged in one-on-one interactions with employees in the development, management, and execution of business initiatives. To employees, the directors had apparent authority behind this convention, so they dutifully acted in accordance with the regular practice of involving directors, members, and committees in the management of the bureau’s business.

*1) Risk of board action in violation of the enabling act—illegal, fiat or ultra vires acts:*

*Board directly managing employee responsibilities that administer the powers of the bureau, contrary to the express limitations stated in §§ 9106 (a), (i) requiring a vote to give directives to employees; and, without complying with the procedure in §§ 9105 (e), (k) of the enabling act to delegate authority to board committees through administrative-regulatory promulgation.*

GVB’s enabling act prohibits directors from giving directives to employees until the board resolves to give it, and the directive receives 8 or more votes at a board meeting. The bureau’s corporate governance structure in practice, however, skipped this step.

In order for a committee of the board to exercise the bureau’s powers, the bureau must “[a]dopt such rules and regulations pursuant to the Administrative Adjudication Law (AAL) as may be necessary for the exercise of the powers ... conferred or imposed upon ... the Board by” the enabling act. Under the enabling act, therefore, AAL’d-regulation is required to delegate bureau powers to a committee of the board. However, the committees currently established by the board were not established under an AAL’d-regulation promulgated by the bureau. This creates risk that board action may be taken without lawful authority.

*BRCC position.* The BRCC’s position is that board action concerning its duties and authorities are limited to what is expressly allowed in the enabling law. To the extent that the members or the board creates authority outside of the enabling law, that grant of authority is outside of the membership/board’s jurisdiction. Moreover, any acts taken on the basis of that grant of authority are by *fiat* and are *ultra vires* acts.

*Identified CAPs—amend/repeal/enact conforming bylaws.* The BRCC expects that provisions of the bylaws may need to be considered for repeal, amendment and or enactment by the

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members/board. Once presented at a public meeting and discussed by the board, counsel will develop draft third amended bylaws.

The BRCC also expects that administrative-level policies and procedures will be necessary to ensure that board corporate governance complies with the enabling act. Once the third amended bylaws are discussed then formally adopted at a public meeting, management may propose policies and procedures for adherence to the bylaws.

*Identified CAPs—amend/repeal/enact conforming policies and procedures.* Counsel targets 8/1/22 for completion of analysis of board policies and procedures used to run board-created committees. Like with the bylaws, these policies and procedures were not AAL'd. The analysis will be used to help the BRCC determine next steps to establish CAPs related to board governance through the committees it creates outside of the AAL procedure. The BRCC expects that, in committees not created through the AAL, GVB member/director-employee interaction will be modified as a result of CAPs.

2) *Risk of board action in violation of administrative law—void acts:*

- (i) *Nonconformity under the OGL voiding votes on member business at membership meetings.*

GVB's corporate bylaws may be enacted, adopted, repealed and amended by the members, or the board, if the members by a 2/3 vote delegate such power to the board. Members also nominate and vote on elected director positions.

Under the OGL, when official votes on the affairs of an autonomous agency are cast, or when agency business is to be discussed or deliberated by a class of persons authorized to make decisions, the vote, discussion or deliberation must be done at a public meeting and conducted in compliance with the procedures detailed in that law. On June 11, 2021, the legislature amended the OGL to void action taken without prior notice in the meeting agenda. On its face, member meetings are public meetings because decisionmakers are taking official votes on bureau business.

*BRCC position:* GVB member meetings must comply with the OGL. The BRCC is examining the impact of this position on member meetings from June 11, 2021, going-forward to new member business in future meetings.

*Identified CAPs.* The BRCC expects to recommend to the members that it conducts membership meetings in compliance with the OGL.

\* \* \* End of Report \* \* \*