

# SECURITIES & EXCHANGE COMMISSION EDGAR FILING

## BIO KEY INTERNATIONAL INC

**Form: 8-K**

**Date Filed: 2005-01-05**

Corporate Issuer CIK: 1019034

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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

**FORM 8-K**

**CURRENT REPORT**

**Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

Date of Report (Date of earliest event reported): **December 30, 2004**

**BIO-key International, Inc.**

(Exact name of registrant as specified in its charter)

**Delaware**

(State or other jurisdiction of  
incorporation)

**1-13463**

(Commission File Number)

**41-1741861**

(I.R.S. Employer Identification No.)

**1285 Corporate Center Drive, Suite 175  
Eagan, MN 55121**

(Address of principal executive offices)

**(651) 687-0414**

(Registrant's telephone number, including area code)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2 below):

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

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**Item 1.01. Entry Into Material Definitive Agreements.**

On January 1, 2005, BIO-key International, Inc., a Minnesota corporation ("BIO-key Minnesota"), consummated a merger (the "Reincorporation") with and into its wholly owned subsidiary, BIO-key International, Inc., a Delaware corporation ("BIO-key Delaware"), in order to reincorporate in the State of Delaware. The Reincorporation was effected pursuant to an Agreement and Plan of Merger dated as of December 30, 2004 (the "Merger Agreement") by and between BIO-key Minnesota and BIO-key Delaware, a copy of which is filed as an exhibit to this Current Report on Form 8-K. The Reincorporation was recommended for approval by the board of directors of both BIO-key Minnesota and BIO-key Delaware, and was submitted to a vote of, and approved by, BIO-key Minnesota's shareholders at its special meeting in lieu of an annual meeting held on August 16, 2004, as adjourned to December 13, 2004, and by the sole stockholder of BIO-key Delaware. As a result of the Reincorporation, the legal domicile of the registrant is now Delaware.

Pursuant to the Merger Agreement, at the effective time of the Reincorporation: (i) each outstanding share of Common Stock of BIO-key Minnesota, \$0.01 par value per share, was automatically converted into one share of Common Stock, \$0.0001 par value per share, of BIO-key Delaware; (ii) each outstanding share of Series C 7% Convertible Preferred Stock of BIO-key Minnesota, \$0.01 par value per share, was automatically converted into one share of Series A 7% Convertible Preferred Stock, \$0.0001 par value per

share, of BIO-key Delaware, with such Series A 7% Convertible Preferred Stock containing substantially identical terms and conditions as the Series C 7% Convertible Preferred Stock of BIO-key Minnesota; (iii) each option to purchase shares of BIO-key Minnesota's Common Stock granted by BIO-key Minnesota under any warrant, stock option plan or similar plan of BIO-key Minnesota outstanding immediately before the Reincorporation was, by virtue of the Merger Agreement and without any action on the part of the holder thereof, converted into and become an option to purchase, upon the same terms and conditions, the same number of shares of BIO-key Delaware common stock at an exercise price per share equal to the exercise price per share thereunder immediately before the Reincorporation; and (iv) each warrant, option or stock option plan of BIO-key Minnesota was assumed by, and continues to be, a warrant, option or plan of BIO-key Delaware. Accordingly, as a result of the Reincorporation, the shareholders of BIO-key Minnesota became shareholders of BIO-key Delaware, and BIO-key Minnesota has been merged out of existence by operation of law. Each certificate representing shares of capital stock of BIO-key Minnesota outstanding immediately before the Reincorporation will, from and after the Reincorporation, be deemed for all corporate purposes to represent the same number of shares of capital stock of BIO-key Delaware.

As a result of the Reincorporation, the Certificate of Incorporation and By-Laws of BIO-key Delaware immediately prior to the Reincorporation remained the Certificate of Incorporation and By-Laws of BIO-key Delaware following the Reincorporation. Additionally, the directors and officers of BIO-key Minnesota in office immediately prior to the Reincorporation became the directors and officers of BIO-key Delaware following the Reincorporation. BIO-key Delaware's Common Stock continues to be quoted on the OTC Bulletin Board under the symbol "BKYI.OB".

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### **Item 3.03 Material Modification to Rights of Security Holders.**

As described under Item 1.01 above, on January 1, 2005, BIO-key International, Inc., a Minnesota corporation ("BIO-key Minnesota"), consummated a merger (the "Reincorporation") with and into its wholly owned subsidiary, BIO-key International, Inc., a Delaware corporation ("BIO-key Delaware") in order to reincorporate in the State of Delaware. As a result of the Reincorporation, the legal domicile of the registrant is now Delaware.

Prior to the Reincorporation, the registrant's corporate affairs were governed by the corporate law of Minnesota, and its Amended and Restated Articles of Incorporation and Amended and Restated Bylaws (as amended from time to time, the "Minnesota Charter and Bylaws"), each of which were adopted under Minnesota law. Pursuant to the Agreement and Plan of Merger described above, and as a result of the consummation of the Reincorporation, the Certificate of Incorporation and the By-Laws of BIO-key Delaware in effect immediately prior to the consummation of the Reincorporation (the "Delaware Charter and Bylaws") became the Certificate of Incorporation and By-Laws of the surviving corporation. Accordingly, the constituent instruments defining the rights of holders of the registrant's capital stock will now be the Delaware Charter and Bylaws, copies of which are filed as exhibits to this Current Report on Form 8-K, rather than the Minnesota Charter and Bylaws. Additionally, as a result of the Reincorporation, Delaware corporate law will generally be applicable in the determination of the rights of security holders of the registrant under state corporate laws. The differences in the rights of the security holders of the registrant as a result of the Reincorporation are more fully set forth in the registrant's Definitive Proxy Statement on Schedule 14A filed with the Securities and Exchange Commission on July 21, 2004, which is incorporated in its entirety herein by reference.

### **Item 9.01. Financial Statements and Exhibits**

(c) Exhibits. The following Exhibits are attached to this Current Report on Form 8-K:

<u>Exhibit No.:</u>	<u>Description:</u>
Exhibit 2.1	Agreement and Plan of Merger dated as of December 30, 2004 by and among BIO-key International, Inc., a Delaware corporation, and BIO-key International, Inc., a Minnesota corporation.
Exhibit 3.1	Certificate of Incorporation of BIO-key International, Inc., a Delaware corporation.
Exhibit 3.2	Certificate of Designation of Series A 7% Convertible Preferred Stock of BIO-key International, Inc., a Delaware corporation.
Exhibit 3.3	By-Laws of BIO-key International, Inc., a Delaware corporation.

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**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

BIO-KEY INTERNATIONAL, INC.

Date: January 5, 2005

By: /s/ Michael W. DePasquale

Michael W. DePasquale

Chief Executive Officer

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#### EXHIBIT INDEX

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## AGREEMENT AND PLAN OF MERGER

This Agreement and Plan of Merger (the "Merger Agreement") is entered into as of December 30, 2004, by and between BIO-key International, Inc., a Minnesota corporation ("Old BIO-key") and BIO-key International, Inc., a Delaware corporation ("New BIO-key").

### Introduction

WHEREAS, Old BIO-key and New BIO-key desire to enter into this Merger Agreement for the purpose of effecting a reorganization of Old BIO-key from Minnesota to Delaware;

WHEREAS, New BIO-key is a newly formed corporation which has one share outstanding which is owned by Old BIO-key and has been formed for the purpose of effecting this reincorporation;

WHEREAS, the Delaware General Corporation Law (the "DGCL") permits the merger of a Delaware corporation with a corporation organized under the laws of another jurisdiction;

WHEREAS, the Minnesota Business Corporation Act (the "MBCA") permits the merger of a Minnesota corporation with a corporation organized under the laws of another jurisdiction; and

WHEREAS, the respective Boards of Directors of Old BIO-key and New BIO-key have adopted resolutions approving this Merger Agreement and declaring its advisability, and the respective stockholders of Old BIO-key and New BIO-key, to the extent required, have adopted and approved this Merger Agreement in accordance with the applicable provisions of the DGCL and the MBCA.

NOW, THEREFORE, in consideration of the premises and of the mutual agreements contained in this Merger Agreement, Old BIO-key and New BIO-key agree to merge on the terms and conditions as follows:

### ARTICLE 1 The Merger

Section 1.1. The Merger. In accordance with the provisions of this Merger Agreement, the DGCL and the MBCA, Old BIO-key shall be merged with and into New BIO-key (the "Merger") as of the Effective Time (as hereinafter defined in Section 1.2). Following the Effective Time, New BIO-key shall continue its existence as the "Surviving Corporation," and the identity, rights, titles, privileges, powers, franchises, properties and assets of New BIO-key shall continue unaffected and unimpaired by the Merger. Following the Effective Time, the identity and separate existence of Old BIO-key shall cease, and all of the rights, titles, privileges,

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powers, franchises, properties and assets of Old BIO-key shall be vested in New BIO-key and all debts, liabilities or duties of Old BIO-key shall attach to the Surviving Corporation.

Section 1.2. Effective Time. The Merger shall be effected by the filing of a Certificate of Merger (the "Certificate of Merger"), together with any other documents required to be filed to consummate the Merger, with the Secretary of State of the State of Delaware and the Secretary of State of the State of Minnesota. The term "Effective Time" shall mean 12:00 A.M. January 1, 2005.

### ARTICLE 2 Charter; Bylaws

Section 2.1. Charter. The Certificate of Incorporation (the "Charter") of New BIO-key, as in effect immediately prior to the Effective Time, shall be the Charter of the Surviving Corporation from and after the Effective Time, except as the Charter may thereafter be altered, amended or repealed.

Section 2.2. By-laws. The By-laws of New BIO-key, as in effect immediately prior to the Effective Time, shall be the By-laws of the Surviving Corporation from and after the Effective Time, except as the By-laws may thereafter be altered, amended or repealed.

### ARTICLE 3 Directors and Officers

Section 3.1. Directors. From and after the Effective Time of the Merger, the directors of the Surviving Corporation, who shall

hold office until their successors are elected and qualified according to the By-laws of the Surviving Corporation, shall be the same as the directors of Old BIO-key immediately prior to the Effective Time of the Merger.

Section 3.2. Officers. From and after the Effective Time of the Merger, the officers of the Surviving Corporation, who shall hold office until their successors are elected and qualified according to the By-laws of the Surviving Corporation, shall be the same as the officers of Old BIO-key immediately prior to the Effective Time of the Merger.

## **ARTICLE 4**

### **Conversion and Exchange of Shares**

Section 4.1. Conversion of Shares. At the Effective Time, and without any action on the part of Old BIO-key or New BIO-key, or any other holders of any of the capital stock of any of those corporations:

(a) each share of the Common Stock, \$0.01 par value per share, of Old BIO-key (the Old BIO-key Common Stock) issued and outstanding immediately prior to the Effective Time shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into and exchanged for one share of the common stock, \$0.0001 par value per share, of New BIO-key ("New BIO-key Common Stock");

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(b) each share of New BIO-key Common Stock issued and outstanding immediately prior to the Effective Time shall, by virtue of the Merger, be cancelled and shall cease to exist;

(c) each share of the Series C 7% Convertible Preferred Stock, \$0.01 par value per share, of Old BIO-key issued and outstanding immediately prior to the Effective Time shall, by virtue of the Merger and without any action on the part of the holder thereof, be converted into and exchanged for one share of the Series A 7% Convertible Preferred Stock, par value \$0.0001 per share, of New BIO-key; and

(d) the stock transfer books of Old BIO-key shall be closed, and there shall be no further registration of transfers of shares of capital stock thereafter on the records of Old BIO-key.

#### Section 4.2. Exchange of Shares.

(a) All of the shares of Old BIO-key capital stock converted into New BIO-key capital stock as provided in this Article 4 shall no longer be outstanding and shall automatically be canceled and shall cease to exist, and each certificate (each a "Certificate") previously representing any such shares of Old BIO-key capital stock, as the case may be, shall thereafter represent the right to receive the number of whole shares of New BIO-key capital stock into which such shares of Old BIO-key capital stock represented by such Certificate have been converted pursuant to Section 4.1. Certificates previously representing shares of Old BIO-key capital stock may be exchanged for certificates representing shares of New BIO-key capital stock upon the surrender of such Certificates in accordance with Section 4.1 hereof, without any interest thereon.

(b) In the event any Certificate shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the person claiming such Certificate to be lost, stolen or destroyed and, if required by New BIO-key, the posting by such person of a bond in such amount as New BIO-key may direct as indemnity against any claim that may be made against it with respect to such Certificate, New BIO-key will issue in exchange for such lost, stolen or destroyed Certificate, certificates representing shares of New BIO-key capital stock pursuant to this Merger Agreement.

#### Section 4.3. Options.

(a) As of the Effective Time, all options to purchase shares of Old BIO-key capital stock issued by Old BIO-key, whether vested or unvested, which are outstanding and not exercised immediately prior to the Effective Time, shall be automatically, without any action by any third party, amended to provide for the substitution of shares of New BIO-key Common Stock to be issued by New BIO-key upon the proper exercise of the Options. Immediately after the Effective Time, each Option outstanding immediately prior to the Effective Time shall be deemed to constitute an option to acquire, on the same terms and conditions as were applicable under such Option immediately prior to the Effective Time, such number of shares of New BIO-key Common Stock as is equal to the number of shares of Old BIO-key Common Stock subject

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to the unexercised portion of such Option; provided, however, that no such amendment or substitution shall be made in the case of

an incentive stock option, without the consent of the holder of such Option, if it would constitute a “modification”, “extension” or “renewal” of such Option, within the meaning of Section 424(h) of the Internal Revenue Code of 1986 (as amended, the “Code”). The exercise price per share of each such exchanged Option shall be equal to the exercise price of such Option immediately prior to the Effective Time. The term, exercisability, vesting schedule, repurchase provisions, status as an “incentive stock option” under Section 422 of the Code, if applicable, and all of the other terms of the Options in effect immediately prior to the Effective Time shall otherwise remain unchanged.

(b) As soon as practicable after the Effective Time, the Surviving Corporation shall deliver to the holders of Options appropriate notices setting forth such holders’ rights pursuant to such Options, as amended by this Section 4.3 and the agreements evidencing such Options shall continue in effect on the same terms and conditions (subject to the amendments provided for in this Section 4.3 and such notice).

Section 4.4. Warrants. As of the Effective Time, each outstanding warrant issued by Old BIO-key shall be converted into a warrant to purchase shares of New BIO-key capital stock on the same terms and conditions.

## **ARTICLE 5**

### **Further Assurances**

If, at any time on and after the Effective Time, the Surviving Corporation or its successors and assigns shall consider or be advised that any further assignments or assurances in law or any organizational or other acts are necessary or desirable (a) to vest, perfect or confirm, of record or otherwise, in the Surviving Corporation title to and possession of any property or right of Old BIO-key acquired or to be acquired by reason of, or as a result of, the Merger, or (b) otherwise to carry out the purposes of the Merger Agreement, Old BIO-key and its directors, officers and stockholders shall be deemed to have granted to the Surviving Corporation an irrevocable power of attorney to execute and deliver all such proper deeds, assignments and assurances in law and to do all acts necessary or proper to vest, perfect or confirm title to and possession of such property or rights in the Surviving Corporation and otherwise to carry out the purposes of the Merger Agreement; and the director(s) and officer(s) of the Surviving Corporation are fully authorized in the name of Old BIO-key or otherwise to take any and all such action.

## **ARTICLE 6**

### **Amendment or Abandonment**

Subject to applicable law, at any time prior to the Effective Time, the director(s) and officer(s) of Old BIO-key or New BIO-key may amend or abandon the Merger Agreement without the vote of the constituent stockholders.

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## **ARTICLE 7**

### **Conditions**

The respective obligations of Old BIO-key and New BIO-key to effect the transactions contemplated hereby are subject to satisfaction of the following conditions (any or all of which may be waived by either of Old BIO-key or New BIO-key in its sole discretion to the extent permitted by law):

(a) Owners of the issued and outstanding shares of the Old BIO-key Common Stock shall not have dissented nor invoked their appraisal rights such that Old BIO-key becomes obligated to make a substantial payment, as determined by the Old BIO-key Board of Directors, to such dissenting shareholders; and

(b) Any and all consents, permits, authorizations, approvals and orders deemed in the sole discretion of the Old BIO-key Board of Directors and the New BIO-key Board of Directors, respectively, to be material to the consummation of the Merger shall have been obtained.

## **ARTICLE 8**

### **Miscellaneous**

Section 8.1. Waivers. Any party, by written instrument signed by any duly authorized officer, may extend the time for the performance of any of the obligations or other acts of any other party hereto, and may waive compliance with any of the covenants or performance of any of the obligations of the other party contained in this Merger Agreement.

Section 8.2. Governing Law. This Merger Agreement shall be governed by and construed in accordance with the laws of the State of Delaware applicable to agreements made and entirely to be performed within such State.

Section 8.3. Construction. The headings of the several Articles and Sections herein are inserted for convenience of

reference only and are not intended to be part of or to affect the meaning or interpretation of this Merger Agreement.

Section 8.4. Counterparts. This Merger Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[Signature page follows]

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IN WITNESS WHEREOF, the parties hereto have executed this Merger Agreement as of the date first above written.

BIO-KEY INTERNATIONAL, INC.,  
a Delaware corporation

By: \_\_\_\_\_  
Michael DePasquale  
President and Chief Executive Officer

BIO-KEY INTERNATIONAL, INC.,  
a Minnesota corporation

By: \_\_\_\_\_  
Michael DePasquale  
President and Chief Executive Officer

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**CERTIFICATE OF INCORPORATION****OF****BIO-KEY INTERNATIONAL, INC.**

The undersigned, in order to form a corporation under and pursuant to the provisions of the General Corporation Law of the State of Delaware, does hereby certify as follows:

**ARTICLE I****NAME**

The name of the corporation is BIO-key International, Inc. (the "Corporation").

**ARTICLE II****REGISTERED OFFICE**

The address of the Corporation's registered office in the state of Delaware is Corporation Trust Center, 1209 Orange Street, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

**ARTICLE III****PURPOSE**

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware, as amended from time to time (the "DGCL").

**ARTICLE IV****CAPITAL STOCK**

The total number of shares of all classes of capital stock which the Corporation shall have authority to issue is Ninety Million (90,000,000) shares, consisting of (i) Eighty-Five Million (85,000,000) shares of Common Stock, \$.0001 par value per share ("Common Stock"), and (ii) 5,000,000 shares of Preferred Stock, \$.0001 par value per share ("Preferred Stock").

The Board of Directors is authorized to issue, from time to time, all or any portion of the capital stock of the Corporation, of any class, which may have been authorized but not issued or otherwise reserved for issuance, to such person or persons and for such lawful consideration as it may deem appropriate, and generally in its absolute discretion to determine the terms and manner of any disposition of such authorized but unissued capital stock.

The following is a statement of the designations and the powers, privileges and rights, and the qualifications, limitations or restrictions thereof in respect of each class of capital stock of the Corporation.

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**A. COMMON STOCK**

1. General. The voting, dividend and liquidation rights of the holders of the Common Stock are subject to and qualified by the rights of the holders of the Preferred Stock of any series as may be designated by the Board of Directors upon any issuance of the Preferred Stock of any series.

2. Voting. The holders of the Common Stock are entitled to one vote for each share held at all meetings of stockholders. Except as otherwise provided in any Preferred Stock designation or in this Certificate of Incorporation, the number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by the affirmative vote of the holders of a majority of the stock of the Corporation entitled to vote, irrespective of the provisions of Section 242(b)(2) of the DGCL.

3. Dividends. Dividends may be declared and paid on the Common Stock from funds lawfully available therefor as and when determined by the Board of Directors, or any authorized committee thereof, and subject to any preferential dividend rights of any then outstanding Preferred Stock.

4. Liquidation. Upon the dissolution or liquidation of the Corporation, whether voluntary or involuntary, holders of

Common Stock will be entitled to receive all assets of the Corporation available for distribution to its stockholders, subject to any preferential rights of any then outstanding Preferred Stock.

## B. PREFERRED STOCK

Preferred Stock may be issued from time to time in one or more series, each of such series to have such terms as stated or expressed herein and in the resolution or resolutions providing for the issue of such series adopted by the Board of Directors of the Corporation as hereinafter provided. Any shares of Preferred Stock which may be redeemed, purchased or acquired by the Corporation may be reissued except as otherwise provided by law. Different series of Preferred Stock shall not be construed to constitute different classes of shares for the purposes of voting by classes unless expressly provided.

Authority is hereby expressly granted to the Board of Directors from time to time to issue the Preferred Stock in one or more series, and in connection with the creation of any such series, by resolution or resolutions providing for the issue of the shares thereof, to determine and fix such voting powers, full or limited, or no voting powers, and such designations, preferences and relative participating, optional or other special rights, and qualifications, limitations or restrictions thereof, including without limitation thereof, dividend rights, conversion rights, redemption privileges and liquidation preferences, as shall be stated and expressed in such resolutions, all to the full extent now or hereafter permitted by the DGCL. Without limiting the generality of the foregoing, the resolutions providing for issuance of any series of Preferred Stock may provide that such series shall be superior or rank equally or be junior to the Preferred Stock of any other series to the extent permitted by law. Except as otherwise provided in any Preferred Stock designation or in this Certificate of Incorporation, no vote of the holders of the Preferred Stock or Common Stock shall be a prerequisite to the designation or issuance of any shares of any series of the Preferred Stock authorized by and complying with the conditions of

this Certificate of Incorporation, the right to have such vote being expressly waived by all present and future holders of the capital stock of the Corporation.

## ARTICLE V INCORPORATOR

The name and address of the incorporator is:

Charles J. Johnson, Esq.  
Choate, Hall & Stewart  
Exchange Place  
53 State Street  
Boston, Massachusetts 02109

## ARTICLE VI STOCKHOLDER ACTION

1. Action without Meeting. Except as may be approved in advance by the Board of Directors, any action required or permitted to be taken by the stockholders of the Corporation at any annual or special meeting of stockholders of the Corporation must be effected at a duly called annual or special meeting of stockholders and may not be taken or effected by a written consent of stockholders in lieu thereof.
2. Special Meetings. Except as otherwise required by statute, special meetings of the stockholders of the Corporation may be called only by the Board of Directors acting pursuant to a resolution approved by the affirmative vote of a majority of the Directors then in office. Only those matters set forth in the notice of the special meeting may be considered or acted upon at a special meeting of stockholders of the Corporation.

## ARTICLE VII DIRECTORS

1. General. The business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors except as otherwise provided herein or required by law.
2. Election of Directors. Election of Directors need not be by written ballot unless the By-laws of the Corporation shall so provide.
3. Number of Directors; Term of Office. The number of Directors of the Corporation shall be fixed solely and

exclusively by resolution duly adopted from time to time by the Board of Directors.

4. Vacancies. Any and all vacancies in the Board of Directors, however occurring, including, without limitation, by reason of an increase in size of the Board of Directors, or the death, resignation, disqualification or removal of a Director, shall be filled solely and exclusively by the affirmative vote of a majority of the remaining Directors then in office, even if less than a

quorum of the Board of Directors, and not by the stockholders. Any Director appointed in accordance with the preceding sentence shall hold office until such Director's successor shall have been duly elected and qualified or until his or her earlier resignation or removal. In the event of a vacancy in the Board of Directors, the remaining Directors, except as otherwise provided by law, shall exercise the powers of the full Board of Directors until the vacancy is filled.

5. Removal. Any Director (including persons elected by Directors to fill vacancies in the Board of Directors) may be removed from office (i) only with cause and (ii) only by the affirmative vote of the holders of 75% or more of the shares then entitled to vote at an election of Directors. At least forty-five (45) days prior to any meeting of stockholders at which it is proposed that any Director be removed from office, written notice of such proposed removal and the alleged grounds thereof shall be sent to the Director whose removal will be considered at the meeting.

6. By-Laws. Except as otherwise provided by law, the By-laws of the Corporation may be amended or repealed by the Board of Directors by the affirmative vote of a majority of the Directors then in office. The By-laws of the Corporation may be amended or repealed at any annual meeting of stockholders, or special meeting of stockholders called for such purpose as provided in the By-laws, by the affirmative vote of at least 75% of the outstanding shares entitled to vote on such amendment or repeal, voting together as a single class; provided, however, that if the Board of Directors recommends that stockholders approve such amendment or repeal at such meeting of stockholders, such amendment or repeal shall only require the affirmative vote of the majority of the outstanding shares entitled to vote on such amendment or repeal, voting together as a single class.

#### ARTICLE VIII LIMITATION OF LIABILITY

No Director of the Corporation shall be personally liable to the Corporation or to any of its stockholders for monetary damages for breach of fiduciary duty as a Director, notwithstanding any provision of law imposing such liability; provided, however, that to the extent required from time to time by applicable law, this Article VIII shall not eliminate or limit the liability of a Director, to the extent such liability is provided by applicable law, (i) for any breach of the Director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the General Corporation Law or (iv) for any transaction from which the Director derived an improper personal benefit. No amendment to or repeal of this Article VIII shall apply to or have any effect on the liability or alleged liability of any Director for, or with respect to, any acts or omissions of such director occurring prior to the effective date of such amendment or repeal.

#### ARTICLE IX INDEMNIFICATION

1. Actions, Suits and Proceedings Other than by or in the Right of the Corporation. The Corporation shall indemnify each person who was or is a party or is threatened to be made a

party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Corporation), by reason of the fact that he is or was, or has agreed to become, a director or officer of the Corporation, or is or was serving, or has agreed to serve, at the request of the Corporation, as a director, officer, partner, employee or trustee of, or in a similar capacity with, another corporation, partnership, joint venture, trust or other enterprise (including any employee benefit plan) (all such persons being referred to hereafter as an "Indemnitee"), or by reason of any action alleged to have been taken or omitted in such capacity, against all expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him or on his behalf in connection with such action, suit or proceeding and any appeal therefrom, if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in, or not opposed to, the best interests of the Corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

2. Actions or Suits by or in the Right of the Corporation. The Corporation shall indemnify any Indemnitee who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that he is or was, or has agreed to become, a director or officer of the Corporation, or is or was serving, or has agreed to serve, at the request of the Corporation, as a director, officer, partner, employee or trustee of, or in a similar capacity with, another corporation, partnership, joint venture, trust or other enterprise (including any employee benefit plan), or by reason of any action alleged to have been taken or omitted in such capacity, against all expenses (including attorneys' fees) and, to the extent permitted by law, amounts paid in settlement actually and reasonably incurred by him or on his behalf in connection with such action, suit or proceeding and any appeal therefrom, if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Corporation, except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Corporation unless and only to the extent that the Court of Chancery of Delaware shall determine upon application that, despite the adjudication of such liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses (including attorneys' fees) which the Court of Chancery of Delaware shall deem proper.

3. Indemnification for Expenses of Successful Party. Notwithstanding the other provisions of this Article, to the extent that an Indemnitee has been successful, on the merits or otherwise, in defense of any action, suit or proceeding referred to in Sections 1 and 2 of this Article IX, or in defense of any claim, issue or matter therein, or on appeal from any such action, suit or proceeding, he shall be indemnified against all expenses (including attorneys' fees) actually and reasonably incurred by him or on his behalf in connection therewith. Without limiting the foregoing, if any action, suit or proceeding is disposed of, on the merits or otherwise (including a disposition without prejudice), without (i) the disposition being adverse to the Indemnitee, (ii) an adjudication that the Indemnitee was liable to the Corporation, (iii) a plea of

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guilty or nolo contendere by the Indemnitee, (iv) an adjudication that the Indemnitee did not act in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Corporation, and (v) with respect to any criminal proceeding, an adjudication that the Indemnitee had reasonable cause to believe his conduct was unlawful, the Indemnitee shall be considered for the purposes hereof to have been wholly successful with respect thereto.

4. Notification and Defense of Claim. As a condition precedent to his right to be indemnified, the Indemnitee must notify the Corporation in writing as soon as practicable of any action, suit, proceeding or investigation involving him for which indemnity will or could be sought. With respect to any action, suit, proceeding or investigation of which the Corporation is so notified, the Corporation will be entitled to participate therein at its own expense and/or to assume the defense thereof at its own expense, with legal counsel reasonably acceptable to the Indemnitee. After notice from the Corporation to the Indemnitee of its election so to assume such defense, the Corporation shall not be liable to the Indemnitee for any legal or other expenses subsequently incurred by the Indemnitee in connection with such action, suit, proceeding or investigation, other than as provided below in this Section 4. The Indemnitee shall have the right to employ his own counsel in connection with such action, suit, proceeding or investigation, but the fees and expenses of such counsel incurred after notice from the Corporation of its assumption of the defense thereof shall be at the expense of the Indemnitee unless (i) the employment of counsel by the Indemnitee has been authorized by the Corporation, (ii) counsel to the Indemnitee shall have reasonably concluded that there may be a conflict of interest or position on any significant issue between the Corporation and the Indemnitee in the conduct of the defense of such action, suit, proceeding or investigation or (iii) the Corporation shall not in fact have employed counsel to assume the defense of such action, suit, proceeding or investigation, in each of which cases the fees and expenses of counsel for the Indemnitee shall be at the expense of the Corporation, except as otherwise expressly provided by this Article. The Corporation shall not be entitled, without the consent of the Indemnitee, to assume the defense of any claim brought by or in the right of the Corporation or as to which counsel for the Indemnitee shall have reasonably made the conclusion provided for in clause (ii) above. The Corporation shall not be required to indemnify the Indemnitee under this Article for any amounts paid in settlement of any action, suit, proceeding or investigation effected without its written consent. The Corporation shall not settle any action, suit, proceeding or investigation in any manner which would impose any penalty or limitation on the Indemnitee without the Indemnitee's written consent. Neither the Corporation nor the Indemnitee will unreasonably withhold or delay its consent to any proposed settlement.

5. Advance of Expenses. Subject to the provisions of Section 6 of this Article IX, in the event that the Corporation does not assume the defense pursuant to Section 4 of this Article IX of any action, suit, proceeding or investigation of which the Corporation receives notice under this Article, any expenses (including attorneys' fees) incurred by an Indemnitee in defending a civil or criminal action, suit, proceeding or investigation or any appeal therefrom shall be paid by the Corporation in advance of the final disposition of such matter; provided, however, that the payment of such expenses incurred by the Indemnitee in advance of the final disposition of such matter shall be made only upon receipt of an undertaking by or on behalf of the Indemnitee to repay all amounts so advanced in the event that it shall ultimately be determined that the Indemnitee is not entitled to be indemnified by the Corporation as authorized in this Article; and further provided that no such advancement of expenses shall be made if it is determined (in the

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manner described in Section 6) that (i) the Indemnitee did not act in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the Corporation, or (ii) with respect to any criminal action or proceeding, the Indemnitee had reasonable cause to believe his conduct was unlawful. Such undertaking shall be accepted without reference to the financial ability of the Indemnitee to make such repayment.

6. Procedure for Indemnification. In order to obtain indemnification or advancement of expenses pursuant to Section 1, 2, 3 or 5 of this Article IX, the Indemnitee shall submit to the Corporation a written request, including in such request such documentation and information as is reasonably available to the Indemnitee and is reasonably necessary to determine whether and to what extent the Indemnitee is entitled to indemnification or advancement of expenses. Any such advancement of expenses shall be made promptly, and in any event within 60 days after receipt by the Corporation of the written request of the Indemnitee, unless with respect to requests under Section 1, 2 or 5 of this Article IX the Corporation determines within such 60-day period that the Indemnitee did not meet the applicable standard of conduct set forth in Section 1, 2 or 5 of this Article IX, as the case may be. Any such indemnification, unless ordered by a court, shall be made with respect to requests under Section 1 or 2 only as authorized in the specific case upon a determination by the Corporation that the indemnification of the Indemnitee is proper because the Indemnitee has met the applicable standard of conduct set forth in Section 1 or 2, as the case may be. Such determination shall be made in each instance (a) by a majority vote of the directors of the Corporation consisting of persons who are not at that time parties to the action, suit or proceeding in question ("disinterested directors"), whether or not a quorum, (b) by a majority vote of a committee of disinterested directors designated by majority vote of disinterested directors, whether or not a quorum, (c) if there are no disinterested directors, or if disinterested directors so direct, by independent legal counsel (who may, to the extent permitted by law, be regular legal counsel to the Corporation) in a written opinion, or (d) by the stockholders of the Corporation.

7. Remedies. The right to indemnification or advances as granted by this Article shall be enforceable by the Indemnitee in any court of competent jurisdiction. Neither the failure of the Corporation to have made a determination prior to the commencement of such action that indemnification is proper in the circumstances because the Indemnitee has met the applicable standard of conduct, nor an actual determination by the Corporation pursuant to Section 6 of this Article IX that the Indemnitee has not met such applicable standard of conduct, shall be a defense to the action or create a presumption that the Indemnitee has not met the applicable standard of conduct. The Indemnitee's expenses (including attorneys' fees) incurred in connection with successfully establishing his right to indemnification, in whole or in part, in any such proceeding shall also be indemnified by the Corporation.

8. Limitations. Notwithstanding anything to the contrary in this Article, except as set forth in Section 7 of the Article IX, the Corporation shall not indemnify an Indemnitee in connection with a proceeding (or part thereof) initiated by the Indemnitee unless the initiation thereof was approved by the Board of Directors of the Corporation. Notwithstanding anything to the contrary in this Article, the Corporation shall not indemnify an Indemnitee to the extent such Indemnitee is reimbursed from the proceeds of insurance, and in the event the Corporation makes any indemnification payments to an Indemnitee and such Indemnitee is subsequently

reimbursed from the proceeds of insurance, such Indemnitee shall promptly refund such indemnification payments to the Corporation to the extent of such insurance reimbursement.

9. Subsequent Amendment. No amendment, termination or repeal of this Article or of the relevant provisions of the DGCL or any other applicable laws shall affect or diminish in any way the rights of any Indemnitee to indemnification under the provisions hereof with respect to any action, suit, proceeding or investigation arising out of or relating to any actions, transactions or facts occurring prior to the final adoption of such amendment, termination or repeal.

10. Other Rights. The indemnification and advancement of expenses provided by this Article shall not be deemed exclusive of any other rights to which an Indemnitee seeking indemnification or advancement of expenses may be entitled under any law (common or statutory), agreement or vote of stockholders or disinterested directors or otherwise, both as to action in his official capacity and as to action in any other capacity while holding office for the Corporation, and shall continue as to an Indemnitee who has ceased to be a director or officer, and shall inure to the benefit of the estate, heirs, executors and administrators of the Indemnitee. Nothing contained in this Article shall be deemed to prohibit, and the Corporation is specifically authorized to enter into, agreements with officers and directors providing indemnification rights and procedures different from those set forth in this Article. In addition, the Corporation may, to the extent authorized from time to time by its Board of Directors, grant indemnification rights to other employees or agents of the Corporation or other persons serving the Corporation and such rights may be equivalent to, or greater or less than, those set forth in this Article.

11. Partial Indemnification. If an Indemnitee is entitled under any provision of this Article to indemnification by the Corporation for some or a portion of the expenses (including attorneys' fees), judgments, fines or amounts paid in settlement actually

and reasonably incurred by him or on his behalf in connection with any action, suit, proceeding or investigation and any appeal therefrom but not, however, for the total amount thereof, the Corporation shall nevertheless indemnify the Indemnitee for the portion of such expenses (including attorneys' fees), judgments, fines or amounts paid in settlement to which the Indemnitee is entitled.

12. Insurance. The Corporation may purchase and maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the Corporation or another corporation, partnership, joint venture, trust or other enterprise (including any employee benefit plan) against any expense, liability or loss incurred by him in any such capacity, or arising out of his status as such, whether or not the Corporation would have the power to indemnify such person against such expense, liability or loss under the DGCL.

13. Merger or Consolidation. If the Corporation is merged into or consolidated with another corporation and the Corporation is not the surviving corporation, the surviving corporation shall assume the obligations of the Corporation under this Article with respect to any action, suit, proceeding or investigation arising out of or relating to any actions, transactions or facts occurring prior to the date of such merger or consolidation.

14. Savings Clause. If this Article or any portion hereof shall be invalidated on any ground by any court of competent jurisdiction, then the Corporation shall nevertheless indemnify

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each Indemnitee as to any expenses (including attorneys' fees), judgments, fines and amounts paid in settlement in connection with any action, suit, proceeding or investigation, whether civil, criminal or administrative, including an action by or in the right of the Corporation, to the fullest extent permitted by any applicable portion of this Article that shall not have been invalidated and to the fullest extent permitted by applicable law.

15. Definitions. Terms used herein and defined in Section 145(h) and Section 145(i) of the DGCL shall have the respective meanings assigned to such terms in such Section 145(h) and Section 145(i).

16. Subsequent Legislation. If the DGCL is amended after adoption of this Article to expand further the indemnification permitted to Indemnitees, then the Corporation shall indemnify such persons to the fullest extent permitted by the DGCL, as so amended.

ARTICLE X  
AMENDMENT OF CERTIFICATE OF INCORPORATION

The Corporation reserves the right to amend, alter, change or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute and this Certificate of Incorporation, and all rights conferred upon stockholders herein are granted subject to this reservation.

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IN WITNESS WHEREOF, the undersigned incorporator hereby acknowledges that the foregoing Certificate of Incorporation is his or her act and deed and that the facts stated therein are true.

Dated: July 28, 2004

/s/ Charles J. Johnson  
Charles J. Johnson, Incorporator

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**Certificate of Designation  
of the Preferred Stock of  
BIO-key International, Inc.  
to be Designated  
Series A 7% Convertible Preferred Stock**

The undersigned officer of BIO-key International, Inc., a Delaware corporation (the "Corporation"), does hereby certify that the following resolutions were adopted by the Board of Directors of the Corporation (the "Board") in accordance with Section 151 of the General Corporation Law of Delaware on July 28, 2004:

RESOLVED: That, in accordance with the Certificate of Incorporation of the Corporation (the "Charter"), a series of the Preferred Stock, \$.0001 par value per share, of the Corporation (the "Preferred Stock"), be and it hereby is established, consisting of 100,000 shares, to be designated "Series A 7% Convertible Preferred Stock"; and that, subject to the limitations provided by law and the Charter, the powers, designations, preferences and relative, participating, optional or other special rights of, and the qualifications, limitations or restrictions upon, the Series A 7% Convertible Preferred Stock shall be as follows:

Section 1. Designation and Amount.

The shares of such series shall be designated as the "Series A 7% Convertible Preferred Stock" (the "Series A Shares") and the number of shares initially constituting such series shall be One Hundred Thousand (100,000) which may be issued in whole or fractional shares.

Section 2. Dividends and Distributions.

(a) The holders of Series A Shares shall be entitled to receive dividends, when and as declared by the Board, at a rate of seven percent (7%) per annum of the liquidation preference of \$100 per share, which shall be fully cumulative, prior and in preference to any declaration or payment of any dividend or other distribution on the Common Stock, \$.0001 par value per share, of the Corporation (the "Common Stock"). No dividend shall be declared and/or paid on any shares of Common Stock unless a dividend is also declared and/or paid on the Series A Shares. The dividends on the Series A Shares shall accrue from the date of issuance of each share and shall be payable semi-annually on June 15 and December 15 of each year (each a "Dividend Date") commencing on June 15, 2004, except that if any such date is a Saturday, Sunday or legal holiday (a "Non-Business Day") then such dividend shall be payable on the next day that is not a Saturday, Sunday or legal holiday on which banks in the State of Delaware are permitted to be closed (a "Business Day") to holders of record as they appear on the stock books of the Corporation on the applicable record date, which shall be not more than 60 nor less than 10 days preceding the payment date for such dividends, as fixed by the Board of Directors (the "Record Date"). The dividends shall be payable in shares of Common Stock (the "Series A Payments-in-Kind") in accordance with Section 2 (b) below. The amount of dividends payable on the Series A Shares for any period that is shorter or longer than 30 days shall be computed on the basis of a 360-day year of twelve 30-day months.

(b) Each Series A Payment-in-Kind shall be equal in amount to that number of shares of Common Stock for which the dividend is paid that is equal in number to (i) the aggregate cash dividends payable with respect to such Series A Shares on the Record Date,

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divided by (ii) the Conversion Price. Certificates representing the Common Stock issuable in payment of any Series A Payment-in-Kind shall be delivered to each holder entitled to receive such Series A Payment-in-Kind (in appropriate denominations) on the Dividend Date.

(c) The holders of Series A Shares shall not be entitled to receive any dividends or other distributions except as provided in this Certificate of Designation of Series A Shares.

Section 3. Voting Rights.

Except as provided by applicable law or in this Certificate of Designation, the holders of the Series A Shares shall have no voting rights.

Section 4. Liquidation, Dissolution, Winding Up or Certain Mergers or Consolidations

If the Corporation shall adopt a plan of liquidation or of dissolution, or commence a voluntary case under the federal bankruptcy laws or any other applicable state or federal bankruptcy, insolvency or similar law, or consent to the entry of an order for relief in any involuntary case under such law or to the appointment of a receiver, liquidator, assignee, custodian, trustee or

sequestrator (or similar official) of the Corporation or of any substantial part of its property, or make an assignment for the benefit of its creditors, or admit in writing its inability to pay its debts generally as they become due and on account of such event the Corporation shall liquidate, dissolve or wind up, or upon any other liquidation, dissolution or winding up of the Corporation, or, unless approved by the holders of the outstanding Series A Shares, engage in a merger, plan of reorganization or consolidation in which the entity is not the surviving Corporation, then and in that event, no distribution shall be made to the holders of shares of Common Stock unless, prior thereto, the holders of the Series A Shares shall have received an amount in cash or equivalent value in securities or other consideration equal to the Liquidation Preference thereof.

If upon any liquidation, dissolution, winding up, merger, plan of reorganization or consolidation, the amount so payable or distributable does not equal or exceed the Liquidation Preference of the Series A Shares, then, and in that event, the amount of cash so payable, and amount of securities or other consideration so distributable, shall be shared ratably among the holders of the Series A Shares. For the purposes hereof, the term "Liquidation Preference" shall mean \$100 per share with respect to each of the Series A Shares, plus any and all accrued unpaid dividends thereon.

#### Section 5. Conversion.

(a) (i) Subject to the provisions for adjustment hereinafter set forth and the limitation of the number of shares of Common Stock issuable upon conversion set forth in Section 5(a)(ii) below, commencing upon issuance, each Series A Share shall be convertible in the manner hereinafter set forth into fully paid and nonassessable shares of Common Stock, at the option of the holder thereof, at any time at the principal office of the Corporation or any transfer agent for the Series A Shares, into the number of fully paid and nonassessable shares of Common Stock which results from dividing the "Conversion Price" (as defined below) into the Liquidation Preference. The initial "Conversion Price" shall be equal to \$0.75. Upon conversion, all accrued or declared but unpaid dividends on the Series A Shares shall be paid in shares of Common Stock in the manner provided for Series A Payment-in-Kind in Section 2(b); provided, that the

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date of conversion of such Series A Shares shall be the "Record Date" for the purpose of calculating the Series A Payment-in-Kind.

(ii) Notwithstanding anything contained herein to the contrary, in no event (except while there is outstanding a tender offer for any or all of the shares of the Corporation's Common Stock) shall any holder of any Series A Shares be entitled to convert Series A Shares, or shall the Corporation have the obligation to issue shares upon such conversion or in payment of any Series A Payment-in-Kind, to the extent that, after such conversion the sum of (A) the number of shares of Common Stock beneficially owned by such holder and its affiliates (other than shares of Common Stock which may be deemed beneficially owned through the ownership of the unconverted portion of the Series A Shares or unexercised portion of any warrants or other securities convertible into shares of Common Stock of the Corporation beneficially owned by such holder), and (B) the number of shares of Common Stock issuable upon the conversion of the Series A Shares with respect to which the determination of this proviso is being made, would result in beneficial ownership by such holder and its affiliates of more than 4.99% of the outstanding shares of Common Stock of the Corporation (after taking into account the shares to be issued to such Holder upon such conversion). For purposes of the proviso to the immediately preceding sentence, beneficial ownership shall be determined in accordance with Section 13(d) of the Securities Exchange Act of 1934, as amended (the "1934 Act"), except as otherwise provided in clause (A) of such sentence.

#### (b) Adjustments to Conversion Price:

(i) The following definitions shall apply for purposes of this Section:

(A) "Options" shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire either Common Stock or Convertible Securities.

(B) "Convertible Securities" shall mean any evidences of indebtedness, shares or other securities convertible into or exchangeable for Common Stock.

(C) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued (or, pursuant to Section 5(b)(iii), deemed to be issued) by the Corporation after the Series A Original Issue Date (as defined below), other than shares of Common Stock issued or issuable:

(i) upon conversion of Series A Shares;

(ii) in a transaction described in Section 5(b)(vi);

(iii) pursuant to the terms of any stock grant, option, warrant, employment agreement, convertible debt or other written obligation, agreement or commitment to which the Corporation was a party as of the

(iv) by way of dividend or other distribution on shares of Common Stock excluded from the definition of Additional Shares of Common Stock by the foregoing clauses (i), (ii) or (iii);

(v) to consultants or other people providing services to the Corporation so long as such issuances do not exceed Five Hundred Thousand (500,000) shares of Common Stock (or options or warrants to purchase same) in the aggregate; or

(vi) pursuant to a stock option plan or stock purchase plan or other employee stock incentive program or agreement approved by the Board of Directors so long as such issuances do not exceed One Million (1,000,000) shares of Common Stock (or options or warrants to purchase same) in the aggregate.

(D) "Series A Original Issue Date" shall mean the date on which the first Series A Share was issued.

(ii) No Adjustment of Conversion Price: No adjustment in the Conversion Price shall be made in respect of the issuance of Additional Shares of Common Stock unless the consideration per share for an Additional Share of Common Stock issued or deemed to be issued by the Corporation is issued for consideration less than the Conversion Price in effect on the date of such issuance.

(iii) Deemed Issue of Additional Shares of Common Stock

(A) Options and Convertible Securities: In the event the Corporation at any time or from time to time after the Series A Original Issue Date shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefore, the exercise of such Options and conversion or exchange of such Convertible Securities shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, provided that Additional Shares of Common Stock shall not be deemed to have been issued unless the consideration per share (determined pursuant to Section 5(b)(v) hereof) of such Additional Shares of Common Stock would be less than the Conversion Price in effect on the date of and immediately prior to such issue, or such record date, as the case may be, and provided further that in any such case in which Additional Shares of Common Stock are deemed to be issued:

(i) except as provided in Section 5(b)(iii)(A)(ii) hereof, no further adjustment in the Conversion Price shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock upon the exercise of such Options or conversion or exchange of such Convertible Securities;

(ii) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any change in the consideration payable to the Corporation, or change in the number of shares of Common Stock issuable, upon the exercise, conversion or exchange thereof (other than under or by reason of provisions designed to protect against dilution), the Conversion Price computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto) and any subsequent adjustments based thereon, shall, upon any such increase or decrease becoming effective, be recomputed to reflect such increase or decrease insofar as it affects such Options or the rights of conversion or exchange under such Convertible Securities; and

(iii) no readjustment pursuant to clause (ii) above shall have the effect of increasing the Conversion Price to an amount which exceeds the lower of (1) the Conversion Price on the original adjustment date or (2) the Conversion

Price that would have resulted from any issuance of Additional Shares of Common Stock between the original adjustment date and such readjustment date.

(iv) Adjustment of Conversion Rate Upon Issuance of Additional Shares of Common Stock: In the event the Corporation shall issue Additional Shares of Common Stock without consideration or for a consideration per share less than the Conversion Price in effect on the date of and immediately prior to such issue, then and in each such event the Conversion Price shall automatically be reduced to a price equal to the lowest per share

consideration received or to be received by the Corporation in connection with such issuance.

(v) **Determination of Consideration.** For purposes of this Section, the consideration received by the Corporation for the issuance of any Additional Shares of Common Stock shall be computed as follows:

(A) **Cash and Property:** Such consideration shall:

(i) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation;

(ii) insofar as it consists of property other than cash, be computed at the fair value thereof at the time of such issue, as determined by the Board of Directors in the good faith exercise of its reasonable business judgment; and

(iii) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (i) and (ii) above, as determined by the Board of Directors in the good faith exercise of its reasonable business judgment.

(B) **Options and Convertible Securities.** The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Section 5(b)(iii)(A), relating to Options and Convertible Securities, shall be determined by dividing

(i) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities, by

(ii) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

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(vi) **Other Adjustments:**

(A) **Subdivisions, Combinations, or Consolidations of Common Stock:** In the event the outstanding shares of Common Stock shall be subdivided, combined or consolidated, by stock split, stock dividend, combination or like event, into a greater or lesser number of shares of Common Stock, the Conversion Price in effect immediately prior to such subdivision, combination, consolidation or stock dividend shall, concurrently with the effectiveness of such subdivision, combination or consolidation, be proportionately adjusted.

(B) **Reclassifications:** In the case, at any time after the date hereof, of any capital reorganization or any reclassification of the stock of the Corporation (other than as a result of a stock dividend or subdivision, split-up or combination of shares), or the consolidation or merger of the Corporation with or into another person (other than a consolidation or merger (i) in which the Corporation is the continuing entity and which does not result in any change in the Common Stock or (ii) which is treated as a liquidation pursuant to Section 4 hereof), the Series A Shares shall, after such reorganization, reclassification, consolidation or merger be convertible into the kind and number of shares of stock or other securities or property of the Corporation or otherwise to which such holder would have been entitled if immediately prior to such reorganization, reclassification, consolidation or merger such holder had converted its Series A Shares into Common Stock. The provisions of this Section 5(b) shall similarly apply to successive reorganizations, reclassifications, consolidations or mergers.

(c) **Fractional Shares.** In lieu of any fractional shares to which the holder of a Series A Share would otherwise be entitled upon conversion, the Corporation shall pay cash equal to such fraction multiplied by the fair market value of one share of Common Stock as determined by the Board of Directors in the good faith exercise of its reasonable business judgment.

(d) **Miscellaneous:**

(i) All calculations under this Section 5 shall be made to the nearest cent or to the nearest one hundredth

(1/100) of a share, as the case may be.

(ii) The holders of at least 50% of the outstanding Series A Shares shall have the right to challenge any determination by the Board of Directors of fair market value pursuant to this Section 5, in which case such determination of fair market value shall be made by an independent appraiser selected jointly by the Board of Directors and the challenging parties, the cost of such appraisal to be borne equally by the Corporation and the challenging parties.

(iii) No adjustment in the Conversion Price need be made if such adjustment would result in a change in such Conversion Price of less than \$0.01. Any adjustment of less than \$0.01 which is not made shall be carried forward and shall be made at the time of and together with any subsequent adjustment which, on a cumulative basis, amounts to an adjustment of \$0.01 or more in the Conversion Rate.

(e) No Impairment. The Corporation will not, through any reorganization, recapitalization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities

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or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Corporation, but will at all times in good faith assist in the carrying out of all the provisions of this Section 5 and in the taking of all such action as may be necessary or appropriate in order to protect the conversion rights of the holders of the Series A Shares against impairment.

(f) Reservation of Stock Issuable Upon Conversion. The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the Series A Shares and payment of dividends thereon, such number of its shares of Common Stock as shall from time to time be sufficient to effect (i) the conversion of all outstanding Series A Shares and (ii) the payment of three (3) years of dividends less any dividends previously paid on the Series A Shares as provided in Section 2(b). If at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding Series A Shares and the payment of such dividends, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes.

#### Section 6. Reports as to Adjustments.

Whenever the Conversion Price or the type of securities, cash or other property into which the Series A Shares may be converted is adjusted as provided in Section 5 hereof, the Corporation shall promptly mail to the holders of record of the outstanding Series A Shares at their respective addresses as the same shall appear in the Corporation's stock records, a notice stating that the Conversion Price has been adjusted and setting forth the new number of shares of Common Stock (or describing the new stock, securities, cash or other property) into which each Series A Share is convertible as a result of such adjustment, a brief statement of the facts requiring such adjustment and the computation thereof and when such adjustment became effective.

#### Section 7. Redemption.

(a) Prior to March 3, 2007, there shall be no redemption of the Series A Shares. If during any thirty (30) consecutive trading day period occurring after March 3, 2007, the average closing bid price for one share of Common Stock, as reported by Bloomberg, L.P. (or such successor to its function of reporting share prices), is less than \$1.00 (subject to proportionate adjustment in the event of any stock splits or similar events) (the "Period"), the Corporation shall, within ten (10) days after the last day of the Period (the "Redemption Date"), redeem all remaining outstanding Series A Shares at \$100 per Series A Share, together with all accrued and unpaid dividends thereon (the "Redemption Price"), in cash, to the Redemption Date.

(b) Notice of redemption ("Redemption Notice") shall be given by the Corporation with respect to the Series A Shares immediately after the Period and shall be delivered by mail, first class postage prepaid, to each holder of record (at the close of business on the business day preceding the day on which notice is given) of the Series A Shares, at the address last shown on the records of the Corporation for such holder or given by the holder to the Corporation, for the purpose of notifying such holder of the redemption to be effected.

(c) On the Redemption Date, the Corporation shall pay by cash or wire transfer of immediately available funds to the person whose name appears on the certificate or certificates

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of the Series A Shares that (i) shall not have been converted pursuant to Section 5 hereof and (ii) shall have been surrendered to the Corporation in the manner and at the place designated in the Redemption Notice, the Redemption Price, and thereupon each surrendered certificate shall be canceled.

(d) If the funds of the Corporation legally available for redemption of the Series A Shares are insufficient to redeem the total number of Series A Shares outstanding on the Redemption Date, the Series A Shares shall be redeemed (on a pro rata basis from the holders of the Series A Shares, from time to time), to the extent the Corporation is legally permitted to do so, and the redemption obligations of the Corporation hereunder will be a continuing obligation until the Corporation's redemption of all of the Series A Shares.

(e) From and after the Redemption Date, unless there shall have been a default in payment of the Redemption Price, all rights of the holders of the Series A Shares (except the right to receive the Redemption Price subsequent to the Redemption Date upon surrender of their certificate or certificates) shall cease with respect to such shares, and such shares shall not thereafter be transferred on the books of the Corporation or be deemed to be outstanding for any purpose whatsoever. If for any reason the Corporation shall not have paid the Redemption Price to the holders of Series A Shares on the Redemption Date, (i) the Series A Shares outstanding at such date shall accrue dividends at a rate of nine percent (9%) per annum of the Liquidation Preference from the Redemption Date until the Redemption Price is paid in full and (ii) all rights of the holders of the Series A Shares and obligations of the Corporation provided herein shall continue until the Redemption Price is paid in full.

#### Section 8. Reacquired Shares.

Any Series A Shares converted, purchased or otherwise acquired by the Corporation in any manner whatsoever shall be retired and canceled promptly after the acquisition thereof, and, if necessary to provide for the lawful purchase of such shares, the capital represented by such shares shall be reduced in accordance with the General Corporation Law of Delaware. All such shares shall upon their cancellation become authorized but unissued shares of Preferred Stock, \$.0001 par value per share, of the Corporation and may be reissued as part of another series of Preferred Stock, \$.0001 par value per share, of the Corporation.

Section 9. Protective Provisions. So long as any shares of Series A Shares are outstanding, the Corporation shall not, without first obtaining the approval of the holders of a majority of the then outstanding Series A Shares:

(a) alter or change the rights, preferences or privileges of the Series A Shares;

(b) create or issue any new class or series of capital stock that is pari passu with, or has a preference over, the Series A Shares as to payment of dividends or the distribution of assets upon liquidation, dissolution or winding up of the Corporation ("Senior Securities"), or alter or change the rights, preferences or privileges of any Senior Securities so as to affect adversely the Series A Shares;

(c) increase the authorized number of shares of Series A Shares;

(d) do any act or thing not authorized or contemplated by this Certificate of Designation which would result in taxation of the holders of shares of the Series A Shares under Section 305 of the Internal Revenue Code of 1986, as amended (or any comparable provision of the Internal Revenue Code as hereafter from time to time amended);

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(e) engage in a reverse stock split or other similar transaction with respect to the Common Stock;

(f) authorize, create, designate, issue or sell any class or series of preferred stock of the Corporation (including, but not limited to, Series A Shares or other shares of preferred stock or treasury stock) or rights, options, warrants or other securities convertible into or exercisable or exchangeable for Common Stock (other than any such rights, options, warrants or other securities convertible into or exercisable or exchangeable for Common Stock issued to employees of the Corporation in the ordinary course of their employment or consultants pursuant to Section 5(b)(i)(C)(v)) or any debt security which by its terms is convertible into or exchangeable for any Common Stock of the Corporation.

The approval requirement contained in this Section 9 shall apply to any action taken by officers, directors or shareholders of the Corporation resulting in any of the effects described in clauses (a) - (f) above, regardless of the form such action takes.

#### FURTHER

RESOLVED: That such certificate of designation be, and it hereby is, approved and adopted by the Board; and that the officers of the Corporation, or any of them, hereby are authorized and directed to execute and file such certificate of designation with the Secretary of State of the State of Delaware; that the Board hereby is authorized to issue such shares of Series A 7% Convertible Preferred Stock from time to time and for such consideration and on such terms as the Board may determine; and that a sufficient

number of shares of Common Stock hereby is reserved for issuance upon conversion of the Series A 7% Convertible Preferred Stock.

IN WITNESS WHEREOF, BIO-key International, Inc. has caused this certificate to be signed by its President and Chief Executive Officer and attested by its secretary, and its corporate seal to be hereunto affixed, on this 28th day of July, 2004.

BIO-KEY INTERNATIONAL, INC.

By: /s/ Michael W. DePasquale  
Michael W. DePasquale  
President and Chief Executive Officer

[Corporate Seal]

ATTEST:

By: /s/ Gary E. Wendt  
Gary E. Wendt  
Secretary

**BY-LAWS**  
**OF**  
**BIO-KEY INTERNATIONAL, INC.**  
**(a Delaware corporation)**

ARTICLE I

Stockholders

Section 1.1. Annual Meetings. An annual meeting of stockholders shall be held for the election of directors at such date, time and place, either within or without the State of Delaware, as may be designated by resolution of the Board of Directors from time to time. Any other proper business may be transacted at the annual meeting. If no annual meeting has been held for a period of thirteen months after the Corporation's last annual meeting, a special meeting in lieu thereof may be held, and such special meeting shall have, for the purposes of these By-Laws or otherwise, all the force and effect of an annual meeting. Any and all references hereafter in these By-Laws to an annual meeting or annual meetings also shall be deemed to refer to any special meeting(s) in lieu thereof.

Section 1.2. Special Meetings. Special meetings of stockholders for any purpose or purposes may be called at any time by the Board of Directors, but such special meetings may not be called by any other person or persons. Special meetings of stockholders may be held within or without the State of Delaware, as may be designated by resolution of the Board of Directors from time to time.

Section 1.3. Nomination of Directors. Only persons who are nominated in accordance with the following procedures shall be eligible for election as directors (except for directors elected to fill vacancies, as provided in Article II, Section 2.2). Nomination for election to the Board of Directors of the Corporation at a meeting of stockholders may be made (i) by or at the direction of the Board of Directors, or any committee thereof, or (ii) by any stockholder of the Corporation entitled to vote for the election of directors at such meeting who complies with the notice procedures set forth in this Section 1.3.

To be timely, a stockholder's notice must be received by the Secretary at the principal executive offices of the Corporation as follows: (a) in the case of an election of directors at an annual meeting of stockholders, not less than 60 days nor more than 90 days prior to the first anniversary of the preceding year's annual meeting; provided, however, that (i) in the event that the date of the annual meeting is advanced by more than 20 days, or delayed by more than 60 days, from such anniversary date, to be timely, a stockholder's notice must be so received not earlier than the 90th day prior to such annual meeting and not later than the close of business on the later of (A) the 60th day prior to such annual meeting and (B) the 10th day following the day on which notice of the date of such annual meeting was mailed or public disclosure of the date of such annual meeting was made, whichever first occurs, or (ii) with respect to the annual meeting of stockholders of the Corporation to be held in the year 2004, to be timely, a stockholder's notice must be so received not earlier than the 90th day prior to such annual meeting and not

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later than the close of business on the 10th day following the day on which notice of the date of such annual meeting was mailed or public disclosure of the date of such annual meeting was made, whichever first occurs; or (b) in the case of an election of directors at a special meeting of stockholders, not earlier than the ninetieth day prior to such special meeting and not later than the close of business on the later of (A) the sixtieth day prior to such special meeting and (B) the 10th day following the day on which notice of the date of such special meeting was mailed or public disclosure of the date of such special meeting was made, whichever first occurs.

The stockholder's notice to the Secretary shall set forth (a) as to each proposed nominee (i) the name, age, business address and, if known, residence address of each such nominee, (ii) the principal occupation or employment of each such nominee, (iii) the number of shares of stock of the Corporation which are beneficially owned by each such nominee, and (iv) any other information concerning the nominee that must be disclosed as to nominees in proxy solicitations pursuant to Regulation 14A under the Securities Exchange Act of 1934, as amended; (b) as to the stockholder giving the notice (i) the name and address, as they appear on the Corporation's books, of such stockholder and (ii) the class and number of shares of the Corporation which are beneficially owned by such stockholder; and (c) as to the beneficial owner, if any, on whose behalf the nomination is being made (i) the name and address of such beneficial owner and (ii) the class and number of shares of the Corporation which are beneficially owned by such person. In addition, to be effective, the stockholder's notice must be accompanied by the written consent of the proposed nominee to serve as a director if elected. The Corporation may require any proposed nominee to furnish such other information as may reasonably be required by the Corporation to determine the eligibility of such proposed nominee to serve as a director of the Corporation.

The chairman of the meeting may, if the facts warrant, determine and declare to the meeting that a nomination was not made in accordance with the foregoing procedure, and if he should so determine, he shall so declare to the meeting and the defective nomination shall be disregarded.

Nothing in the foregoing provision shall obligate the Corporation or the Board of Directors to include in any proxy statement or other stockholder communication distributed on behalf of the Corporation or the Board of Directors information with respect to any nominee for directors submitted by a stockholder.

Section 1.4. Notice of Business at Annual Meetings. At any annual meeting of the stockholders, only such business shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (a) specified in the notice of meeting (or any supplement thereto) given by or at the direction of the Board of Directors, (b) otherwise brought before the meeting by or at the direction of the Board of Directors, or (c) otherwise properly brought before an annual meeting by a stockholder. For business to be properly brought before an annual meeting by a stockholder, (i) if such business relates to the election of directors of the Corporation, the procedures in Section 1.3 must be complied with and (ii) if such business relates to any other matter, the stockholder must have given timely notice thereof in writing to the Secretary in accordance with the procedures set forth in this Section 1.4.

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To be timely, a stockholder's notice must be received by the Secretary at the principal executive offices of the Corporation not less than 60 days nor more than 90 days prior to the first anniversary of the preceding year's annual meeting; provided, however, that (i) in the event that the date of the annual meeting is advanced by more than 20 days, or delayed by more than 60 days, from such anniversary date, to be timely, a stockholder's notice must be so received not earlier than the 90th day prior to such annual meeting and not later than the close of business on the later of (A) the 60th day prior to such annual meeting and (B) the 10th day following the day on which notice of the date of such annual meeting was mailed or public disclosure of the date of such annual meeting was made, whichever first occurs, or (ii) with respect to the annual meeting of stockholders of the Corporation to be held in the year 2004, to be timely, a stockholder's notice must be so received not earlier than the 90th day prior to such annual meeting and not later than the close of business on the later of (A) the 60th day prior to such annual meeting and (B) the 10th day following the day on which notice of the date of such annual meeting was mailed or public disclosure of the date of such annual meeting was made, whichever first occurs.

The stockholder's notice to the Secretary shall set forth as to each matter the stockholder proposes to bring before the annual meeting (a) a brief description of the business desired to be brought before the annual meeting and the reasons for conducting such business at the annual meeting, (b) the name and address, as they appear on the Corporation's books, of the stockholder proposing such business, and the name and address of the beneficial owner, if any, on whose behalf the proposal is made, (c) the class and number of shares of the Corporation which are beneficially owned by the stockholder and beneficial owner, if any, and (d) any material interest of the stockholder or such beneficial owner, if any, in such business. Notwithstanding anything in these By-Laws to the contrary, no business shall be conducted at any annual meeting of stockholders except in accordance with the procedures set forth in this Section 1.4; provided that any stockholder proposal which complies with Rule 14a-8 of the proxy rules (or any successor provision) promulgated under the Securities Exchange Act of 1934, as amended, and is to be included in the Corporation's proxy statement for an annual meeting of stockholders shall be deemed to comply with the requirements of this Section 1.4.

The chairman of the meeting shall, if the facts warrant, determine and declare to the meeting that business was not properly brought before the meeting in accordance with the provisions of this Section 1.4, and if he should so determine, the chairman shall so declare to the meeting that any such business not properly brought before the meeting shall not be transacted.

Section 1.5. Adjournments. Any meeting of stockholders, annual or special, may adjourn from time to time to reconvene at the same or some other place, and notice need not be given of any such adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting the Corporation may transact any business which might have been transacted at the original meeting. If the adjournment is for more than thirty days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting.

Section 1.6. Quorum. Except as otherwise provided by law, the Certificate of Incorporation or these By-Laws, at each meeting of stockholders the presence in person or by proxy of the holders of shares of stock having a majority of the votes which could be cast by the

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holders of all outstanding shares of stock entitled to vote at the meeting shall be necessary and sufficient to constitute a quorum. In

the absence of a quorum, the stockholders so present may, by majority vote, adjourn the meeting from time to time in the manner provided in Section 1.5 of these By-Laws until a quorum shall attend. Shares of its own stock belonging to the Corporation or to another Corporation, if a majority of the shares entitled to vote in the election of directors of such other Corporation is held, directly or indirectly, by the Corporation, shall neither be entitled to vote nor be counted for quorum purposes; provided, however, that the foregoing shall not limit the right of the Corporation to vote stock, including but not limited to its own stock, held by it in a fiduciary capacity.

Where a separate vote by a class or classes is required, a majority of the outstanding shares of such class or classes, present in person or represented by proxy, shall constitute a quorum entitled to take action with respect to that vote on that matter and the affirmative vote of the majority of shares of such class or classes present in person or represented by proxy at the meeting shall be the act of such class.

Section 1.7. Organization. Meetings of stockholders shall be presided over by the Chairman of the Board, if any, or in his absence by the Vice Chairman of the Board, if any, or in his absence by the President, or in his absence by a Vice President, or in the absence of the foregoing persons by a chairman designated by the Board of Directors, or in the absence of such designation by a chairman chosen at the meeting. The Secretary shall act as a secretary of the meeting, but in his absence the chairman of the meeting may appoint any person to act as secretary of the meeting.

Section 1.8. Voting; Proxies. Except as otherwise provided by the Certificate of Incorporation, each stockholder entitled to vote at any meeting of stockholders shall be entitled to one vote for each share of stock held by him which has voting power upon the matter in question. Each stockholder entitled to vote at a meeting of stockholders may authorize another person or persons to act for him by proxy dated and delivered by mail, courier or other delivery service, telephone, telecopier or any other form of electronic transmission permitted by law, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. A duly executed proxy shall be irrevocable if it states that it is irrevocable and if, and only as long as, it is coupled with an interest sufficient in law to support an irrevocable power. A stockholder may revoke any proxy which is not irrevocable by attending the meeting and voting in person or by filing an instrument in writing revoking the proxy or another duly executed proxy bearing a later date with the Secretary of the Corporation. At all meetings of stockholders held for the election of directors a plurality of the votes cast shall be sufficient to elect. If a ballot is used in the election of directors, such requirement of a written ballot shall, if authorized by the Board of Directors, be satisfied by a ballot submitted by electronic transmission, provided that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the stockholder or proxyholder. Unless otherwise provided by law, the Certificate of Incorporation or these By-Laws, in all matters other than the election of directors, the affirmative vote of the majority shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders. Any copy, facsimile telecommunication or other reliable reproduction of the writing or transmission created pursuant to this Section 1.8 may be substituted or used in lieu of the original writing or

transmission for any and all purposes for which the original writing or transmission could be used, provided that such copy, facsimile telecommunication or reproduction shall be a complete reproduction of the entire original writing or transmission.

Section 1.9. Fixing Date for Determination of Stockholders of Record In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or to express consent to corporate action in writing without a meeting, or entitled to receive payment of any dividend or other distribution or allotment of any rights, or entitled to exercise any rights in respect of any change, conversion or exchange of stock or for the purpose of any other lawful action, the Board of Directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors and which record date: (i) in the case of determination of stockholders entitled to vote at any meeting of stockholders or adjournment thereof, shall, unless otherwise required by law, not be more than sixty (60) nor less than ten (10) days before the date of such meeting; (ii) in the case of determination of stockholders entitled to express consent to corporate action in writing without a meeting, shall not be more than ten (10) days after the date upon which the resolution fixing the record date is adopted by the Board of Directors; and (iii) in the case of any other action, shall not be more than sixty days (60) before such other action. If no record date is fixed: (i) the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given, or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held; (ii) the record date for determining stockholders entitled to express consent to corporate action in writing without a meeting when no prior action of the Board of Directors is required by law, shall be the first date on which a signed written consent setting forth the action taken or proposed to be taken is delivered to the Corporation in accordance with applicable law, or, if prior action by the Board of Directors is required by law, shall be at the close of business on the day on which the Board of Directors adopts the resolution taking such prior action; and (iii) the record date for determining stockholders for any other purpose shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

Section 1.10. List of Stockholders Entitled to Vote. The Secretary shall prepare and make, at least ten days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, during ordinary business hours, for a period of at least ten days before the meeting, either at a place within the city where the meeting is to be held, which place shall be specified in the notice of the meeting, or, if not so specified, at the place where the meeting is to be held. The list shall also be produced and kept at the time and place of the meeting during the whole time thereof and may be inspected by any stockholder who is present. Upon the willful neglect or refusal of the directors to produce such a list at any meeting for the election of directors, they shall be ineligible for election to any office at such meeting. The stock ledger shall be the only evidence as to who are

the stockholders entitled to examine the stock ledger, the list of stockholders or the books of the Corporation, or to vote in person or by proxy at any meeting of stockholders.

Section 1.11. Voting Procedures and Inspectors of Election. The Corporation shall, in advance of any meeting of stockholders, appoint one or more inspectors to act at the meeting to make a written report thereof. Each inspector, before entering upon the discharge of his duties, shall take and sign an oath faithfully to execute the duties of inspector with strict impartiality and according to the best of his ability. The inspectors shall (i) ascertain the number of shares outstanding and the voting power of each, (ii) determine the shares represented at the meeting and the validity of proxies and ballots, (iii) count all votes and ballots, (iv) determine and retain for a reasonable period a record of the disposition of any challenges made to any determination by the inspectors, (v) certify their determination of the number of shares represented at the meeting, and their count of all votes and ballots.

The date and time of the opening and the closing of the polls for each matter upon which the stockholders will vote at a meeting shall be announced at the meeting. No ballot, proxies or votes, nor any revocations thereof or changes thereto, shall be accepted by the inspectors after the closing of the polls unless otherwise determined in accordance with applicable law.

Unless otherwise provided in the Certificate of Incorporation, this section shall apply only if the Corporation has a class of voting stock that is (i) listed on a national securities exchange, (ii) authorized for quotation on an inter-dealer quotation system of a registered national securities association or (iii) held of record by more than 2,000 stockholders.

Section 1.12. Action by Consent of Stockholders. Except as provided in the Certificate of Incorporation, stockholders may not take any action by written consent in lieu of a meeting.

## ARTICLE II

### Board of Directors

Section 2.1. Number; Qualifications. The number of Directors of the Corporation shall be fixed solely and exclusively by resolution duly adopted from time to time by the Board of Directors. Directors need not be stockholders.

Section 2.2. Election; Resignation; Removal; Vacancies. The Board of Directors shall initially consist of the person or persons named as directors in the Certificate of Incorporation (or, if no directors are named in the Certificate of Incorporation, the person or persons so named by the incorporators), and each director so elected shall hold office until the first annual meeting of stockholders or until his successor is elected and qualified. At the first annual meeting of stockholders and at each annual meeting thereafter, the stockholders shall elect directors, each of whom shall hold office until the next annual meeting of stockholders or until his successor is elected and qualified, or his earlier resignation or removal. Any director may resign at any time upon written notice given in writing or by electronic transmission to the Corporation. Vacancies in the Board of Directors shall be filled in the manner provided in the Certificate of Incorporation. Directors may be removed from office in the manner provided in the Certificate of Incorporation.

Section 2.3. Regular Meetings. Regular meetings of the Board of Directors may be held at such places within or without the State of Delaware and at such times as the Board of Directors may from time to time determine, and if so determined notices thereof need not be given.

Section 2.4. Special Meetings. Special meetings of the Board of Directors may be held at any time or place within or without the State of Delaware whenever called by the President, any Vice President, the Secretary, or by any member of the Board of

Directors. Notice of a special meeting of the Board of Directors shall be given to each director by the person or persons calling the meeting at least twenty-four hours before the special meeting.

Section 2.5. Notice of Regular and Special Meetings. Notice of regular or special meetings may be given in writing, by mail or courier or other hand delivery, addressed to such director, at his address as it appears on the records of the Corporation, with postage thereon or courier or delivery fees prepaid, and such notice shall be deemed to be given at the time when the same shall be deposited in the United States mail, if mailed, or when delivered to such address if delivered by courier or other hand delivery. Notices to directors may also be given by electronic transmission, when directed to a number or electronic address at which the director has consented to receive such form of notice.

Section 2.6. Telephonic Meetings Permitted. Members of the Board of Directors, or any committee designated by the Board of Directors, may participate in a meeting thereof by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this bylaw shall constitute presence in person at such meeting.

Section 2.7. Quorum; Vote Required for Action. At all meetings of the Board of Directors a majority of the whole Board of Directors shall constitute a quorum for the transaction of business. Except in cases in which the Certificate of Incorporation or these By-Laws otherwise provide, the vote of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

Section 2.8. Organization. Meetings of the Board of Directors shall be presided over by the Chairman of the Board, if any, or in his absence by the Vice Chairman of the Board, if any, or if there shall be no Chairman or Vice Chairman, or such persons shall be absent, by the President, or in their absence by a chairman chosen at the meeting. The Secretary shall act as secretary of the meeting, but in his absence the chairman of the meeting may appoint any person to act as secretary of the meeting.

Section 2.9. Action by Consent of Directors. Unless otherwise restricted by the Certificate of Incorporation or these By-Laws, any action required or permitted to be taken at any meeting of the Board of Directors, or of any committee thereof, may be taken without a meeting if all members of the Board of Directors or such committee, as the case may be, consent thereto in writing or by electronic transmission, and the writing or writings or electronic transmissions are filed with the minutes of proceedings of the Board of Directors or such committee. Such filing shall be maintained in accordance with Section 7.5 of these By-Laws.

### ARTICLE III

#### Committees

Section 3.1. Committees. The Board of Directors may, by resolution passed by a majority of the whole Board of Directors, designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in place of any such absent or disqualified member. Any such committee, to the extent permitted by law and to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to the following matters: (i) any action that must be expressly approved by the stockholders under Delaware law; and (ii) adopting, amending or repealing any bylaw.

Section 3.2. Committee Rules. Unless the Board of Directors otherwise provides, each committee designated by the Board of Directors may make, alter and repeal rules for the conduct of its business. In the absence of such rules, each committee shall conduct its business in the same manner as the Board of Directors conducts its business pursuant to ARTICLE II of these By-Laws.

### ARTICLE IV

#### Officers

Section 4.1. Selection; Statutory Officers. The Board of Directors shall elect a President, a Treasurer and a Secretary, and it may, if it so determines, choose a Chairman of the Board and a Vice Chairman of the Board from among its members. The Board of Directors also may, if it so determines, elect one or more Vice Presidents, one or more Assistant Treasurers, and one or more Assistant Secretaries. Any number of offices may be held by the same person.

Section 4.2. Time of Election. The officers named above shall be chosen by the Board of Directors at its first meeting after each annual meeting of stockholders. Except for the Chairman of the Board and Vice Chairman of the Board, if any, none of such officers need be a director.

Section 4.3. Additional Officers. The Board of Directors may appoint such other officers and agents as it shall deem necessary, who shall hold their offices for such terms and shall exercise such powers and perform such duties as shall be determined from time to time by the Board of Directors.

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Section 4.4. Terms of Office. Each officer of the Corporation shall hold office until his successor is chosen and qualified, or until his earlier resignation or removal. Any officer elected or appointed by the Board of Directors may be removed at any time by the Board of Directors.

Section 4.5. Compensation of Officers. The Board of Directors shall have power to fix the compensation of all officers of the Corporation. It may authorize any officer, upon whom the power of appointing subordinate officers may have been conferred, to fix the compensation of such subordinate officers.

Section 4.6. Chairman of the Board. The Chairman of the Board shall be the chairman of the Board of Directors and shall perform and do all acts and things incident to the position of chairman of the board and shall have such other duties as may be assigned to him from time to time by the Board of Directors. The Chairman of the Board shall preside at all meetings of the stockholders and directors at which he shall be present.

Section 4.7. President. Unless the Board of Directors otherwise determines, the President shall be the chief executive officer and head of the Corporation, shall perform and do all acts and things incident to the positions of president and chief executive officer and shall have such other duties as may be assigned to him from time to time by or under authority of the Board of Directors. Under the supervision of the Board of Directors, the President shall have general control and management of the Corporation and its business and affairs, including general supervision over its officers (other than the Chairman of the Board), employees and agents, subject, however, to the right of the Board of Directors to confer any specific power upon any other officer or officers of the Corporation. The President shall perform such other duties as may be assigned to him from time to time by the Board of Directors.

Section 4.8. Vice Presidents. The Vice Presidents shall perform such of the duties of the President on behalf of the Corporation as may be respectively assigned to them from time to time by the Board of Directors or the President. The Board of Directors may designate one of the Vice Presidents as the Executive Vice President, and in the absence or inability of the President to act, such Executive Vice President shall have and possess all of the powers and discharge all of the duties of the President, subject to the control of the Board of Directors.

Section 4.9. Treasurer. The Treasurer shall have the care and custody of all the funds and securities of the Corporation which may come into his hands as Treasurer, and the power and authority to endorse checks, drafts and other instruments for the payment of money for deposit or collection when necessary or proper and to deposit the same to the credit of the Corporation in such bank or banks or depository as the Board of Directors, or the officers or agents to whom the Board of Directors may delegate such authority, may designate, and he may endorse all commercial documents requiring endorsements for or on behalf of the Corporation. He may sign all receipts and vouchers for the payments made to the Corporation. He shall render an account of his transactions to the Board of Directors as often as the board shall require the same. He shall enter regularly in the books to be kept by him for that purpose full and adequate account of all moneys received and paid by him on account of the Corporation. He shall perform all acts incident to the position of Treasurer, subject to the control of the Board of Directors. He shall when requested, pursuant to vote of the Board of Directors, give a bond to

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the Corporation conditioned for the faithful performance of his duties, the expense of which bond shall be borne by the Corporation.

Section 4.10. Secretary. The Secretary shall keep the minutes of all meetings of the Board of Directors and of the stockholders; he shall attend to the giving and serving of all notices of the Corporation. Except as otherwise ordered by the Board of Directors, he shall attest the seal of the Corporation upon all contracts and instruments executed under such seal and shall affix the seal of the Corporation thereto and to all certificates of shares of capital stock of the Corporation. He shall have charge of the stock certificate book, transfer book and stock ledger, and such other books and papers as the Board of Directors may direct. He shall, in general, perform all the duties of Secretary, subject to the control of the Board of Directors.

Section 4.11. Assistant Secretary. The Board of Directors or any two of the officers of the Corporation acting jointly may appoint or remove one or more Assistant Secretaries of the Corporation. Any Assistant Secretary upon his appointment shall perform such duties of the Secretary, and also any and all such other duties, as the Board of Directors or the President or the Executive Vice President or the Treasurer or the Secretary may designate.

Section 4.12. Assistant Treasurer. The Board of Directors or any two of the officers of the Corporation acting jointly may appoint or remove one or more Assistant Treasurers of the Corporation. Any Assistant Treasurer upon his appointment shall perform such of the duties of the Treasurer, and also any and all such other duties, as the Board of Directors or the President or the Executive Vice President or the Treasurer or the Secretary may designate.

Section 4.13. Subordinate Officers. The Board of Directors may select such subordinate officers as it may deem desirable. Each such officer shall hold office for such period, have such authority, and perform such duties as the Board of Directors may prescribe. The Board of Directors may, from time to time, authorize any officer to appoint and remove subordinate officers and to prescribe the powers and duties thereof.

Section 4.14. Position Holders. The President shall have the authority to designate position holders of the Corporation. Such position holders will have such titles (including without limitation the title of vice president or director) and responsibilities as assigned by the President. Such position holders shall not be deemed to be officers or directors of the Corporation by virtue of such designations.

## ARTICLE V

### Capital Stock

Section 5.1. Certificates. Every holder of stock shall be entitled to have a certificate signed by or in the name of the Corporation by the Chairman or Vice Chairman of the Board of Directors, if any, or the President or a Vice President, and by the Treasurer or an Assistant Treasurer, or the Secretary or an Assistant Secretary, of the Corporation, certifying the number of shares owned by him in the Corporation. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent, or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent,

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or registrar before such certificate is issued, it may be issued by the Corporation with the same effect as if he were such officer, transfer agent, or registrar at the date of issue.

Section 5.2. Lost, Stolen or Destroyed Stock Certificates; Issuance of New Certificates. The Corporation may issue a new certificate of stock in the place of any certificate theretofore issued by it alleged to have been lost, stolen or destroyed, and the Corporation may require the owner of the lost, stolen or destroyed certificate, or his legal representatives, to give the Corporation a bond sufficient to indemnify it against any claim that may be made against it on account of the alleged loss, theft or destruction of any such certificate or the issuance of such new certificate.

Section 5.3. Transfers. Except as otherwise established by rules and regulations adopted by the Board of Directors, and subject to applicable law, shares of stock may be transferred on the books of the Corporation by the surrender to the Corporation or its transfer agent of the certificate representing such shares properly endorsed or accompanied by a written assignment or power of attorney properly executed, and with such proof of authority or the authenticity of signature as the Corporation or its transfer agent may reasonably require. Except as may be otherwise required by law, by the Certificate of Incorporation or by these By-Laws, the Corporation shall be entitled to treat the record holder of stock as shown on its books as the owner of such stock for all purposes, including the payment of dividends and the right to vote with respect to such stock, regardless of any transfer, pledge or other disposition of such stock until the shares have been transferred on the books of the Corporation in accordance with the requirements of these By-Laws.

## ARTICLE VI

### Indemnification

Section 6.1. Right to Indemnification. The Corporation shall indemnify and hold harmless, to the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, each of its directors and officers who was or is a party or is threatened to be made a party or is otherwise involved in any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (a "proceeding") by reason of the fact that such person is or was a director or officer of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another Corporation or of a partnership, joint venture, trust, non-profit entity or other enterprise, including service with respect to employee

benefit plans, against all liability and loss suffered and expenses (including attorneys' fees) reasonably incurred by such person in connection with such proceeding. The Corporation shall be required to indemnify a person in connection with a proceeding initiated by such person only if the proceeding was authorized by the Board of Directors of the Corporation.

Section 6.2. Prepayment of Expenses. The Corporation may, if authorized by the Board of Directors, pay the expenses (including attorneys' fees) incurred by any director or officer in defending any proceeding in advance of its final disposition, provided, however, that the payment of expenses incurred by such director or officer in advance of the final disposition of the proceeding shall be made only upon receipt of an undertaking by the director or officer to repay all amounts advanced if it should be ultimately determined that the director or officer is not

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entitled to be indemnified under this Article or otherwise. Such expenses (including attorneys' fees) incurred by other employees and agents may be so paid upon such terms and conditions, if any, as the board of directors deems appropriate.

Section 6.3. Non-Exclusivity of Rights. The rights conferred on any person by this ARTICLE VI shall not be exclusive of any other rights which such person may have or hereafter acquired under any statute, provision of the Certificate of Incorporation, by these By-Laws, agreement, vote of stockholders or disinterested directors or otherwise.

Section 6.4. Insurance. The Corporation shall have the power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another Corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Corporation would have the power to indemnify him against such liability under the provisions of this ARTICLE VI.

Section 6.5. Inurement. The indemnification and advancement of expenses provided by, or granted pursuant to, this ARTICLE VI shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director or officer, and shall inure to the benefit of the heirs, executors and administrators of such a person.

Section 6.6. Indemnification of Employees and Agents. To the extent permitted under applicable law, any agent or employee of or for the Corporation may be indemnified in such manner as the Board of Directors decides.

Section 6.7. Amendment or Repeal. Any repeal or modification of the foregoing provisions of this ARTICLE VI shall not adversely affect any right or protection hereunder of any person in respect of any act or omission occurring before the time of such repeal or modification.

## ARTICLE VII

### Miscellaneous

Section 7.1. Fiscal Year. Except as from time to time otherwise designated by the Board of Directors, the fiscal year of the Corporation shall begin on the first day of January of each year and end on the last day of December in each year.

Section 7.2. Seal. The corporate seal shall have the name of the Corporation inscribed thereon and shall be in such form as may be approved from time to time by the Board of Directors.

Section 7.3. Notices and Waiver of Notice of Meetings of Stockholders, Directors and Committees Whenever, under the provisions of applicable law or of the Certificate of Incorporation or of these By-Laws, notice is required to be given to any director or stockholder, it shall not be construed to be personal notice, but such notice may be given, if to a stockholder, in the manner prescribed in ARTICLE I, and if to a director, in writing, by mail or courier or

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other hand delivery, addressed to such director, at his address as it appears on the records of the Corporation, with postage thereon or courier or delivery fees prepaid, and such notice shall be deemed to be given at the time when the same shall be deposited in the United States mail, if mailed, or when delivered to such address if delivered by courier or other hand delivery. Notices to directors may also be given by electronic transmission, when directed to a number or electronic address at which the director has consented to receive such form of notice.

Any written waiver of notice, signed by the person entitled to notice, whether before or after the time stated therein, shall be

deemed equivalent to notice. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting except when the person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of any regular or special meeting of the stockholders, directors, or members of a committee of directors need be specified in any written waiver of notice.

Section 7.4. Interested Directors; Quorum. No contract or transaction between the Corporation and one or more of its directors or officers, or between the Corporation and any other Corporation, partnership, association, or other organization in which one or more of its directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or committee thereof which authorizes the contract or transaction, or solely because his or their votes are counted for such purpose, if: (i) the material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the Board of Directors or the committee, and the Board of Directors or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or (ii) the material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or (iii) the contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified, by the Board of Directors, a committee thereof, or the stockholders. Common or interested directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors or of a committee which authorizes the contract or transaction.

Section 7.5. Form of Records. Any records maintained by the Corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or be in the form of, paper, electromagnetic, optical, or any other information storage means, provided that the records so kept can be converted into clearly legible form within a reasonable time. The Corporation shall so convert any records so kept upon the request of any person entitled to inspect the same.

Section 7.6. Amendment of By-Laws. Except as otherwise provided by law, the By-Laws of the Corporation may be amended or repealed by the Board of Directors by the affirmative vote of a majority of the Directors then in office. The By-Laws of the Corporation may be amended or repealed at any annual meeting of stockholders, or special meeting of stockholders called for such purpose as provided in the By-Laws, by the affirmative vote of at least 75% of the outstanding shares entitled to vote on such amendment or repeal, voting together

as a single class; provided, however, that if the Board of Directors recommends that stockholders approve such amendment or repeal at such meeting of stockholders, such amendment or repeal shall only require the affirmative vote of the majority of the outstanding shares entitled to vote on such amendment or repeal, voting together as a single class.