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Official Business

Alaska State Legislature

Senate

Labor & Commerce Committee

Pouch V
State Capitol
Juneau, Alaska 99811

SB 801

Concepts are contained in the Code Revision Commission rewrite of the Alaska Corporations Code; Section 10.06.970 (5).

CODE REVISION PROJECT
719 Second Street
Suite 17
Davis, California 95616

6th of March, 1962

Elizabeth Johnston, Esquire
General Counsel
Bristol Bay Native Corporation
445 East 5th Avenue
Anchorage, Alaska 99510

Dear Ms. Johnston:

A copy of your letter to Mr. Larry Carroll, Chief Securities Examiner with the Department of Commerce and Economic Development has been forwarded to my office. For nearly two years I have been working with the Code Revision Commission in a comprehensive revision of the Alaska Business Corporation Act. The Commission has recently completed a final draft of what it has termed the Alaska Corporations Code and has transmitted it to Legislative Counsel for introduction.

Section 10.06.970. Rules of Construction and Interpretation should prove of special interest to your client. Sub-section (5) declares:

References in this chapter to financial statements, balance sheets, income statements, and statements of changes in financial position of a corporation and references to assets, liabilities, earnings, retained earnings, and similar accounting items of a corporation mean financial statements or items prepared or determined in accordance with generally accepted accounting principles then applicable, and fairly presenting the matters which they purport to present, subject to any specific accounting treatment required by a particular section of this chapter. Unless otherwise expressly stated, references in this chapter to financial statements mean, in the case of a corporation which has subsidiaries, consolidated statements of the corporation and those of its subsidiaries as are required or

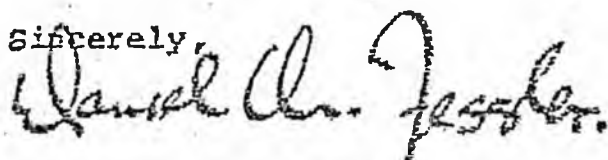
Elizabeth Johnston, Esquire
Page two
6 March, 1982

permitted to be included in the consolidated statements under generally accepted accounting principles then applicable, and all references to these accounting ~~items~~ mean items determined on a consolidated basis in accordance with consolidated financial statements.

You will observe that this provision of the ACC is predicated upon Section 114 of California's General Corporation Law with a slightly less baroque wording of a long overdue clarification.

At the appropriate point in which hearings are slated I would urge your attention to the provisions of the ACC and hope, that upon review, they will meet with your approval. If you have any questions please feel free to contact my office.

Sincerely,



Daniel Wm. Fessler
Professor of Law and Consultant to the
Alaska Code Revision Commission

cc:

Ms. Katherine Walsh, Secretary
Alaska Code Revision Commission

Bristol
Bay
Native
Corporation

445E 5TH AVENUE P.O. BOX 2201 ANCHORAGE ALASKA 99512 PH (907) 218-3507

March 10, 1982

Mr. Chairman:

My name is Elizabeth Johnston, General Counsel for Bristol Bay Native Corporation. I am here to testify in support of Senate Bill 801.

Senate Bill 801 amends the profit corporation statutes to specifically define the phrase "financial statements of the corporation." Why is this definition needed?

"Financial statements of the corporation" is a key phrase in determining a director's defense against personal liability for dividend payments. AS 10.05.219(1). Yet the phrase is ambiguous. This ambiguity creates unnecessary risks for directors attempting to comply with statutory requirements. Clarity would serve to protect directors from ex post facto definitions and liability.

The definition of "financial statements of the corporation" in Senate Bill 801 contains two basic concepts. The first is that the financial statements will be prepared according to generally accepted accounting principles then applicable. The second is that the statements will be consolidated, where appropriate. Both of these concepts are

basic to the published financial statements required by the Securities Exchange Commission to be sent to all shareholders. Both concepts have also been incorporated by the Code Revision Commission, in its working draft of the corporation statutes. The American Institute of Certified Public Accountants, the SEC and the Code Revision Commission, all endorse these concepts because they produce economically meaningful data and because they protect shareholders and creditors from the manipulation of financial data.

In short, I support the definition because it will protect directors and it will protect creditors and shareholders as well.

SENATE BILL 801

Alaska corporate law makes directors of a profit corporation jointly and severally liable for excessive dividend payments. AS 10.05.216(a). However, this same law also provides a defense or a safe harbor. A director is not liable for excessive dividends if he in good faith relied on the financial statements of the corporation for his analysis of a legal dividend source. AS 10.05.219(1).

The problem is that the scope of this defense is ambiguous. The meaning of "financial statements" is unclear and therefore, creates unnecessary risks for directors as they try to comply with dividend requirements.

The solution is to define the "financial statements of the corporation." The definition proposed in Senate Bill 801 includes, where appropriate, consolidated balance sheets and income statements prepared according to generally accepted accounting principles. While other financial documents are useful for other corporate purposes, only the preceding are useful for an analysis of a legal source for dividends under AS 10.05.219(1).

(b) A person required to designate an agent under (a) of this section and the corporation controlled by the person may not initiate an action in the courts of the state until the person complies with the provisions of (a) of this section. If the person or corporation controlled by the person initiates an action in a court of the state and the court finds that the person has not complied with (a) of this section, the court shall dismiss the action without prejudice. (§ 36 ch 123 SLA 1980)

Sec. 10.05.794. Cancellation of certificates issued and filings accepted. The commissioner may, within one year after a filing, and after written notice to the corporation or individual making a filing, cancel a certificate issued or filing accepted under AS 10.05.003 — 10.05.828, on any ground existing at the time notice of cancellation is made and on which the commissioner could have originally refused to issue the certificate or accept the filing. The notice of cancellation shall state the reason for the cancellation. A corporation or individual may request a hearing within 90 days after receipt of the notice. Cancellation becomes final if the corporation or individual does not request a hearing within 90 days after receipt of notice. Notice of cancellation shall be sent by certified mail with return receipt requested. If the return receipt is not received by the department within a reasonable time and the department has made diligent inquiry as to the address of the corporation, notice may be made by publication in a newspaper of general circulation in the vicinity of the registered office of the corporation or the address of the individual who made the filing, and the cancellation becomes final 60 days after publication of the notice. (§ 36 ch 123 SLA 1980)

Sec. 10.05.799. Identification code. The commissioner and the commissioner of revenue shall jointly establish and adopt a coded list of business activities and shall make the list available to the public. (§ 36 ch 123 SLA 1980)

Article 11. General Provisions.

Section

- 823. Regulations
- 825. Definitions

Sec. 10.05.823. Regulations. The department may adopt regulations in accordance with the Administrative Procedure Act (AS 44.62.10 — 44.62.650) to administer AS 10.05.003 — 10.05.828. (§ 36 ch 123 SLA 1980)

Sec. 10.05.825. Definitions. In AS 10.05.003 — 10.05.828, unless the context otherwise requires,

- (1) "commissioner" means the commissioner of commerce and economic development or his designee;

(2) "corporation" or "domestic corporation" means a corporation for profit subject to the provisions of AS 10.05.003 — 10.05.828, except a foreign corporation or a state or national bank;

(3) "department" means the Department of Commerce and Economic Development;

(4) "foreign corporation" means a corporation for profit organized under laws other than the laws of Alaska for a purpose for which a corporation may be organized under AS 10.05.003 — 10.05.828;

(5) "articles of incorporation" means the original or restated articles of incorporation and all amendments and includes articles of merger;

(6) "shares" means the units into which the proprietary interest in a corporation is divided;

(7) "subscriber" means one who subscribes for a share in a corporation before or after incorporation;

(8) "shareholder" means one who is a holder of record of a share in a corporation;

(9) "authorized shares" means the shares of all classes which the corporation may issue;

(10) "treasury shares" means shares which have been issued, have been subsequently acquired by and belong to the corporation, and have not, either by reason of the acquisition or thereafter, been cancelled or restored to the status of authorized but unissued shares; treasury shares are "issued" shares, but not "outstanding" shares;

(11) "net assets" means the amount by which the total assets of a corporation, excluding treasury shares, exceed the total debts of the corporation;

(12) "stated capital" means, at any particular time, the sum of

(A) the par value of all issued shares which have a par value,

(B) the amount of the consideration received by the corporation for all issued shares which do not have a par value, except that part of the consideration allocated to capital surplus as permitted by law, and

(C) such amounts not included in (A) and (B) of this paragraph which have been transferred to stated capital, whether upon the issue of shares as a share dividend or otherwise, less all reductions made as permitted by law; but notwithstanding the manner of designation by the laws under which a foreign corporation is organized, the stated capital of a foreign corporation is determined on the same basis and in the same manner as the stated capital of a domestic corporation for the purpose of computing charges imposed by AS 10.05.003 — 10.05.823, fees, and franchise taxes;

(13) "surplus" means the excess of the net assets of a corporation over its stated capital;

(14) "earned surplus" means the portion of the surplus of a corporation equal to the balance of its net profits, income, gains and losses from the date of incorporation, or from the latest date when a deficit was eliminated by an application of its capital surplus or stated capital.

otherwise, after deducting subsequent distributions to shareholders and transfers to stated capital and capital surplus to the extent the distributions and transfers are made out of earned surplus;

(15) "capital surplus" means the entire surplus of a corporation other than its earned surplus;

(16) "insolvent" means inability of a corporation to pay its debts as they become due in the usual course of its business;

(17) "franchise tax" means the annual corporation tax imposed under Alaska law on corporations;

(18) "affiliate" means a person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, a corporation subject to AS 10.05.003 — 10.05.828;

(19) "control" means

(A) owning directly or indirectly, or having the power to vote, 25 percent or more of any class of voting securities of a corporation subject to AS 10.05.003 — 10.05.828; or

(B) influencing or affecting in any substantive manner the election of a majority of the directors or trustees of a corporation subject to AS 10.05.003 — 10.05.828;

(20) "person" means an individual, a corporation, a partnership, an association, a joint-stock company, an estate, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated association, a government, a political subdivision of a government, or a combination of these entities;

(21) "reorganization" means a "reorganization" as that word is defined by § 368(a)(1)(A)–(D) of the Internal Revenue Code of 1954 as it exists on the effective date of this Act.

(22) "alien" means

(A) an individual who is not a citizen or national of the United States, or who is not lawfully admitted to the United States for permanent residence, or paroled into the United States under the Immigration and Nationality Act (8 U.S.C. §§ 1101 — 1503), as amended;

(B) a person, other than an individual, that was not created or organized under the laws of the United States or of a state, or whose principal place of business is not located in any state; or

(C) a person, other than an individual, that was created or organized under the laws of the United States or of a state, or whose principal place of business is located in a state, and which is controlled by a person described in (A) or (B) of this paragraph;

(23) "state" means any of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or any other territory or possession of the United States;

(24) "five percent shareholder" means a person owning at least five percent of the shares, or five percent of any class of shares, of a corporation. (§ 2 ch 126 SLA 1957; am § 2 ch 168 SLA 1957; § 10 ch 64 SLA 1959; am § 2 ch 1 SLA 1961; am § 1 ch 80 SLA 1965; am § 6 ch 145 SLA 1975; am § 62 ch 218 SLA 1976; am §§ 37 — 40 ch 123 SLA 1980)

Effect of amendments. — The 1975 amendment added paragraphs (18) through (21).

The 1976 amendment substituted "commissioner of commerce and economic development" for "commissioner of commerce" in paragraph (1) and "Department of Commerce and Economic Development" for "Department of Commerce" in paragraph (3).

The 1980 amendment added "or his designee" at the end of paragraph (1), rewrote paragraph (19), inserted "an estate", substituted "association" for

"organization", deleted "or" preceding "a political", added "or a combination of these entities", all in paragraph (20), and added paragraphs (22)-(24).

Editor's notes. — Section 7, ch. 145, SLA 1975, provides: "It is the intent of the legislature to adopt the definitions for 'affiliate' and 'control' as those terms are in use and have been interpreted by the United States Securities Exchange Commission on the effective date of this Act."

Legislative history reports. — For report on ch. 145, SLA 1975 (CSSB 376 am H), see 1975 Senate Journal, p. 1028.

Chapter 10. Business and Industrial Development Corporation Act.

Section

- 10. Incorporators
- 20. Assistance of commissioner
- 30. Articles of incorporation
- 40. General powers
- 110. Amendment of articles

Section

- 150. Examinations
- 185. Cancellation of certificates issued and filings accepted
- 210. Definitions

Sec. 10.10.010. Incorporators. Three or more persons, who are residents of this state, who desire to create an industrial development corporation under AS 10.10.010 — 10.10.220 for the purpose of promoting, developing, and advancing the prosperity and economic welfare of the state and, to that end, to exercise the powers and privileges provided in AS 10.10.010 — 10.10.220, may be incorporated by filing articles of incorporation in the office of the commissioner as provided in AS 10.10.010 — 10.10.220. (§ 1 ch 94 SLA 1967; am § 63 ch 218 SLA 1976)

Effect of amendments. — The 1976 amendment deleted "of commerce" following "commissioner" near the end of the section.

Sec. 10.10.020. Assistance of commissioner. The commissioner shall assist the incorporators in forming the corporation and shall meet with and advise the corporation's board of directors. (§ 1 ch 94 SLA 1967; am § 64 ch 218 SLA 1976)

Effect of amendments. — The 1976 amendment deleted "of economic development" following "commissioner."

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. SE 801
Title An Act relating to financial statements of corporations
Requested by Ferguson by request Date 2/16/82

II. FISCAL DETAIL

Agency Affected Department of Commerce & Economic Development
Program Category Affected Division of Banking, Securities, Small Loans & Corporations
BRU, Program, Or Subprogram(s) Affected Public Protection
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES		-0-				
200 TRAVEL		-0-				
300 CONTRACTUAL		-0-				
400 COMMODITIES		0				
500 EQUIPMENT		-0-				
600 LAND & STRUCTURES		0				
700 GRANTS, CLAIMS, ETC.		-0-				
TOTAL		-0-				

FUNDING (Thousands of Dollars)

GENERAL FUND		-0-				
FEDERAL FUNDS		0				
OTHER (Specify Source)		-0-				
		-0-				

POSITIONS

FULL TIME		-0-				
PART TIME		-0-				
TEMPORARY		-0-				

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

Legislation, if passed, would add a new paragraph to the definition section of the Alaska Business Corporation Act defining "financial statements of the corporation."

IV. DATE February 22, 1982

PREPARED BY Willis F. Kirkpatrick
AGENCY Division of Banking, Securities, Small Loans & Corporations
PHONE 457-4111

Original: Legislative Finance
Budget and Management
State Archives - Dept. Legislative Council