

# LEGAL SERVICES

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### MEMORANDUM

October 8, 2015

**SUBJECT:** CSHB 194(L&C) relating to the Alaska Securities Act  
(Work Order No. 29-GH1060\W)

**TO:** Representative Kurt Olson  
Chair of the House Labor and Commerce Committee  
Attn: Konrad Jackson

**FROM:** Terry Bannister  
Legislative Counsel

This memo accompanies the bill described above. You have requested that we review HB 194 and provide you with a committee substitute that contains any drafting changes that are needed for the bill to comply with the Legislature's drafting style. You have not requested any substantive changes.

1. Overview. The bill is taken in most part from the 2002 version of the Uniform Securities Act ("USA"), and because it is a uniform act, the USA sections are, for the most part, left as they are. Changes have been made throughout the bill. Most of the language changes are made to language that does not appear in the USA. Some are indicated in this memo, along with questions about certain bill provisions. The other changes can be identified upon request.
2. AS 06.26.020. In (a)(4), added "**investment adviser**" to the list at the end because the term is used in the paragraph.
3. AS 44.64.030. Do you want to add the AS 45.55 sections that are not repealed by the bill to the list of agencies and statutes for which the Office of Administrative Hearings may provide services?
4. AS 45.55.905(b). The bill section amending this section did not make any substantive changes, so it has been removed from the bill.
5. AS 45.55.935. This section is repealed, so there is no express provision left in AS 45.55 for providing respondents with hearings arising out of the administrator's orders issued under AS 45.55.920. Do you want to address hearings in the bill, or did you intend for the administrator's regulations authorized under AS 45.55.950 (as amended by the bill) to authorize hearings for orders issued under AS 45.55.920?

6. Sec. 45.56.205 (exempt securities). In (1), both "by a political subdivision of a state" and "by a political subdivision of one or more states" are used. Is this a duplication or is there a reason to use both? For your information, AS 01.10.050(b) provides that the singular includes the plural in Alaska statutes. In (10), replaced "under AS 44.81.010" with "issued under AS 44.81.010."

7. Sec. 45.56.210 (exempt transactions). In (1), can the bill clarify what part of (1) is modified by "as the administrator may define by regulation or order"? It is not clear whether it modifies the entire paragraph or the seller not being a promotor or controlling person.

In (2)(E)(i), please note the change in the NASDAQ name.

In (11), made changes to avoid what appeared to be a duplication: part of the introductory language appeared to be a version of (A). The section uses the language in the introductory portion as a new "(A)" because it was the language used currently in AS 45.55.900(b)(2). The deleted language was taken from the USA (sec. 202(11)). Either can be used, but using both creates redundancy.

In (21)(A), made some punctuation and placement changes to make it read like the USA but with the new additions. In (21)(B), to whom does "those persons" refer to?

In (26), there is some rearrangement of the material to avoid the unclear use of "those."

In (27), the use of "a security" does not work with the lead-in language at the beginning of the section ("The following transactions. . ."); a security is not a "transaction". So, "a transaction relating to" was added at the beginning of (27) to make it work syntactically for now. Should this exemption be listed under sec. 45.56.205 (exempt securities) or do you want to add language that would make the paragraph a transaction, e.g., "a sale or other transfer of a security. . . ."?

8. Sec. 45.56.220. In (a)(1), there is some rewriting.

In sec. 45.56.220(a)(8)(B), how do you want to define "control person"? In the second sentence of (b), the language was changed to "may not be considered."

In (a)(13), "remove" has been used in place of "alleviate." The meaning of "alleviate" did not fit there. Another word could be used instead of "remove." The word, "exempt" is not used, because its usage might cause confusion with the next reference to "exemptions" in the paragraph.

The definition of "residency" has been moved to its own subsection at the end of the section, the normal placement for definitions that only apply to a section.

In (b), in the third sentence, "not" was added ("A person may not be considered") because the sentence did not make sense as it was. Is this what you intended? There are other ways to correct this, if you don't like this approach.

In (b), the last sentence was removed because it is already generally covered by sec. 45.56.540.

9. Sec. 45.56.230. There is some rewriting, including incorporation of the definition of "disqualifier" from sec. 45.56.900. That is the only section that uses "disqualifier" and the two provisions seemed to be inconsistent.

10. Sec. 45.56.250. The section uses both "under this chapter" and "under this subsection" in (a). In (b), "under this section" is used. Is that what you intended?

11. Sec. 45.56.310. In (c), replaced "so" with "that the registration is effective."

12. Sec. 45.56.330. In (c), which "(D)" do you want (there are two in the regulation)?

In the exception language at the beginning of sec. 45.56.330(d), should "federal security" read "federal covered security"? The USA uses "federal security," but that term is not used otherwise.

13. Sec. 45.56.340 (viatical settlement interests). The definitions of "viatical settlement interest" and "viator" have been moved to this section. Do you want to define "viatical settlement provider"? A definition of that term appears in AS 21.96.110.

14. Sec. 45.56.360. In (a)(7), there was something missing here with "operate." The USA uses "so operate." Since "so" is imprecise, the bill now reads "operate as a fraud on purchasers."

15. Sec. 45.56.405. In (b)(2), the reference to the Office of Thrift Supervision has been deleted, since it no longer exists.

16. Sec. 45.56.410 (Canadian broker-dealers and agents). What does "resident in" mean? Do you want to define this?

17. Sec. 45.56.420. This does not appear to be taken from the USA. In (a), deleted "In general" because it does not have a specific meaning. If there are other conditions that are meant to be covered by "in general," those conditions could be written out. There are other drafting changes throughout the section.

In (a), "(d)" has been changed to "(c)." Is that correct?

In (b)(2), (e)(2)(A), and (4)(A), the reference to 15 U.S.C. 78o(b) is changed to 15 U.S.C.78o(l).

In (d), the reference to "title" has been changed to "chapter."

In (e), rewrote (1)(A) because it was not clear. Does the rewriting say what you intended?

18. Sec. 45.56.480. In (c), commas have been removed, so please read to confirm the correct intent is there.

In (d)(1), inserted "that," after "45.55.995" (where the USA has "which"). The addition was needed for the sense of the paragraph.

In (d)(1) - (3), the USA limits how far back it applies by inserting "within the previous 10 years." Do you want that inserted in (d)(1) and (2)?

A reference to AS 45.55.930 appears in (d)(2), (4), and (9) but not in (d)(1). Is this intentional?

In (d)(2), (4), and (9), as in (1), I suggest that you replace the references to individual sections with a general term that is defined with the specific sections.

19. Sec. 45.56.505(3). Do you want this fraud standard language to be the same as that at sec. 45.55.360(a)(7)(A)?

20. Sec. 45.56.540(b). This subsection states that a person claiming an exemption, etc. "has the burden of going forward with evidence of the claim." This language is different from that contained in the existing Securities Act. *See* AS 45.55.900(d). Burden of going forward does not specifically identify who has the burden of proving or disproving the claim. It is unclear if this language treats exemptions, etc., as affirmative defenses or defenses. If it is an affirmative defense, the person would not only have present some evidence in support of the claim but also has the burden of establishing the claim by a preponderance of the evidence. AS 11.81.900(b)(2). If it is a defense, the person only has to present some evidence of the claim and the state has the burden of disproving the claim beyond a reasonable doubt.

21. Sec. 45.56.605. Why is (e) placed in this section? If there is no other section you want to add it to, could it be placed in its own section? Further, despite this subsection disclaiming the creation of a dedicated fund it still requires the deposit of 33% of money received by the state from civil penalties into the fund. The proper method of achieving this would be to provide that "the legislature may appropriate 33% of the money . . . ." Why is (f) located in this section? It is a general provision not limited to administration. Should it be placed in sec. 45.56.625 or 45.56.635? I suggest moving (f) from this section.

22. Sec. 45.56.630. Subsection (f) seemed to be misplaced in this section and so I moved it to 45.56.635 as subsection (b).

23. Sec. 45.56.635. It is not clear how sec. 45.56.635 interacts with sec. 45.56.625, the section in the USA that addresses jurisdiction. This section does not appear in the USA, so there is no guidance on its interpretation. Sec. 45.56.635 may be intended to provide special provisions for security transactions relating to oil, gas, and mining (see (b)(3)). However, the language of the section does not limit its application to any particular type of transaction. If we could get more information on its intent, we could adjust the section to achieve that intent and to indicate how it interacts with sec. 45.56.625.

24. Sec. 45.56.650. In (b), added "provided" in the last sentence. In (c), changed the wording at the end. In (d)(2), broke out the list of items to clarify what modified what. If the breakout is not what you intended, it can be changed accordingly.

25. Sec. 45.56.660. In sec. 45.56.660(b)(1), (b)(3), (c)(1), (c)(3), (e), and (f)(1), there is a reference to "reasonable attorney fees determined by the court." It is not clear what this is intended to say. If it is intended to address attorney fees awarded by the court under Rule of Civil Procedure 82, then it indirectly changes Rule of Civil Procedure 82 by establishing "reasonable" as the criterion. If it is intended to limit the amount of attorney fees that the seller may recover as damages from an activity before bringing the action, then it may not amend the rule. Whichever is intended, it would be a good idea to make it clear, and, if it does amend a court rule, indicate the court rule change in the title and at the end of the bill.

26. Sec. 45.56.670. In (a) two different mental states are provided "knowingly" and "willfully." Neither is defined. "Knowingly" should probably be defined as in AS 11.81.900. "Willfully" although it is defined in the comments in the USA, may not be ideal for Alaska courts used to the mental states provided in AS 11.81.900. In (b), the description of the misdemeanor needs a mens rea, or the court will be left to determine one. This provision is not in the USA.

27. Sec. 45.56.675. In (a), the notice of appeal is to be filed within 30 days after the order becomes final under AS 44.64.060. Tying the 30-day requirement to the date the order becomes final appears to be inconsistent with Rule of Appellate Procedure 602, so (a) appears to trigger a court rule change. This court rule change has been added to the title and text of the bill.

28. Sec. 45.56.730. The section has been rearranged and placed in numerical order to make it more readable and useable. Please be aware that the adoption of future amendments raises an issue of improper delegation of legislative authority to the federal government.

Also, would it be possible to avoid the long list and instead state that a federal statute cited in the new chapter includes the regulations adopted under that statute (and, with the

caveat above, future amendments)? It does not appear that all of the federal laws cited in the bill appear in the list. Was this intentional? Do you want to include them all in this section?

29. Sec. 45.56.900 (Definitions). A definition of "department" has been added. Because of syntax, the definition of "defraud" is separated from the definition for "fraud" and "deceit." The definition of "disqualifier" has been moved to the section where it appears. The definition of "person" does not track the USA with regard to governmental entities. Was this intentional? The definition of "viatical settlement interest" and "viator" have been moved to sec. 45.56.340.

30. Older Alaskan category. In secs. 45.56.650 and 45.56.655, the category of "Older Alaskan" is used as the basis for additional civil penalties for a violation. In the bill, "Older Alaskan" is defined to mean a state resident who is 60 years of age or older. There may be an issue whether limiting the additional penalties to violations involving state residents violates the privileges and immunities clause of Article IV of the United States Constitution.<sup>1</sup> If an additional enforcement provision were considered to be a privilege or immunity protected by the clause, there would have to be a substantial state interest in treating nonresidents differently from residents.<sup>2</sup> A basis for claiming this substantial state interest is not evident from reading the bill. To avoid the possible issue, you may want to consider rewriting this enforcement provision to eliminate the residency requirement.

31. Control. Throughout the new chapter, there are references to "control" and "controlling persons" in various forms. Most of these are not defined for the specific section. Do you want to add a general definition of "control" for the bill or is this going to be done by regulation?

32. Revisor's Instruction. The proposed title for AS 45.55 has been changed because the title requested by HB 194 was too narrow to cover AS 45.55.138 and would be misleading. If AS 45.55.138 were placed in the new chapter, the title could be limited to proxy solicitations.

33. References to repealed sections. At several points in the bill, e.g., in sec. 45.56.480, the repealed sections from AS 45.55 are listed. Since this occurs a number of times, it may be possible to refer to them as "former securities laws," and then list them more specifically in a definition in the definitions section for the chapter or an applicability section. This approach would make the sections easier to read, but retain the specificity that is needed.

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<sup>1</sup> U.S. Const. art IV, sec. 2.

<sup>2</sup> 2 Rotunda and Nowak, *Treatise on Constitutional Law*, 12.7(d)(ii) (5th ed. 2012).

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34. References to federal regulations. The bill cites to specific federal regulations. Federal regulations can change, and, if they do, the change may require an amendment of the state law citing the regulation. Would it be possible to make more general references for the regulations, e.g., regulations adopted under the federal law covering the particular subject the statute is addressing?

If I may be of further assistance, please advise.

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Enclosure