SB

246

#2

ALASKA STATE LEGISLATURE - SENATE

COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON
CHAIRMAN

POUCH V • JUNEAU, ALASKA 99811
(907) 465-3844

OFFICIAL BUSINESS

LETTER OF INTENT

It is the intent of the Senate Labor and Commerce Committee that the detailed commentary accompanying S.B. 246, House and Senate Joint Journal Supplement No. 11, be considered a comprehensive guide to the proposed new Alaska Corporation Code and as such should be amended and revised accordingly if any changes are made to S.B. 246.

The following narrative changes reflect the amendments adopted in CSSB 246 (L&C).

(At page 89 of the House and Senate Joint Journal Supplemental for April 8, 1983, the Official Comment to Section 388 should be amended to read):

Official Comment to ACC Section 10.06.388. ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT.

SCOPE: ACC sec. 388 specifies the treatment to be given redeemed or repurchased shares. They revert to the status of authorized but unissued shares unless the articles of incorporation prohibit reissuance. If reissuance is prohibited, the article stating the number of authorized shares must be amended to reflect the lowered number. Such an amendment of the articles must be filed with the commissioner. Shareholder approval of the required amendment is not necessary.

While sec. 388 abolished the antiquated accounting concept of "treasury shares", nothing in this section is intended to prejudice the present or contingent contract rights which pre-ACC corporations may have created in reacquired shares described as "treasury shares."

CHANGE IN FORMER ALASKA LAW: ACC sec. 388 is taken from GCL Section 510. It continues prior Alaska law (former AS 10.05.312-345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies prior law by the elimination of the concept of "treasury shares."

(At page 123 of the House and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 455 should be amended to read):

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

SCOPE: Sec. 455 provides for optional classification of a board consisting of a minimum membership while taking steps to preclude the adoption of such a scheme for a corporation which has not eliminated cumulative voting from adopting such a classification scheme by amendment if shares sufficient to elect one director under cumulative voting oppose such amendment. Sec. 455 replaces former AS 10.05.186.

CHANGE IN FORMER ALASKA LAW: Sec. 455(a) is an enactment of Model Act Section 37 and works an important change from former AS 10.05.186 respecting the election to classify the board. Under prior Alaska law this decision could be taken by a bylaw adopted by the board without shareholder participation. The danger to minority share representation in such circumstances led to subsection (a)'s requirement that the election be taken in the articles, which insures shareholder participation.

Subsection (b) is new. Continuing the concern for minority share representation on the board of a corporation which has not eliminated cumulative voting, sec. 455(b) precludes amendment of the articles to classify the board if the number of shares voting "no" on the amendment or refusing to consent in writing would be sufficient to elect one director if voted cumulatively at an election of the entire board.

Subsection (c) is new. It permits board classification pursuant to the terms of a provision in the bylaws rather than the articles of incorporation. In order to classify a board under sec. 455(c) it is necessary that the bylaw have been adopted prior to March 24, 1982 with or without shareholder participation, and that it contains nothing which, were it a provision in the articles of incorporation, would offend sec. 455(a). Thus, all of the restrictions on the minimum size of the board, the minimum number of classes, and the terms of the director office set forth in sec. 455(a) limit the terms of any bylaw which would be effective under sec. 455(c).

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: January 31, 1984

REQUEST
Bill/Resolution No.: SB 246
Title: An act revising the Alaska Corporations Code.
Sponsor: Rules Committee
Requestor: Legislative Council
Date of Request: 4/8/83

FISCAL DETAIL
Agency Affected: Commerce and Economic Dev.
Program Category Affected: Consumer Protection.
BRU, Program or Subprogram(s) Affected: Banking, Securities and Corporations

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
* TOTAL OPERATING	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
CAPITAL	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
REVENUE	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

* There will be no fiscal impact providing the adoption of the proposed amendment of the Alaska Code Revision Commission which deletes in Sec. 10.06.733 the words, "together with a verified copy of its articles of incorporation and all amendments to the articles."

ANALYSIS: Attach a separate page for analysis

Prepared By: Willis F. Kirkpatrick Phone: 465-2521
Division: Banking, Securities and Corporations Date: 1/31/84

Approved by Commissioner: Richard A. Lyon Date: 2/3/84
Agency: Commerce and Economic Development

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

12/1/83

ALASKA STATE LEGISLATURE - SENATE

COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON
CHAIRMAN

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OFFICIAL BUSINESS

Feb. 2, 1984

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ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Senator Richard I. Eliason, Chairman
Senate Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: February 2, 1984

RE: Amendments to HB 343/SB 246 on
for profit corporations

The subcommittee appointed by the Alaska Federation of Natives to work on the corporations bill has proposed these changes in the proposed amendments I transmitted to you on January 31, 1984: Those members of the code revision commission that could be polled by telephone have agreed that the changes are acceptable.

(1) CHANGE:

Page 12, line 27-29: In the previously proposed amendment change "January 1, 1983" to "March 24, 1982".

EXPLANATION: A relatively recent date is needed, but the specific date chosen is not of importance. The date of first introduction of the Alaska Corporations Code as a bill in the legislature is a date used elsewhere in the bill. Using it here is simply to avoid using many different dates in the bill.

(2) CHANGE:

Page 56, following line 28: In the previously proposed amendment, change "January 1, 1971" to "March 24, 1982".

EXPLANATION: The bill provides that staggered terms of directors must be provided for in the articles of incorporation. The effect of the change is that a provision in a corporation's bylaws providing for staggered terms of its directors would be valid if the provision was in the bylaws before a recent date--the date of first introduction of the Alaska Corporations Code bill in the legislature, March 24, 1982.

In other words, the amendment would make this provision of the bill prospective, keeping in effect valid bylaws on staggered terms; however, no corporation would be able to hurriedly enact bylaws now, simply in anticipation of passage of this bill.

(3) CHANGE:

Page 149, line 12, following the period: In the previously proposed amendment, following "section" insert "prior to December 19, 1991,".

EXPLANATION: The amendment as previously proposed was overbroad. Its only purpose was to conform to a requirement of Section 30 of the Alaska Native Claims Settlement Act, a copy of which is attached. The reason for the change will be clear by reference to the attached Section 30 of ANCSA.

Retyped with these three changes, the proposed amendments are attached.

DR:chw
Attachments

A M E N D M E N T

Offered in the SENATE LABOR AND COMMERCE COMMITTEE BY:

TO: SB 246

Page 12, line 27-29:

Delete all material and insert:

"(3) if incorporation is after March 24, 1982, the address of its initial registered office and the name of its initial registered agent;"

Page 12, line 29:

Delete "at that address"

Page 16, line 5:

Delete "AS 10.06.873" and insert "AS 10.06.870"

Page 56, following line 28:

Insert:

"(c) a provision in the bylaws of a corporation which, were it a provision of the articles of incorporation, would accord with (a) of this section shall be valid provided that it was adopted prior to March 24, 1982."

Page 127, lines 7-9:

Delete "together with a verified copy of its articles of incorporation and all amendments to the articles,"

Page 138, line 28:

Insert "Class A" before "misdemeanor"

Page 139, line 9:

Insert "Class A" before "misdemeanor"

Page 147, lines 28-29:

Delete ", except a village corporation that may be incorporated under either this chapter or AS 10.20,"

Page 148, line 8:

Delete "approved by the United States Secretary of the Interior"

Page 148, line 18:

Delete ", 7(i),"

Page 148, lines 25-26:

Delete "may not be considered to be a distribution in partial liquidation" and insert "is not a 'distribution to its shareholders' as defined by AS 10.06.990(17)"

Page 149, line 12, following the period:

Insert "Notwithstanding the provisions of AS 10.06.574--10.06.586, a plan of merger, consolidation, or exchange qualified under this section prior to December 19, 1991, shall not include the right of shareholders to dissent."

Page 149, line 15:

Delete "that is required by the language of that Act"

Page 161, line 13:

Delete "July 1, 1983" and insert "July 1, 1984"

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

Senator Richard J. Eliason, Chairman
Senator Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: February 1, 1984

RE: Transcript of joint hearing on
HB 343/SB 246 on profit corporations

Enclosed is a transcript made from the House Labor and Commerce Committee's tape of the joint hearing on HB 343/SB 246 held Monday, January 23, 1984. Catherine Walsh of this office typed it at the request of the code revision commission.

Any members of the House or Senate Labor and Commerce Committees who were absent from the January 23rd meeting may be especially interested in the transcript.

Since the House members had to leave for a floor session before the meeting was concluded, they may be interested in the testimony at the last of the transcript--testimony of Elizabeth Johnston of the Alaska Federation of Natives subcommittee on the bill and Irv Bertram, legal counsel for Alaska Airlines.

DR:chw

Enclosure

JOINT HOUSE /SENATE LABOR AND COMMERCE COMMITTEE
HEARING ON HB 343/SB 246--FOR PROFIT CORPORATIONS
JANUARY 23, 1984
8:30 a.m.

COWDERY: I'd like to call the Labor and Commerce meeting to order. It's January 23, 1984, at 9:50 a.m. (sic) 8:50 a.m. I'd like to note those present: Rep. Ueling, Rep. Pestinger, Rep. Koponen and James Cowdery. And I'd also like to note present Senator Mulcahy. The purpose of this morning's meeting is to have testimony on an act revising the corporate code. At this time I think that we would like to call on John Abbott and anyone that would like to testify sign in. The first one to testify that I believe I'd like to have is John Abbott. State your name and affiliation.

ABBOTT: Thank you, Rep. Cowdery. My name is John Abbott and I am the chairman of the Alaska Code Revision Commission. The code revision commission, for those of you who are unaware of this, was a Title 24 commission created by the legislature in 1976. It is comprised of individuals representing the Alaska Court System, the Attorney General's office representing the Governor, the Alaska Bar Association representative, representatives from both the House and the Senate, at this time, Rep. Charlie Bussell and Senator Patrick Rodey. Myself as an appointment of the Governor, as a layperson and Fred Brown as a representative of Governor Sheffield. We have one vacancy on the commission at the present time. Generally, the purpose of the commission is to entertain requests by the legislature, by any branch of government for that matter, to look into areas of statutory law of a technical nature that are in need of revision for any number of reasons including the fact that they no longer comport with the Alaska life, because we are a more sophisticated state, because they haven't provided for a number of years, that they are out of sync with the present needs of the law. The commission also entertains its own projects and has at any given point in time two major projects at least, plus a number of minor projects for consideration by the legislature. We have at the present time five major bills, some of which will be considered by the legislature this session, others will die and not get consideration. The bill in front of you today has been introduced by the Rules Committee in both the House and the Senate as HB 343 and SB 246. The two bills are identical in what they do and were introduced simultaneously for the purpose of consideration by both the House and Senate without the necessity of going through one and then going through the other. This is the practice the code revision commission has used for the past several years to expedite consideration of the bill. Myself, as chairman, and Jerry Kurtz who represents the Alaska Bar Association have been present on the commission during the entire

period of time the corporations bill has been considered and worked on, and we along with with other members of our staff and other commissioners are most anxious to meet with you or your staff to further explain the bill itself. It's a very large bill; it's complicated; it is a sophisticated bill. It determines all of the areas of responsibility which are taken on when a company seeks a corporate charter and seeks a privilege conferred by the State of Alaska. We have with us today Professor Daniel Fessler. He is a professor of law at the University of Davis, California, who has been the consultant on this bill since its inception and is one of the recognized authorities on corporate law in the United States. He will give you a thumbnail sketch of this bill and attempt to answer any questions that you may have concerning the specific technical aspects of the bill. The bill was the result of concern on the part of members of the code commission, both in private practice and in the other areas represented by the code commission, that some work needed to be done because the basic bill had been, as it were, an off-the-rack bill adopted from Oregon statutes at the time of statehood. Whether or not it was appropriate to Alaska even at the time it was adopted leaves some question. Certainly the existing law does not in any respect really meet the needs of Alaskans for incorporation. The new bill attempts to set out and define all the relationships between the various principals or players in the corporate status. So that one need only look at this bill to determine how you become a corporation; how you act as a corporation; how you terminate as a corporation. The bill that's presently before this committee was introduced, I believe, on April 9, 1983. Since that time, some changes have been made as a result of public hearings held by the code revision commission and input from various different organizations concerning some of the specific features of the bill. And as a result, the code commission will be making some recommendations for changes to the committees considering this bill. The work on sections, written comments to the bill and requests that certain changes be made. These changes address concerns raised by Alaska Airlines, one of probably the state's largest corporations, a special subcommittee of the Alaska Federation of Natives that has worked for quite some time with the code commission, has graciously, generously provided its own time and expertise and its legal staff in various of the corporations and has provided us with some good and needed amendments to the bill. Those, too, will be entertained. We also have worked very closely with Mr. Willis Kirkpatrick, deputy director of corporations in the Commissioner of Commerce office. And he, too, has recommended some changes that if made will reduce any financial impact on his office. So that it was the intent of the commission to draft a bill that would have no financial impact on the Commissioner of Commerce office or the director of corporations. So you will be getting some recommendations for amendments pursuant to our discussions and the exchange of ideas of Alaska Airlines, the Commissioner of

Commerce and the Alaska Federation of Native's subcommittee. I think without further ado I'll ask Professor Daniel Fessler to come up and give you a brief summary, an overview of what the bill does. If there are any questions, we also have signed up as witnesses, Commissioner Jerry Kurtz, Fred Brown to provide additional testimony or comments or, in the event you have some questions, we'll do our best to answer them for you. Thank you.

COWDERY: Thank you. I'd like to note that Senator is present. And at this time, I'd like to have John Abbott . . . then the next one up is . . .

RODEY: Rather than invite any comments, I think that Professor Fessler can do a better job of explaining the material than anybody else I know. Mr. Chairman, I'm the Senate member of the code revision commission, and the code has labored long and hard, particularly Professor Fessler and Chairman Abbott on this particular legislation. And I think it is worthy of the committee's very serious consideration. It is in final form, but it is very near passage.

FESSLER: Gentlemen, I am a school teacher at the University of California at Davis. And the subjects that I teach are contracts and corporations. Four years ago I was approached by the commission and asked if I would be interested in serving as a consultant to first survey the content of existing Alaska statutory law in the business field, and then work with the commission should it determine that there was need for revision. The survey of existing Alaska law was undertaken, and the conclusion was arrived at that the existing Alaska law was not the law that the state would most like to have its citizens functioning under. The law that we currently have in Alaska was adopted by the legislature, the first legislature after statehood, by adopting the then Alaska, excuse me, the then content of the Oregon corporation law. The Oregon corporations law in turn was taken from something called the Model Business Corporation Act, which act was put out by the Business Law Section of the American Bar Assocation in the early 1950's. By the time Alaska adopted the Oregon law, the Oregon legislature was on the verge of changing it. And, subsequently, the Oregon legislature has changed much of the content of the law. So, and this is because the model act, which was the basis of the Oregon law and then became the basis of our sort of stepchild has been in the process of evolution. The commission also noted that in the intervening near quarter of a century, that there have been significant changes in corporate law in three of the most critical jurisdictions to which other states generally look for guidance. And that is that New York had rewritten its corporations laws in the late 1960's; California undertook a similar project in which I was involved on the working committee with the legislature in the mid-1970's. And finally the model

act itself has been recalled and is in the process of a three-year study in which a couple of years from now will result in further recommendations. So there have been changes with regard to the theoretical basis of the law. Further, there are changes in Alaska in a quarter of a century. Changes which suggested that it might be time for the State of Alaska to have a corporation law that is a product of its own deliberate creation, rather than something borrowed from elsewhere. The result of this four-year effort is the bill which you have in front of you. And with the exception of some minor amendments which resulted in final meetings with representatives of the Alaska Federation of Natives subcommittee and various other private parties who have testified before the commission that the bill which the commission is seeking your legislative approval and enactment is now in final form. In addition to the bill, the commission has prepared very lengthy commentaries. These commentaries, hopefully, are designed to explain to members of both the House and Senate the origin of each and every provision of the act, to share the value judgments which caused the members of the code revision commission to recommend that particular content, to disclose to you to the extent that the statute is borrowed or modified from statutory law in other jurisdictions the specific genesis of the law, and then to state what change would be made in existing Alaska law were the legislature to adopt this bill. In addition, your staffs will be furnished, and the members will be invited, to work with another document. I apologize for the prodigious size of these documents, but this document is useful in that if an individual is familiar with the provision of existing Alaska law, this works backwards from existing Alaska law, section by section, and shows how that provision would fare should this particular bill be adopted. So those study aids hopefully will be useful to staffs and will be useful to the various committees of the legislature. What I had hoped to do this morning was to share with you some of the value judgments which the commission has made and which are embodied in the multiple provisions of this act. One of the major disadvantages of existing Alaska law is that if an individual were to pick it up seeking to know the content of the law the individual might follow, existing Alaska corporate law is totally disorganized. Provisions which may relate or surround the problem are scattered throughout the bill. One of the initial impressions that you will gain from looking at this bill is that it is very tightly organized. it is organized by major topical sections with the hope that if an individual has a problem with the formation of a corporation, all provisions of the act that deal with corporate formation will be found in Article 3. If the issue relates to corporate finance, Article 4 contains all the relevant law. So that, in essence, the commission directed me to draft the value judgments which it had made very much in the form of a cookbook, but hopefully getting the ingredients in the right order so that it should be something which an individual, whether

a layperson or a practitioner desirous of knowing the content of the law, will be able to find it. And once in the right area, will find all of the related provisions of the statute rather than have them lying around in land mines some 25 to 30 credit pages later, which is the rather dubious distinction of the current provisions of chapter 5, Title 10. Now the areas wherein significant value judgments are found would be Article 3 which deals with the formation of a corporation. Some states like California have attempted to say that if you are going to form a corporation in California, certain major value judgments have been made by the legislature. And the price for forming a corporation in California is that you comply with the value judgments. They would include such things as the requirement that there be cumulative voting for shareholders; that the board cannot be classified; that the directors can only serve one-year terms. California is a statute which is very pregnant with value judgments that sort of tell citizens this is the only way we are going to permit it to be done. Now the reason that this statute does not do that is first there was a fundamental philosophical disagreement that the State of Alaska should be in the business of making value judgments about how people who enter in the corporate form ought to behave. The value judgment which took precedence over that was that people should be informed by reading the statute what the possibilities are. And that they should be allowed, knowing what the possibilities are, to make their own decisions as to whether there will be cumulative voting; how large a board they will have; whether they will classify the board; whether the board will have terms that exceed one year. But that those value judgments should be layed out, and they are layed out in Article 3 in a manner which an individual determining to form a corporation can quickly see that these are the basic things with which the individuals desirous of entering this association should come to some agreement. Further, there is the advantage that we say that if you are going to make these fundamental decisions, you must put them in the articles of incorporation. So that if a person who is a potential investor desiring to know what the lay of the land is for XYZ corporation need only obtain a copy of the articles of XYZ corporation, and that individual will have a definitive statement of the basic value judgments which citizens forming that corporation have made. And there is a further problem, while California has attempted to make value judgments and impose them on citizens, the scandal is that people then simply leave the state and foreign incorporate. They come back as Oregon corporations. They come back across the state line as Nevada corporations. And so it was deemed that this was probably not the best thing to attempt, and that the attempt in the state that's pursuing it isn't working. So in that respect, although you'll see the California corporation code has had a significant impact on many of the provisions of this recommended legislation, the basic thing that the California corporation code is known for

is not carried forward here. It is possible to form a corporation in Alaska which is every bit as straightlaced as a corporation mandated under California law. That is a value judgment that citizens can make. It is not a value judgment that the legislature would be making for you. Now with regard to Article 4 on corporate finance. Here Alaska law was deemed to be flawed in a manner that is true of virtually every state. Lawyers, at least in my experience of being one and teaching others for a longer period of time than I like to recollect, generally make a career decision to go into law sometime after they learn that they have no aptitude whatsoever for arithmetic, let alone mathematics. The consequence is that most lawyers cannot, including myself, balance a checkbook. And lawyers are horrified by concepts of accounting. Therefore, over the years we have sort of developed our own accounting techniques. Because over the years we have had perhaps a bigger voice than we should have whispering in the ears of elected representatives and people, our versions of the myths of accounting rather than the accounting profession have begun to creep into the law. Alaska's current corporation law suffers from perhaps a terminal case of lawyer-accounting terms. One of the major things which corporations must worry about if they are to behave in a socially responsible manner, since they are given the presumption of limited liability. If I form a corporation, my creditors and even victims of calamaties such as torts must look only to the assets of the corporation, not to my own personal assets. Circumstances are important to the state, all people who come into contact with corporations. Well, then what assets must I leave with the corporate entity? What accounting principles must I observe in keeping the books of the corporation? The law has always been interested in this question. But the problem is that we allowed a gulf to grow between what the law seemed to be suggesting and what accountants were telling people are the intelligent way to parse through matters and to resolve them on the books and records of a corporate entity. California broke new ground in 1977 when it said that it would abolish all concepts of legal accounting. It would substitute some straight, common sense ideas as to when a corporation could pay a dividend. A corporation could pay a dividend within the discretion of the board of directors at any time so long as the assets of the corporation equal the liabilities of the corporation with the protective ratio of $5.00 in assets to every $4.00 in liabilities. A very simple concept to understand. There are no longer reduction surplus, earned surplus, all of the notions which lawyers have invented over the years. It's a very simple idea. If we are going to make a distribution, whether we make it in money, whether we make it in corporate property to shareholders, we have what is called the ratio of assets to liabilities which must be maintained. This bill adopts what is turning out to be one of the most successful decomplications of corporate life which was done in California. It also follows both

California and now New York in saying that in complying with the law, that so long as a corporation keeps its books and records in a manner which reflects generally accepted accounting principles, he has complied with the law. So we leave to the accounting profession and not to my brothers and sisters-in-law the determination as to what is the best way for that craft and science to proceed to advise. So accounting is left to accountants, but we make a simple value judgment to protect people. It's this ratio of liabilities to assets. Five dollars in assets to four dollars. You can make any distribution you want so long as you do not go below that floor. That, I think, will make it much easier for people determined to comply with the law to do so and make the detection of those few people who are determined to evade the law much easier. Now with regard to Article 5, a major question has been in existence for many years. What are the proper prerogatives of shareholders as opposed to the directors and officers of the corporations? Is it to be an Athenian democracy, or is the better model that you elect the directors and you vest control and management of the corporate entity during the period of tenure of their terms in the individuals? Article 5 has a default provision that the powers of control and management of the corporation are vested in the board. However, a corporation may by the terms of its articles modify this presumption and confer greater prerogatives upon shareholders. If it is going to do that, however, it must do it by an affirmative provision in the articles of incorporation. The thrust of Article 5 is to ensure that shareholders have acess to reliable and up-to-date information as to the condition and record of accomplishment or failure of the people they have elected to be the directors of the corporation. You will notice that for the first time we would standardize notice requirements. Under current law, one of the defects is that we have no standardization of notice requirements. For certain matters, 30 days' notice is sufficient. For others, 40 days is required. Under this bill, notice requirements are standardized, and it should make people who are determined to evade it much easier to ferret out. So again the act reflects the commission's value judgment that the basic policy or power between shareholders on the one hand and directors on the other that the act should specify what should be that ratio or relationship if the parties don't wish to change it. But if they do wish to make a different arrangement, if they put it in the articles they are free to do so. Article 6 deals with the prerogatives and responsibilities of officers and directors. Here I think you'll be very pleased to see that for the very first time we have a statutory definition of the duties of care and duties of loyalty which directors and officers are expected to obey. At the present time in Alaska, it would be a matter of conjecture what the Alaska Supreme Court would eventually say with the content of those important duties. This makes it difficult for an individual who is embarking upon the career of

being a corporate director, perhaps out of accommodation to friends, and many small corporations know exactly what it is I am expected to do, a peril of later on being held accountable for not having done it. Another important feature of this bill which has received wide support by those people who have read it, is Section 435. Section 435 for the first time in Alaska subjects shareholder derivative causes of action to statutory regulation. Alaska presently has the dubious distinction of being one of two American jurisdictions which has no statutory regulation of the derivative suit. This is a suit in which a shareholder comes forward and brings a cause of action that alleges that not I, the shareholder, have been injured but that the corporation has been injured. And I as a shareholder appoint myself to litigate this matter on behalf of the corporation. The tension between the prerogatives of the incumbent directors of the corporation to make that decision and to control that litigation and the rights of a shareholder to say that I am going to elbow my way into the pilot's seat in this plane for the next several years, is a very important one because it may be that there is corruption at the board level. Maybe there is not. I urge your very careful attention to Section 435 to point out that I believe you would find that you would go from having no statutory regulation on this important subject to having one of the most balanced, comprehensive regulations of the subject in this country. Section 435, therefore, is an important innovation. Article 7 is rather technical in nature. It deals with the question of how we go about making amendments and changes to the articles of incorporation. Again, it standardizes procedures and forces the attention of those who wish to change the basic format of a corporation into doing it by way of amending the articles so that there is regularity. And again so that potential investors interested in the corporate entity can look at the articles of incorporation and have not only an historical impression of what the corporation was like in yesteryear, but an accurate, modern impression of where the power within this corporation is currently being distributed. Article 8 is going to be a matter of great interest to your constituents. It deals with what are called organic changes. In essence, mergers; consolidations; share exchanges; sale of all the corporate assets other than in the usual course of business. As each of us is aware, the United States right now is going through what is called a merger craze. Corporations are appearing to be attractive takeover candidates by individuals who may or may not have legitimate desires or desires which would advance the interest of shareholders should they be in a position to seize control of the board of directors. At the present time, Alaska law is very unclear as to the respective roles of incumbent boards as opposed to shareholders. And, therefore, Alaska corporations look vulnerable to individuals who are determined to launch a takeover bid. Article 8 clearly defines the prerogatives of existing management and the shareholders of a corporation with respect to

framing the content of one of these organic changes and taking it through the shareholder approval level. Essentially, what Article 8 does is vest with the existing board the power to frame the terms of a merger, a consolidation, a share exchange, or sale of assets in an extraordinary transaction. And then require two-thirds approval by the shareholders of the corporation in order to approve. This should bring Alaska corporations into line with California and New York and other major states which have moved to protect the integrity of their corporations from being the victims of an easy takeover in which the will of the shareholders and existing management would simply be subverted and brushed aside. Reform needs to be taken in Alaska in this area. I would hope that you would be satisfied with the commission's recommendations which are embodied in Article 8. Article 9, dealing with dissolution, is very important because of the changes that have been made in the federal bankruptcy law. It coordinates with modern federal bankruptcy law and creates for the Alaska judiciary a far more sensible approach to protecting the rights of creditors as well as the rights of senior shareholders in the event that a corporation goes to either voluntary or involuntary dissolution. It also contains some very innovative, and I think, useful provisions that deal with giving shareholders who are being oppressed or frozen out of the role of management or income where other shareholders are being afforded such prerogativees a right in the final analysis to petition for involuntary dissolution in order that the grievance which would have to rise to the level of a very serious grievance to get the attention of Alaska courts. Again, these are not new ideas. They might be the final decision of the Alaska Supreme Court if someone were to spend $100,000 litigating that. But if you enact this bill, all Alaskans with only the expense of supporting their government will have presumptive answers to these important questions. Those are the basic provisions and value judgments which underlie this bill. Both myself and the law students who have assisted me in working with the technicians in this area will be available to any member of either body and staff members. I am prepared now to answer any questions which any members of the committee may have.

RODEY: Mr. Pestinger.

PESTINGER: Thank you, Senator Rodey. Professor Fessler, to me this is a really excellent articulation of the rights and duties and obligations so that it gives our larger corporate participants a clearer understanding of where they stand, which is so essential to doing business. But what I am wondering about, though, is what burden this approach may place upon the smaller mom and pop family corporation. To me, if I had such a business I could not engage in corporate law comfortably without the assistance of counsel. Do you think that this packet necessitates the assistance of counsel as almost a mandate now

for anyone that does business in the corporate form? In other words, I am wondering, I see the need for this in California and New york, and I see the need for this in Alaska with that level of corporations that we deal with. But how about that other level that are just kind of, they get their articles punched out and they ask their lawyer to help them with the minutes, and they look at the Supreme Court that says that the only way you pierce the corporate veil is with an indicia of fraud. So they are using a whole different standard of operation. I mean this is really substantial. Do you think it might have a negative effect on that small family business?

FESSLER: In terms of cost of doing business in the corporate form, I think it will have the opposite effect. Right now, many small businesses probably are coming into corporate existence without the assistance of counsel at all. People are going out and buying little kits for $49.95 that contain forms that they fill in and send to the state. They are oblivious to the legislature's requirement that they file biannual reports to the legislature. They are not doing so. They are in danger of having their articles and their corporate status dissolved by the commission because the legislature has prescribed that as the penalty for not filing reports. And one of the basic difficulties with this situation will always be people who, to use your example, a two-person corporation, decides for one reason or another that they should do business in the corporate form, and then having done that they forget about it. They don't observe any of the formalities of corporate existence. They don't keep separate books and records. They don't segregate their assets from the assets of their corporation. And they don't file reports. Now they would be in trouble under existing Alaska law, sir. They will be in trouble under this bill. In the sense that when the State of Alaska confers a corporate charter on someone, whether or not they have sent $49.95 off to somebody who advertises in every airline magazine, that you don't need a lawyer and you, too, can be a corporation and somehow you will pay no income tax and like me you will turn out being rich. The only person that's probably ever done that is the individual who wrote that book, because he is getting rich by all of the people who write in and send their $50. I think this is the problem you'll want to keep in mind. What I am saying to all of you is that this bill is designed in such a manner that, although it is a complicated subject and I wouldn't suggest anyone could write a corporation code that could be so obvious that an individual could make casual reference to it and never need an attorney so they could guide themselves through the world of maintaining a corporation, this bill does organize the law. It does restate the law. It does have comments which are designed to assist people in understanding the law. Not one of those features can be said about current Alaska law. So there will be a problem of people who incorporate and thereafter regard it as a

little flag of convenience which they'll fly so long as it's useful and which, on the day that it isn't, they'll just forget about it. That will continue to be a problem not only in Alaska, but in California. It's true in Nevada. It's true in Wyoming where I was reared. It's a major social problem we have. People who incorporate with no idea that there are responsibilities as well as privileges for taking on that status. Now, fortunately, the federal tax law which in years gone by caused people to believe that they could pay less income tax by somehow becoming a corporation, have because of movements undertaken first by the administration of President Carter and now of greater emphasis during the administration of President Reagan. As you know, the marginal income tax on individual income has now been reduced from a maximum of 70% now to where it is very close to the top corporate, there is only a two percent spread. But I still find that many people believe that they are going to get some tremendous tax benefit by becoming a corporation. What they do, of course, is eventually wind up in a hellacious tax audit. They find and the individual who wrote the $49 book and gave you the form never accompanies you to that audit because he is living in Bimini.

RODEY: Representative Koponen.

KOPONEN: I was interested in Section 488 which does create a liability for the officers of the corporation, and I'm not up on contract law and one of your notes, in terms of any written contract to modify or eliminate the liability created by this section, what happens to that liability, is it transferred or . . .

FESSLER: Let me explain to all of the members. Section 488, gentlemen, appears at page 67 of the draft in front of you. Section 488 relates also to Rep. Pestinger's question. One of the reasons that people incorporate is to achieve from the State of Alaska a presumption of limited liability. Now this presumption of limited liability means that to all individuals who do business with the entity which is incorporated, they are to look only to the assets which the individuals who incorporated have left with the corporation to satisfy their claim. This is true whether those individuals have made contractual relationships with the corporation or whether they have entered into an accidental injury situation, a tort. Section 488 is called secondary liability of directors and officers. It was reflected after lengthy discussions among members of the commission, a feeling that for small creditors of corporations, employees, tradesmen, materialmen, suppliers, individuals who generally have a credit relationship to a corporation which is not reduced to writing, that these individuals are the year in and year out, these are the individuals who pay the price for corporate existence. When corporations are run so long as it is

convenient to the individuals who find they are the owners and then when they are not, they are simply abandoned. Large institutional lenders, bankers, insurance companies, large contracting creditors, will get a lawyer and go out and they will quote, attempt to pierce the corporate veil. Alaska's common law on the circumstances in which it will disregard limited liability is found in only three cases since statehood. Those cases do not hold out great hope that in the absence of fraud in a transaction that the court would do. But if you have a claim for $1,000 in wages owed to you, there is no lawyer who is going to be able to successfully launch that lawsuit. If you are an individual who sold fish to a restaurant which has now gone out of business, and the owner has marched off leaving you unpaid and it's a $43,000 account receivable, you cannot get any modern recourse at all. Section 488 for the first time to a very limited extent shifts that presumption. It says that the officers and directors of a corporation to the extent that its assets prove insufficient to cover its liabilities, have a liability to a class of individuals who are defined as employees of the corporation as materialmen, tradesmen, etc., people who have extended credit on open account for up to $25,000. Now this liability, sir, is not inevitable. The statute clearly says that if I have a corporation and you have a fishing fleet, and you are supplying my incorporated restaurant with fresh salmon, that you can be approached by me saying I would like you to agree in writing that in the event that this business folds, my restaurant, you won't look to me for the liability which exists under the law. It would be a liability of up to $25,000. That's all you could ever recover under this. So for the first time there would be an incentive in dealing with the smallest people in the marketplace who are the recurrent little mules on which this business of limited liability is ridden out, year in and year out, that these people would have some relief and that there would be an incentive to talk about this question of limited liability. And then if I can convince you that you should give me a relaxation, a waiver of that, that's fine. But in the absence of a contractual modification, I would have the right to this.

KOPONEN: The contract then is between the creditor and the corporation, not between the corporation and its directors.

FESSLER: That's absolutely right. It's between the corporate debtor and its employees, between the corporate debtor and its materialmen or suppliers.

KOPONEN: It's a very useful section. I know there is a major business problem in the Fairbanks area, these collapsible corporations.

FESSLER: Mr. Chairman.

COWDERY: Would the effect of this, would it discourage say qualified managers from getting into taking over a trouble corporation that was having some problems, maybe through a lack of expertise in the past, would this discourage someone from coming in . . .

FESSLER: Well, it would certainly give me pause. Now there are two things relevant, sir, in the bill. First, if the corporation is in a process of dissolution, one of the ways to avoid dissolution under the provisions of this bill is for a court to appoint interim directors in order to resolve deadlocks. Those directors are not subjected to this type of liability. So the director who is brought on board to try and straighten things out by court order is the director who is exempted by the reference in the bill to other than the directors who are appointed pursuant to. Now that is one protection. Another factor, of course, would be that if a corporation is in trouble, and I am going to step in and attempt to save it, one of the things I'd want to do is be aware of Section 488 and go to the creditors and say, I am willing to come into this picture only if you are willing to contract to exempt me from any personal liability that I would incur. Yes, sir, it would be something that in the hypothetical you advance an individual would want to take into consideration.

RODEY: If I might interject, that would apply to directors but not to employees of the corporation?

FESSLER: It has no application to employees at all. In fact, I should tell you that this appears to be very novel, and I want you to understand that it has a great quality of being novel. But New York has never given total limited liability to anyone. And if anybody tries to come to you and say, my God, if we adopt this the wheels of commerce will grind to a halt. Since 1843 when New York adopted the first general incorporation statute, the ten largest shareholders in a New York corporation are subjected to liability in the event the corporate assets prove insufficient to the claims of all employees. New York has never stricken that from the books, and it has not prevented the development of the State of New York as a center of commerce. What we did here, was to say that in many Alaskan corporations we didn't want to have the liability on the ten largest shareholders because that might include many very passive people who really have nothing to do with the way in which the business was run. So put the liability on the people who are being paid, the officers, the president, and the secretary and the treasurer. They are the defined officers and the directors. They are not passive, or they oughtn't to be. So that is how we would differ from New York law. And we have broadened the exposure, because in New York the exposure is limited to claims of employees, and we broadened it to include the claims of materialmen and

suppliers.

COWDERY: In the past we have had some of the Native corporations who have had financial troubles and hired two people to direct them and turn it around. And this is an area I was wondering about, if that would be . . .

FESSLER: I appreciate the question. It is an important matter. The AFN subcommittee has looked into this question. I think that at that level, or at the level of any large corporation that is involved in an attempted turn around, that there would be awareness of the provisions of Section 488 and that there would be appropriate advice from counsel to deal with the subject. That would be my hope.

BROWN: Mr. Chairman, may I suggest . . .

RODEY: Mr. Brown.

BROWN: I am Fred Brown. It's nice to know that Labor and Commerce [garbled] . . . The one example you might think of is what would really happen . . . the example might be one of the most prosperous, currently most prosperous Alaska corporation is Alaska International Air. Originally, that was Interior Airways based out of Fairbanks. They expanded too fast for the building of the pipeline, which didn't get built fast enough as many Alaskans remember. What happened then was, and this sort of thing is really what happens when a corporation gets into trouble in most cases, and that's why I'm raising this as an example. What happened then was they went into reorganization and the creditors and shareholders hired Mr. Duncan McClaren, a legend in the Canadian air industry, a great manager and a legendary worker [TAPE CHANGE] . . . Section 488 to take care of that problem.

RODEY: Thank you, Mr. Brown. This is a problem currently in Alaska. It is possible for individuals who incorporate to run up all sorts of bills, not pay its creditors, and then just move away from that corporation, will eventually be resolved by the state, set up another corporation and then bilk a lot of small tradesmen who work for the corporation, creditors, what have you, move on. You can do it in serial fashion. It is currently being abused presently in the state. Mr. Abbott has kept an eye on this, has had a practice in that area of the law for 15 years. But it is currently a problem. There are a lot of honest Alaskans who lose money because of this problem.

FESSLER: And I think the problem is also the, it has a broader ramification. To the extent that citizens get the impression that there are tricks out there for people who are in with lawyers, if you will. It demeans my profession of which I am very proud. We were never the source of this value judgment,

that people could pull this type of thing. But to the extent that people believe that if you quote, know the law, you can do bad things and get away with it. You can do hurtful things and have no accountability. It creates an impression of the law which none of us have an interest in seeing furthered in the minds of citizens. Because the minute one law becomes suspect like this, the cloud falls over all law. And so this is probably the most important value judgment about corporations. They have done great things for us. But the idea of a one-person corporation, and the only person that probably has pulled off that role real well in history, was Louis the Fourteenth and a tremendous price was paid for that notion.

UEHLING: If we can kind of go back to the section regarding the foreign corporations, maybe you could explain what the Alaska Code Revision Commission took as far as an approach as a comparison of what occurred in California regarding the foreign corporation situation there.

FESSLER: Because California has this basic social problem that in order to evade the restrictions on long-term director terms or in order to have a board classify itself, most important California business, most corporate business at the moment in my state, is foreign incorporated. Runs to a different jurisdiction and comes back home and says we've been gone 20 minutes, and we are now a foreign corporation, we're a Delaware corporation. The basic social problem we had in California when we approached the revision of the legislation was to say, well, will we give up these value judgments which we've had for many years. And the bar association, frankly, and the banking industry thought that's what was going to happen. That we were going to get a corporation law that looked more like that of other states. What the legislature did, interestingly enough, and I think it remains to be seen because it's costing us a lot of money in litigation in front of the federal supreme court, was to say, no, if a corporation has a certain percentage of its employees in California, does a certain volume of business in California, has a certain amount of its ownership owned by shareholders in California, then even though it purports to be an Alaska corporation or a Delaware corporation, we're going to say that it's merely a pseudo foreign corporation, and we're going to apply California's laws to it. Now the Arden-Mayfair litigation is pending in the California Supreme Court where it has been on hold for nearly three years. Delaware's courts have already litigated the Arden-Mayfair case and come to the conclusion that California was attempting to deny full faith and credit to the public acts of a sister state. Ultimately, the federal supreme court will have to decide whether California's notion of pseudo foreign corporations is an idea whose time has come. The judgment of the commission was that there are no pseudo foreign corporation concepts in this bill. Instead, we increased the

reporting obligations on foreign corporations to keep us informed of the nature of their activities. We greatly increased the circumstances under which it's clear that they must seek a certificate to do business in the State of Alaska. But we have not attempted to interfere with their internal control and management such as California has done, because we haven't done it to our own people. We haven't said you have to have a board with one-year terms, that you can't classify the board, that you have to have cumulative voting. Our default mode if you don't say is, you do have one-year terms, if you do have cumulative voting and you don't have board classification. But we didn't feel that it was necessary to get involved in that position. But later on in what may be five or six years as you see the outcome of the Arden-Mayfair matter, and then if you decide you want to adopt certain similar rules, that would be an appropriate time to do that. But there is nothing here now that contains that.

BROWN: At least some of the members of the commission think the Delaware view is going to prevail in the state supreme court, and that's one of the reasons why the provision is written that way.

RODEY: Thank you, Mr. Brown.

UEHLING: This is a follow up question. And in just sort of reading through this I got the feeling what would be the situation like if you took a state like Delaware where we had a situation where companies are going to incorporate ther because it's a very pro-management kind of situation, where in California it's very pro-shareholder, the shareholder is a completely different situation, how does Alaska rate on that spectrum? Would they be considered a very pro-management situation?

FESSLER: No. The default provisions, ever since I learned to use the personal computer, I've picked up the jargon, excuse me. The provisions that are in place if you don't say otherwise of the Alaska statute today, because it's a version of the early '50's model act would today be called a pro-shareholder jurisdiction. And the provisions which would lock into place in the absence of agreement that they be otherwise unde this bill are also pro-shareholder provisions. But so that Alaska would in the default mode line up looking very much more like California than Delaware. But it would be possible for people to make an intelligent and informed decision to form a very, very management oriented, reduced role for shareholder corporation, not going as far as Delaware has gone. For instance, a good example in Delaware, it is possible that the board of directors would have the exclusive power to amend the articles and bylaws, and the shareholders could be ousted from any role at all. That would not be possible in Alaska. It isn't possible under current law with regard to the articles. It would not be possible with

regard to the bylaws should the legislature enact this bill. So it continues to leave Alaska law with most other western jurisdictions as having a pro-shareholder bias, but not going nearly as far as California.

RODEY: Are there other questions from members of the committee? If there are . . .

FESSLER: I'll remain in the room, Mr. Chairman, in case anyone does have any questions for me, but there are other witnesses desiring to appear.

RODEY: The next witness is Willis Kirkpatrick, the director of the division of banking and securities.

KIRKPATRICK: Mr. Chairman and committee members. My name is Willis Kirkpatrick. I am director of banking and securities for the State of Alaska. I'd first like to say that we have appreciated the opportunity to join with the commission as a participant in discussion in their work. I believe that any of the concerns the state has had as far as the administration of this new code, the commission has known up front as to what the problems we've had. One of the things I'd like to point out is that what I am excited about in their work is that in a present situation where we have an old Oregon law, in a situation where we have very little, if any, state common law court cases the administration of the provisions of the Alaska Business Corporations Code as it stands today is somewhat suspect in some of its legislative intent. And to determine legislative intent, we go back to Oregon law, we go back to Oregon cases, we go back to the sparse official comments under the model code. With the passage of this bill, I think that our work as far as working with the corporations in maintaining their files is going to be a whole lot easier because of the official comments alone. Everything has been addressed. I would suggest that in considering the passage of this bill, that they make part of the record the official comments as to the new law. There is only one particular area that I have a problem with, and that is in Section 733 on page 127, in the filing of foreign corporations to do business in the State of Alaska. On line 7, beginning on line 7, it requires that together with a certified copy of its articles of incorporation all amendments to the articles . . . In other words, what they are saying here is that one of the provisions for a foreign corporation to qualify to do business in the State of Alaska, is that it would have to file its articles with the state and any amendments to those articles. In a hearing last session, we brought this up and I believe, you'd have to check with the code revision commission on this, but I believe it was agreed upon that they would reconsider that requirement to file articles. At the present time articles of foreign corporations are not filed with the state. We find that

some of our sister states, those that do have this provision, are looking at dropping them. I think the last one we've heard from is Texas. Now I don't believe that it is going to create any hardship to anybody in the State of Alaska that wishes to find out the substance of the articles of a foreign corporation. First of all, if they are looking for the officers and directors of the foreign corporation, we can look at the application they file with us giving us that particular information. If they do want a copy of the articles of incorporation or the amendments to the articles of incorporation of a foreign corporation, the place that would have the most current filing would be the state of domicile so that they are available. We would be more than happy to assist anybody that wanted that to find out the proper procedures to obtain those records. With my understanding that this provision, that the code revision commission had no particular problem with that being dropped, the fiscal note that I prepared was zeroed out. If this provision stays in, I am going to ask for a revision of the fiscal note because one of the problems we have now is just file maintenance. The biggest problem in file maintenance is amendments to articles. We receive a great number of amendments to articles every day, and one of the things we have to do is that we just don't file the amendments. A lot of times we have to look back through the files to see what the prior articles contain to see amendments are consistent. If nothing more than article order. That is the only comment that I have as far as any changes are concerned, and I am sorry I don't have an amendment prepared, but I would be most happy to. I would replace that word with a certificate of compliance executed by the officer of domicile, or the official of domicile. I am open to any questions.

RODEY: If I might ask either Chairman Abbott or Professor Fessler to respond.

ABBOTT: Yes, Mr. Chairman. We had previously agreed with Mr. Kirkpatrick that we would make that change. Unfortunately, consideration of this matter came up after the bill was printed. So it is the position of the commission that this requirement should be deleted when it was brought to our attention that it would serve no useful purpose and would impose an additional fiscal burden on the commissioner of commerce. We are in complete agreement that the provision should be deleted, and there should be no requirement to file foreign articles or amendments.

RODEY: Thank you, Chairman Abbott. Mr. Brown.

BROWN: On behalf of the commission, I am sure they would agree, it would be very nice if Professor Fessler were involved in structuring the amendment that the committee might be interested . . .

RODEY: That's a very good suggestion, Mr. Brown. Professor, would it be possible for you to prepare that amendment?

FESSLER: Certainly.

RODEY: Mr. Kirkpatrick, continue.

KIRKPATRICK: One other item that my notes show. On page 138 and 139, on line 28 of page 138 it refers to the misdemeanor, and my staff says that it should be either a rated misdemeanor A or B to be consistent with Title 9. And the same with line 9 on page 139. That also relates to a misdemeanor.

RODEY: If I might address Chairman Abbott or Professor Fessler, are we in that case talking about a Class A misdemeanor?

ABBOTT: That's our understanding, Mr. Chairman. Yes.

RODEY: If again I could request you, Professor Fessler, to prepare the appropriate amendment based on current Alaska criminal law.

FESSLER: The question has been asked, has been prepared, is one of the amendments that Chairman Abbott was referring to is being transmitted . . .

RODEY: Thanks, Professor. Obviously we can't take any official action here. If there are any questions, we'll have this prepared and delivered to committees on both sides for their consideration and Senator Mulcahy and myself will explain it on our side and . . .

COWDERY: Could I, I was wondering what financial burden would this, if we adopt this to the existing corporation for the state, would it be to conform, is there any grandfathering situations . . .

KIRKPATRICK: If I understand your question, Mr. Chairman, as to what this is going to do to existing corporations. I think the last two sections of the bill pretty well cover a timely transfer of the act, and I think we are gong to have some problems just as far as educating the corporations in switching them over. I don't see that a lasting problem. I don't see it as much more of a problem than we have now with the new corporation that is coming on board. I don't think there will be an financial, I think the problem is going to be basically on the state's side as far as getting the information out and getting the transition going. I don't envision any

economic problem on the corporation. I am wondering about correspondence fees, but . . . I don't see it as a major problem.

RODEY: I just might add that the proposed draft was written to reduce legal fees by putting a great element of certainty in there so that a layman would have a much greater understanding of the law just by reading the law without having to consult a lawyer. So I think there will be actually a reduction of attorney's fees. Are there any other questions for Mr. Kirkpatrick? If none, thank you very much Mr. Kirkpatrick. We do have floor session now at 10:00 a.m. We don't go in until 11:00 o'clock on Mondays, as a convenience to the Anchorage legislators. Would you like me to stay?

ABBOTT: Mr. Chairman, if I might, there are only two other people that intend to offer brief testimony. That's Liz Johnston and Irv Bertram.

RODEY: In consultation with House chairman, I will stay here if Senator Mulcahy is agreeable and listen to the comments of Elizabeth Johnston and Irv Bertram and then report to you, sir. Thank you, gentlemen. Next, I'd like to call Elizabeth Johnston. It's always disconcerting to be testifying and have everybody leaving. But, Senator Mulcahy and I will make up for any absence of numbers. You have the floor, madam.

JOHNSTON: Gentlemen. My name is Elizabeth Johnston. I'm general counsel to Bristol Bay Native Corporation. Today I am here speaking on behalf of the Alaska Federation of Natives concerning the bill on the revision of the corporate statutes, the profit corporate statutes. You will be delighted to know my comments will be brief. This is because we have had extensive opportunity to present our concerns before the code revision commission. By way of background, I can tell you that in the summer of 1982, the Alaska Federation of Natives created a subcommittee. And the member of the subcommittee had both regional and village corporation backgrounds, and the committee was created to review and testify on the proposed revision. We met with the code revision commission on three separate occasions and made extensive comments. Based on the receptivity of the commission to our comments, and the way they were able to meet our concerns, in April of 1983 Janie Leask, who is the president of the federation, wrote in support of the proposed revision. And she commented specifically on the quality of the new legislative scheme, on the technical commentary which has already been brought up by some of the other people. But the fact there there is technical commentary to back up the new code which should help all of us in the absence of court cases to understand the legislative history. The fact there there is this kind of backup, we feel will mean it will reduce the legal expenses for

the Native corporations. We also articulated, commented on the finance section, that it was an important reform. Unlike Professor Fessler I can read numbers, and I still feel that it is a significant accomplishment. I was forced to. So finally the only final comment is that this is a bill which does strengthen the rights of shareholders and does strengthen the requirements of periodic reporting by corporations to their shareholders. It is a pro-shareholder document, and the federation supports the revision.

RODEY: Senator Mulcahy, do you have any questions for Miss Johnston? Thank you, appreciate your coming. Next I'd like to call Irv Bertram.

BERTRAM: I'm Irv Bertram, and I am assistant counsel to Alaska Airlines. We have looked at the bill and discussed it with the commission to raise some of the concerns we have. Our bylaws and articles go back to 1938, at least the articles do. The bylaws have been changed on numerous occasions. And we did have some concerns, but we found that the commission has made some changes that will assist us in going forward. We think that the bill is very well drafted and very good and will be of benefit to the state as well as being helpful to us. In my current position as house counsel, I have an opportunity to advise management or answer questions about Alaska law. I have practiced in Alaska for a number of years before joining the airlines, and you don't feel so foolish when you have something layed out in front of you in the law. You can look at it and say, well, this is how it's done. Currently Alaska law on corporations has a number of areas where simply there is no law. And so you really have to say, gee, I don't know, maybe we can do it and maybe we can't. It's . . . you're not sure how to do something. But I think the bill answers that. It does provide a very well layed out road map, so to speak, which I think will be very helpful not only to large corporations such as ourselves, but I also believe this will be helpful to the small mom and pop operations. There is that old trite saying that ignorance of the law is no excuse. However, when the law is a body of common law with very few statutory references, it makes it fairly difficult to know what's going on. On the other hand, once things have been layed out in a fairly succinct form that can be followed, it's true a lawyer may still be required and should be used. But I think most people will have a better understanding of what corporate governess should be once they have this body of law in front of them. So we think it would be good for the state. Alaska Airlines will have to make one change in its bylaws as a result of this. It doesn't address everything we wanted. But on the other hand, we think on the whole it is very good and we do support it and would recommend it. Thank you.

RODEY: Thank you very much, Mr. Bertram. Senator

Mulcahy, do you have any questions? I am aware of the . . . if there are no other comments, Mr. Brown.

BROWN: One comment, Mr. Chairman. There have been much comment about the comments, and the people who are supporting the bill who are now part of the commission, are finding that the comments are very important. I would hope an admission to the members of the Senate and the House in the event this bill is considered, that an action be taken similar to what was taken when the criminal code revision was passed. And that is there be specifically an affirmative vote on the floor of each house approving the comments or the comments as you may have amended in concert with the commission to make a clear and unambiguous legislative history. To really make sure those are available and that they are important legislative history, since they will be relied on by people in the private sector as well as scholars.

RODEY: Thank you, Mr. Brown. That's a very good suggestion. Obviously it's wise. It's an area of law we don't know much about in terms of importance, and whether a separate vote on that really means much or not.

BROWN: Take it from Alaska's only published legal historian.

RODEY: And a distinguished member of the Fairbanks bar. I think it is a wise suggestion to incorporate in the journal and to vote separately and affirmatively on the commentary. I think it is a good and desirable method of annotating Alaska laws. It is certainly preferable to allowing Michie Company to do it back east. If there are no other comments, the committee meeting is adjourned.

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

Senator Richard I. Eliason, Chairman
Senator Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 31, 1984

RE: HB 343/SB 246 on profit corporations

Enclosed are proposed minor amendments to HB 343/SB 246.

The Alaska Code Revision Commission, author of the bill, developed the amendments based upon suggestions from three sources--the Alaska Department of Commerce and Economic Development, the Alaska Federation of Natives, and Alaska Airlines.

The enclosed form of the amendments proposed by each of these entities has been approved by its appropriate representative and by the code revision commission.

DR:chw

Enclosure

A M E N D M E N T

Offered in the SENATE LABOR AND COMMERCE COMMITTEE BY:

TO: SB 246

Page 12, line 27-29:

Delete all material and insert:

"(3) if incorporation is after January 1, 1983, the address of its initial registered office and the name of its initial registered agent;"

Page 12, line 29:

Delete "at that address"

Page 16, line 5:

Delete "AS 10.06.873" and insert "AS 10.06.870"

Page 56, following line 28:

Insert:

"(c) a provision in the bylaws of a corporation which, were it a provision of the articles of incorporation, would accord with (a) of this section shall be valid provided that it was adopted prior to January 1, 1971."

Page 127, lines 7-9:

Delete "together with a verified copy of its articles of incorporation and all amendments to the articles,"

Page 138, line 28:

Insert "Class A" before "misdemeanor"

Page 139, line 9:

Insert "Class A" before "misdemeanor"

Page 147, lines 28-29:

Delete ", except a village corporation that may be incorporated under either this chapter or AS 10.20,"

Page 148, line 8:

Delete "approved by the United States Secretary of the Interior"

Page 148, line 18:

Delete ", 7(i),"

Page 148, lines 25-26:

Delete "may not be considered to be a distribution in partial liquidation" and insert "is not a 'distribution to its shareholders' as defined by AS 10.06.990(17)"

Page 149, line 12, following the period:

Insert "Notwithstanding the provisions of AS 10.06.574--10.06.586, a plan of merger, consolidation, or exchange qualified under this section shall not include the right of shareholders to dissent."

Page 149, line 15:

Delete "that is required by the language of that Act"

Page 161, line 13:

Delete "July 1, 1983" and insert "July 1, 1984"

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MEMORANDUM

TO: Representative John Cowdery, Chairman
House Labor and Commerce Committee

Senator Richard I. Eliason, Chairman
Senator Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 31, 1984

RE: HB 343/SB 246 on profit corporations

By a separate memorandum, the Alaska Code Revision Commission has forwarded to you certain minor amendments to HB 343/SB 246.

In addition to the proposed amendments to the bill, the commission proposes additions to the "Commentary to Accompany Proposed Bill on the Alaska Corporations Code (ACC)". The commentary appears in House and Senate Joint Journal Supplement No. 11, April 8, 1983.

So that the proposed changes to two sections of the commentary can be seen in context, the entire sections are enclosed with the additional material underlined.

As you know, the commentary is intended to be a continuing guide to users once the code is enacted, much like the comments prepared by the Commissioners on Uniform State Laws for their uniform acts.

Consistent with the purpose of the commentary, the commission will advise of changes it proposes in the commentary when there are amendments to the bill. However, unless you advise otherwise, a minor editorial correction of the commentary will not be forwarded to you.

Your advice would be welcome. Unless some more formal treatment of these interim changes in the commentary is called for, we ask that this memorandum and any similar memoranda of advice on changes in the commentary be included with material that is passed with the bill to successive committees of reference. Then when the bill is enacted the commentary could be retyped and adopted, perhaps by a joint resolution.

I will pass on to the commission any advice you may give on treatment of the commentary.

DR:chw

Enclosure

CHANGES IN THE COMMENTARY ON HB 343/SB 246

PROPOSED BY THE ALASKA CODE REVISION COMMISSION

The commission is agreeable to and supportive of the following changes to the text of the Commentary to Accompany Proposed Bill on the Alaska Corporations Code (ACC):

*(At page 89 of the House and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 388 should be amended to read):

Official Comment to ACC Section 10.06.388. ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT.

SCOPE: ACC sec. 388 specifies the treatment to be given redeemed or repurchased shares. They revert to the status of authorized but unissued shares unless the articles of incorporation prohibit reissuance. If reissuance is prohibited, the article stating the number of authorized shares must be amended to reflect the lowered number. Such an amendment of the articles must be filed with the commissioner. Shareholder approval of the required amendment is not necessary.

While sec. 388 abolished the antiquated accounting concept of "treasury shares", nothing in this section is intended to prejudice the present or contingent contract rights which pre-ACC corporations may have created in reacquired shares described as "treasury shares."

CHANGE IN FORMER ALASKA LAW: ACC sec. 388 is taken from GCL Section 510. It continues prior Alaska law (former AS 10.05.312-345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies prior law by the elimination of the concept of "treasury shares."

*(At page 123 of the House and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 455 should be amended to read):

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

SCOPE: Sec. 455 provides for optional classification of a board consisting of a minimum membership while taking steps to preclude the adoption of such a scheme for a corporation which has not eliminated cumulative voting from adopting such a classification scheme by amendment if shares sufficient to elect one director under cumulative voting oppose such amendment. Sec. 455 replaces former AS 10.05.186.

CHANGE IN FORMER ALASKA LAW: Sec. 455(a) is an enactment of Model Act Section 37 and works an important change from former AS 10.05.186 respecting the election to classify the board. Under prior Alaska law this decision could be taken by a bylaw adopted by the board without shareholder participation. The danger to minority share representation in such circumstances led to subsection (a)'s requirement that the election be taken in the articles, which insures shareholder participation.

Subsection (b) is new. Continuing the concern for minority share representation on the board of a corporation which has not eliminated cumulative voting, sec. 455(b) precludes amendment of the articles to classify the board if the number of shares voting "no" on the amendment or refusing to consent in writing would be sufficient to elect one director if voted cumulatively at an election of the entire board.

Subsection (c) is new. It permits board classification pursuant to the terms of a provision in the bylaws rather tha

the articles of incorporation. In order to classify a board under sec. 455(c) it is necessary that the bylaw have been adopted prior to January 1, 1971, with or without shareholder participation, and that it contains nothing which, were it a provision in the articles of incorporation, would offend sec. 455(a). Thus, all of the restrictions on the minimum size of the board, the minimum number of classes, and the terms of the director office set forth in sec. 455(a) limit the terms of any bylaw which would be effective under sec. 455(c).

ALASKA STATE LEGISLATURE - SENATE

SENATOR RICHARD I. ELIASON

LABOR AND COMMERCE COMMITTEE, CHAIRMAN
RESOURCES COMMITTEE
JUDICIARY COMMITTEE
FISHERIES SUB-COMMITTEE

P.O. BOX 143
SITKA, ALASKA 99835

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JUNEAU, ALASKA 99811
(907) 465-4916

M E M O R A N D U M

To: Senate Labor and Commerce Committee Members

From: Senator Dick Eliason,Chair
Senate Labor and Commerce Committee

Re: SB 246/HB 343

Date: January 16, 1984

A joint House/Senate Labor and Commerce Committee hearing has been scheduled for 8:30 a.m., Monday, January 23, 1984, in the House Labor and Commerce Committee Room in the Behrends Building. Senator Pat Rodey, appointed subcommittee chair, will conduct the hearing on SB 246/HB 343.

Senate Bill 246 would replace the Alaska Business Corporations Act with the Alaska Corporations Code (ACC). The proposed ACC sets minimum requirements that must be met for the privilege of doing business in the corporate form. Within limits it leaves to incorporators how to divide powers between shareholders and directors.

This senate bill seeks to clearly define in what circumstances it is permissible to pay a dividend. It also seeks to control misuse of the limited liability of officers and directors that the corporate form provides.

A transcript of the previous joint meeting held May 17, 1983, is attached.

SENATE LABOR & COMMERCE
STANDING COMMITTEE
May 17, 1983
3:00 p.m.

Members Present: Senator Pat Rodey

Members Absent: Senator Dick Eliason, Chairman
Senator Bob Mulcahy
Senator Don Bennett
Senator John Sackett

COMMITTEE CALENDAR

SB 246 Amended Title: An Act revising the corporations code; and providing for an effective date.

WITNESS REGISTER

Professor Dan Fessler, Consultant
Code Revision Commission
University of California, Davis, CA
Phone not provided
Position Statement: Outlined Corporate Code Revision.

Henry Lancaster, Aide
Senator Josephson's Office
Pouch V, Juneau, AK 99811
465-3787
Position Statement: Asked for points of clarification.

Jeff Berry, Aide
House Labor & Commerce Committee
Pouch V, Juneau, AK 99811
465-3892
Position Statement: Asked for points of clarification.

John Abbott, Chairman
Alaska Code Revision Commission
Address and phone not provided
Position Statement: Answered questions from the committee.

Willis Kirkpatrick, Director
Division of Banking, Securities and Corporations
Department of Commerce & Economic Development
Pouch D, Juneau, AK 99811
465-2521
Position Statement: Stated concern regarding the method of keeping the records.

PREVIOUS ACTION

SB 246--There is no previous action to report on this bill.

ACTION NARRATIVE

The meeting of the Senate Labor & Commerce Committee was called to order at 3:00 p.m., with Senator Rodey present. Senators Eliason Chair, Mulcahy, Bennett and Sackett were absent. This meeting was called for the purpose of receiving public testimony on SB 246. The following is a verbatim transcript of the proceedings from a cassette tape of the reel-to-reel tape of the meeting.

SENATOR RODEY: . . . This is a subcommittee meeting of the Labor & Commerce Committee. The task is to review the Code Commission's work on the corporation's statute. We have with us today the Chairman of the Code Revision Commission, Mr. John Abbott, attorney from Anchorage. With us also is Professor Daniel Fessler, who is the author of the corporations code, along with the Code Commission. John, did you have any questions, or rather any comments, you'd like to make? Perhaps the best thing you can do is . . . would be to give everybody here, we have mostly staff people and people from the administration here with us today who, they are the ones that do the real work. And, of course, the legislature . . . this is a complicated matter, the legislature really has to take the opinion of those people who have the time and expertise to work on it.

JOHN ABBOTT: Thank you, Senator Rodey. Just a few preliminary comments before I turn it over to Professor Fessler. The corporations code has been under advisement, so to speak, for about four years now. It has undergone a number of revisions, a lot of thought and a lot of man hours. It is a technical bill. It is the first time that the Alaska Corporations Code will have been substantially revised since its adoption in 1962, at which time it was probably not a very good code. And what the Code Commission has tried to do is to improve it, bring it to modern status as a corporation code governing the activities of people that have acquired a state charter and to fill in a number of voids in areas which the Legislature has not spoken to and which need to be spoken to since a corporate charter is, in effect, a set of directions to anyone wishing to incorporate as to how they are to act as a corporation in the legal diction. That is basically what the Code Commission has done and without further ado, I'll turn it over to Professor Fessler. He'll give you a run down on technical aspects of the code.

PROFESSOR FESSLER: And if it would be helpful, Senator, anytime either, particularly you or any members of the staff that are here have questions, please feel free to interrupt me. I should first begin by identifying myself. I am from the University of California at Davis. I am here in the capacity as a consultant to the Code Revision Commission. I was first retained in the fall of 1979 and asked to review the content of Alaska statutory law on for profit corporations, with a view toward advising the commission as to whether or not I thought that any kind of basic reform

PROFESSOR FESSLER (cont'd): was necessary. I concluded that it was, and I can briefly highlight for you what my thoughts were. When Alaska became a state, the legislature adopted with virtually no modification of what was then the current corporation law of the State of Oregon. The Oregon law in turn was a 1954 version of the model act. Now subsequent to Alaska's adoption of the Oregon act, there have been significant change both in the recommended content of the law. The model act, I should point out parenthetically, is an act which is recommended to the legislatures of the several states by a committee of the American Bar Association. Of necessity, it is a very general act. It pertains to the conditions and experience of no single jurisdiction and over the years it has become the basic act in numerous smaller states. It has never been successful in having much of an impact on the law of those states where any legislature sat down and decided to craft their own corporation's law. The Delaware, New York and California laws, which are the three major approaches to the organization and discipline of corporate activity in the United States, and have reflected very little influence on the model act. We have adopted the model act. Now the model act that was adopted in Oregon in 1954 was obviously not adopted with a view toward any interest that might be in Alaska or in legislatures not be given credit or presence in figuring out their law to become that of another state. Unlike the State of Oregon, which in 1954 had ninety years of common law decisions in the business field, and therefore when the legislature enacted a statute to regulate business activity in Oregon, it could take into account that the Oregon Supreme Court is speaking to these questions for nearly a century. The Alaskan act was brought into our state against a background of a near void of decisional law. And in the years that have intervened, our Supreme Court has had occasion to speak from time to time on business matters. But I think that not even the most optimistic leader of the Alaskan courts would feel that there is today a background of supplemental decisional law. So from a practitioner's vantage point or from a client's vantage point, the corporate law in Alaska starts off as being, bearing no rational relationship to the state. It is subsequent to being enacted here. It has been tinkered with from time to time. There have been some amendments. It has never been thoroughly restated. Amendments to the model act as they have been recommended have some been adopted in Alaska, but most have not. And there is virtually no common law in Alaska, pre-statehood and post-statehood, in this area. So that the biggest problem Alaskans face is that the law with regard to business associations in the state is very sparse, very difficult to determine, and therefore it threatens business with the one thing which business cannot deal with--uncertainty. When questions are raised and business people need legal advice, they need to be told yes or no. The answer maybe isn't very useful at all. For the answer that we may get this eventually decided by the Supreme Court is both an expensive and hideously time consuming period at which to try and predicate corporate decisions or corporate action. So what I have recommended, and over the years what the commission

has evolved, is an extremely comprehensive statute. The bill which is pending in the Senate is Senate Bill 246. It is probably the most elaborately stated corporation's code in the United States. If it has a rival, it would be the California act from the mid-1970's. The reason that this statute speaks on subjects that go considerably beyond the model act is because we are attempting to answer by legislative provision many questions which in other states are answered by well known common law decisions, which decisions we simply do not have in the State of Alaska. So in order to have a thoroughly conceptual and detailed statute, it was felt necessary to begin by looking at some basic philosophical choices. And when the commission looked beyond the State of Alaska it found that the attitude of state government toward corporations varies dramatically from state to state. The most impressive distinction would be between Delaware on the one hand and the State of California, where I come from, on the other. It is sort of surprising to people when they first get into this field that Delaware is the most important American jurisdiction for corporate purposes. If you look at the Fortune list of the 100 largest American corporations, 97 are incorporated in post office boxes in Dover, Delaware. And this is because over the years people in business, in management, have found in the Delaware legislature a very, very receptive and understanding body. Also, the State of Delaware has maintained chancery courts long after they were abolished in all other American jurisdictions with the result that you can get a matter litigated, tried and finally disposed of on appeal in the State of Delaware inside of a 100 days. Again, business cannot stand to be told maybe with regard to a question. Delaware's act is considered a management oriented statute. If there are value judgments to be made giving preference to the prerogatives of shareholders on the one hand, or those of the incumbent management, the officers and directors on the other hand. The Delaware act makes all those value calls in favor of incumbent management. In stark contrast, the State of California has the most pro-shareholder, anti-incumbent management corporations code in the United States. In California, Delaware, excuse me, California directors can serve only one year terms of office. It is illegal to attempt to give a director a longer term of office. The entire board must stand for election at a single meeting held every year. And beyond that, in California shareholders are given the mandatory right to cumulate their votes. The voting scheme designed to maximize the opportunity for minority share interest to gain board representation. Now when one looks at the management oriented Delaware act on the one hand, and the California approach which is to bend everything in favor of shareholders, a decision was made by the Code Revision Commission that we would craft a statute which had no inherent internal bias. Under this proposed bill, it would be possible for individuals desiring to form a corporation, to form a corporation that had all of the prerogatives which California insists upon for a California corporation. In other words, you could choose to have one year terms for directors. You could choose to have no classification of the boards, so that the entire board must stand for

annual elections. You can choose to have cumulative voting, but none of these choices are forced upon you by the state. Therefore, it would be possible under this statute to choose three year terms for directors, to classify the board so that only one-third of the board comes up for election every year, and to deny to the shareholders cumulative voting. What we have attempted to do is to allow people in this state the freedom to make their own business decisions and to make their own decision about what it is they want in terms of management and the rights and prerogatives of the beneficial owners, the shareholders. What we have sought by way of reform, however, is to insure that all of these basic decisions are taken within the context of the articles of incorporation so that there is a single document which shareholders or other interested parties can look to that will you a totally accurate picture of what basic decisions have been made with regard to this specific corporation. For that reason, you will notice that there is important language in the provisions of the act dealing with the articles of incorporation. Two sections, the section that speaks to the mandatory terms which must be covered by the articles and the succeeding section which refers to the optional terms. That has a very important caveat. All of the topics covered in that section are stated by the statute to be effective only if made the object of provision in the articles. Therefore, if you put them in bylaws, if you try to put them in shareholder agreements, statutorily they would be null and void. So that our attempt has been made to make the articles of incorporation and the process of incorporation of a new corporate entity is very much like a cookbook. The statute is a recipe of choices to be made. They are clearly presented. Both the counsel and client should find it very easy to go through the process of incorporation, giving to the clients the opportunity to make basic decisions about the corporation being formed. Thereafter any potential investors will find those decisions clearly reflected in terms of the articles of incorporation. So you have here a statute which is pretty much devoid of any internal bias, in favor of shareholders or in favor of management prerogatives, which has also sought to minimize the role of government. Certain states have recently been adopting acts which have attempted to intrude the government more and more into the area of corporate activity. There is concern about the social responsibility of corporate behavior. There is solicitude about the question as to whether corporate management, the people whom Louis Brandeis once referred to as managing other people's money, the degree to which they were truly, honestly and efficiently exercising their business judgment and what the state's interest ought to be. Our decision has been to recommend to the legislature adoption of a pact which renders certain reporting obligations which must be made to the Department of Commerce and Economic Development which standardizes the reporting obligations, both in terms of their content, their form and their title, so that there will be a habitual pattern of reporting to the state. But beyond that does not seek to give the state a very intrusive role to play in the

operation of for profit corporations. The old pro warranto provision brought by the Attorney General which has never enjoyed much use in the State of Alaska does not come in for much of an enhanced role in statute. Yes?

HENRY LANCASTER: Excuse me, but does your definition of state intrusiveness extend to fiduciary duties and . . . type of shareholders?

PROFESSOR FESSLER: No, when I am speaking now of a statement, I appreciate the opportunity to clarify. I am speaking now of the executive branch of government. I am not speaking now of attempting to minimize the role of the judiciary in the event litigation should take place, but rather to what extent would there be an investigative presence of the Attorney General looking into the operation of corporations. We have two provisions: There is a provision in this act which allows the Attorney General to commence a cause of action designed to seek the dissolution of a corporation. That's the old classical pro warranto procedure for very serious offenses against state law or public policy. There is also a provision for the administrative dissolution of corporations which are merely habitually ignoring the various reporting requirements and tax obligations which the state has created. And those enforcement procedures are placed in the hands of the Commissioner of Commerce and Economic Development. They are administrative procedures. There is a provision in the act which would allow a corporation who just had its charter suspended pursuant to this to appeal to the superior court for a trial de novo on the matter so that the state's role is certainly going to be vindicated in terms of tax obligations or reporting obligations. The prerogatives of the Attorney General of the Department of Law have been protected in this legislation. But basically what we have attempted to do is to force those who control the corporation, especially larger corporations having numerous shareholders, to make annual reports to shareholders. And we assume that the shareholders will be the best source of discipline over the stewardship of people who are managing corporate resources which the shareholders have the beneficial interest in protecting. So for the first time if this act were adopted, there would be mandatory reporting obligations every year on the part of the corporation to its shareholders, giving the shareholders a fairly facile means of gathering what the financial status of the corporation is. Also, you'll be interested in looking at the section on what are called transactions with interested directors and officers. These transactions are specifically defined in the statute, and every year corporate management must disclose to the shareholders the identities, dates and amounts of transactions falling within the statutory definition. The shareholders will have a much better opportunity to decide whether or not there have been abuses of fiduciary obligations. I should also point out the reference to the inquiry about fiduciary obligations, that this statute for the first time gives a clear definition of the duties of care

and loyalty which are owed by a director to the corporation. The statute also specifically delineates the rights of a director to rely on certain information supplied by corporate officers including the opinion of counsel or by committees on which that particular director does not happen to serve. Also for the first time in this statute, fiduciary duties are articulated on behalf of corporate officers. There is no statutory formulation of fiduciary of corporate officers in the State of Alaska today. They would be left intrusive to common law conjecture as to what they were and what the dimension might be. So those are the basic approaches which are taken to this very important question.

HENRY LANCASTER: Does it do anything to relieve the burden or reduce the cost of shareholder litigation in seeking to find that information?

PROFESSOR FESSLER: Well, first, the statute clearly defines the rights in which shareholders will have with regard to inspecting corporate books and records. A distinction is drawn, you'll notice in the provisions of this act, between a shareholder whose basic interest is examining the shareholder list and gaining knowledge of the identity of the other shareholders or even greater interest in trying to figure out how the shares are proportionately handled. We also have created a right of inspection with regard to corporate books and records. The statute specifically includes in that description the books and records of subsidiary corporate entities. Because one of the basic problems that has arisen in jurisdictions in recent times has been that corporations will frequently hide transactions that they know may be objectionable by having those transactions take place within the guise of subsidiary or other affiliated corporate entities. So shareholders are now given statutory rights of inspection, and they are given certain teeth. You'll be interested in the provisions that deal with the consequence to a corporate officer who denies to a shareholder what are that shareholder's statutory rights of inspection, including a $5,000 civil liability to that shareholder in addition to whatever actual damages the shareholder may be able to show by virtue of the denial. In the past, one could simply, in the jargon of the trade, tough it out or stumble when faced with shareholder demands. There were no statutory penalties. There was no legally defined downside risk for such a strategy. There was always the possibility that you might well be sued, but you could take a chance that you could resist any liability on the theory that the shareholder could not show that she had suffered any discreet, provable, ascertainable damages. Those matters have been thought out by the commission, debated at some length, and the commission's recommended positions on that are reflected in this bill. In addition to that, in other words, in addition to the prerogatives which a shareholder who suddenly makes it her business to want to look into these matters, there is as I stated a few moments ago the mandatory

reporting obligations which corporations have. They become more elaborate as the size of the corporation increases, and the inertia of shareholders is thought to require that the corporate management be forced to come to them with annual reports. Some are the twelve pay reports that are required by the Securities and Exchange Commission, so that shareholders would at least be alterted by the basic information imparted in those reports. And then might be well alerted to follow up by inquiries and take advantage of their rights of inspection. And in this regard, there is one other area of Alaska law that I think is shockingly deficient. Alaska is one of two jurisdictions in the United States that has no statutory regulation of the shareholder derivative cause of action. If there has been a reform which has had rough sledding in the United States since the 1940's, it has been the theory that the shareholders could be relied upon like Cincinnatus, at their own expense, to enter lists against those who are managing the corporation and sue using the corporation as the beneficial plaintiff for the litigation. The theory in the 1940's when this became a matter of great vogue in corporate literature was that in this manner corporate responsibility would be returned to corporate. . . The role of government was receding as corporations became more and more, there are more than eight thousand for profit corporations in Alaska already. And that number can only be expected to go up. If the Department of Law were to look into their affairs, they would have to be massively inspected. So the theory was, let the shareholders do it. The difficulty was, of course, the flaw in nature of humankind is nicely reflected in the cross section of individuals who are likely to be shareholders. Therefore, section 435 in the bill is addressed to the statutory regulation of shareholder derivative cause of action. However, it has been to attempt to ferret out the shareholder who was most likely to bring a meritorious cause of action and have the legal resources to stick with that cause of action through a process of prosecution and final adjudication. The basic abuses, of course, over the years have become shareholders would bring what are now . . . referred to as strike suits. The causes of action initiated against the corporation with full knowledge that the corporation could find the expense, both in time and treasury, the adverse publicity of the media picking up that a corporation has been sued for a hundred million dollars or a million dollars, alleging that all of the people who are running the corporation are crooks. And that any individuals who brought these types of action were frequently very interested in having incumbent management simply buy them off with non-judicially supervised, out of court settlements. It is not surprising that the fruits of these non-judicially supervised out of court settlements never went to the corporate treasury, which is a theory in a derivative cause of action, but went to the shareholder who was keeping his peace. All of these types of abuses I think have been prophylactically dealt with in section 435. You will notice that the statute defines standing on the part of

shareholders who will be allowed to bring the derivative cause of action. For the first time the statute clearly settles the issue of when such a shareholder is obliged to exhaust intracorporate remedies by making a demand for the action which the shareholder seeks to have effectuated on the incumbent directors, settles for the first time the question as to what the status of incumbent directors and their business judgment should be, recognizing that the question of whether it is in the best interests of XYZ corporation to engage in litigation for the next two years is not purely a question for lawyers to decide, but for businessmen and businesswomen to decide. And, therefore, unless the directors are themselves accused of being the wrongdoers or under the direct or indirect control of those who are alleged to be the wrondoers, the good faith, independent business judgment of disinterested directors is to be respected and will terminate the cause of action which is created by section 435(a).

HENRY LANCASTER: Yes, (a), I guess that leads me to my next question. I noticed you were expressing corporations for profit. What I am going to ask is what protections does that give public corporations in Alaska. The state oversees some of them against residents claiming themselves to be shareholders who want to take some kind of action.

PROFESSOR FESSLER: Nonprofit corporate entities?

HENRY LANCASTER: Well, AHFC, or any other public corporation.

SENATOR RODEY: This section, this bill we have before us doesn't deal with that question. It's just for profit corporations.

PROFESSOR FESSLER: They are not covered at all.

SENATOR RODEY: Mr. Lancaster is legal counsel with Senator Josephson.

PROFESSOR FESSLER: I see. Well, they are not covered at all. Any government created corporation, either by the state or federal government or any nonprofit corporate entity created, has fallen outside the purview of this particular act. Although the Code Revision Commission has prepared an extensive draft of a not for profit corporations bill which very shortly will be submitted by Chairman Abbott to the Legislative Council with the request that it be introduced.

SENATOR RODEY: Let me ask one question . . .

PROFESSOR FESSLER: Senator.

SENATOR RODEY: . . . particularly since we have the banking director here as well, what impact will this bill have on the banking code?

PROFESSOR FESSLER: Well, basically, you are asking me a question that I am afraid that I cannot answer.

SENATOR RODEY: I always wanted to ask a professor a question that he couldn't answer.

PROFESSOR FESSLER: This does not address banking and corporations.

HENRY LANCASTER: Sep[illegible]tles also.

SENATOR RODEY: Yes, I [illegible]at. Is there, which is the reason I asked, as you know, [illegible]d draft corporate articles now as a lawyer you say except [illegible]urance and banking in the State of Alaska is the magic words that you put in. But is there anything in the bill that would affect banking?

PROFESSOR FESSLER: Since banks cannot be formed under the terms of this act, I would say that there would be nothing in this act which would directly affect banking.

SENATOR RODEY: I wanted to put that on the record.

PROFESSOR FESSLER: Well, I think that would be my opinion. I was trying to remember, I think several years ago the commission decided to stick with the basic scheme which was that the current Alaska Corporations Code does not extend to banking. It is receiving discreet statutory treatment, and so it continues to do so.

SENATOR RODEY: That answers my question, and many, many bankers will probably rest easier.

PROFESSOR FESSLER: Well, I assume it will not be because of the enhanced fiduciary obligations that are defined in this code. The bankers will be resting easier, but they are not covered, merely because they would be superfluous . . .

SENATOR RODEY: They become nervous when anybody attempts to change the law.

PROFESSOR FESSLER: If I could generally in terms of suggesting that areas that you might wish to look into for various senators and representatives and committees of the legislature. Article 4 of this act deals with corporate finance. It brings about a suggested reform that I think will be most welcome in the state. One of the most difficult legal issues of the present time is to decide when it is licit for corporate management to make a distribution of corporate assets to the beneficial owners, most commonly in the form of payment of dividends. The difficulty has been that the legal profession in the 1920's began to intrude concepts which were apparently meaningful to lawyers, concepts such as earned surplus, reduction surplus, which had no meaning then or now to

accountants. They also had no meaning then or now to individuals who are in the business world. Consequently, we have the sort of Alice in Wonderland business of the law speaking one language venerating certain very ill defined value judgments with regard to this basic issue, and the accounting profession which was charged with obeying the law or keeping accounting clients within the law, and men and women of good faith desirous of obeying the law in an abysmal state of ignorance as to what exactly it was that the law wanted. Now, California in the 1970's spent a great deal of time and no little treasure attempting to solve this question. They came up with a scheme which is called the ratio/assets surplus test. And with very minor modifications, that is the basis of Article 4 of this proposed bill. It answers the very primitive question of when can a corporation make a licit distribution of assets with a very simple answer. Any time the assets of the corporation exceed its liabilities by a ratio of five dollars of assets to four dollars of liabilities. Any corporate assets beyond that ratio are free to make distributions to shareholders. So that if a corporation has five hundred thousand dollars in assets and four hundred thousand dollars in liabilities, it could make no distribution to shareholders at all. If it had six hundred thousand dollars in assets and four hundred thousand dollars in liabilities, it could make a distribution up to one hundred thousand dollars at which point its assets would have been brought into the statutory equilibrium of liabilities, and no further distribution would be licit. There is a further caveat. The statute does take into account that there is a big distinction between fixed and current assets. If a corporation which had most of its assets tied up in illiquid matters such as land or a factory and had in its liabilities recurrent, short-term money obligations, even though the total ratio of assets to liabilities might meet the so called ratio/assets surplus test, there is a requirement that giving a prospective effect of the proposed distribution that current assets, which is a term of art to accountants, equal current liabilities, another term of art to accountants. The basic scheme here with regard to all accounting concepts is to leave them to the evolved understanding of the accounting profession. You will notice here that the statute does not contain definitions of accounting concepts at all. It simply says that in reckoning the ratio/assets surplus test, that management is to be guided by the decisions or recommendations of members of the Certified Public Accounting field. So as they evolve their various understandings, our act will also beneficially evolve. We will never be wedded to a set of accounting principles which are constantly being eroded as they are being improved by the accounting profession. So that I think that reform will be very deducible in allowing people to be prudentially advised now or frequently to be able to get along without the needed advice, because it is a fairly easy test for accountants to apply. So that in Alaska at the present time, you have a statute which contains elements of two antiquated tests, the so called earned surplus test and

the balance sheet surplus test, are used by various jurisdictions that have a model act. In other words, if you look at our statutory language it doesn't define the test. If you then look at other states that have similar statutory language, you run into a sea of confusion. Since we have no decisional law interpreting our statute, an accountant or businesswoman in this state faces one of the most vexing of all dilemmas. A statute which we have not interpreted which faces divergent and frankly at war interpretations of other jurisdictions. That would all be swept aside and replaced now by fairly easily understood concepts.

SENATOR RODEY: Could you deal with the question of the secondary liability of directors. I think that's an important one. Obviously there are problems in this jurisdiction in that area, and it would probably be one of the more controversial aspects of the bill.

PROFESSOR FESSLER: Yes, one of the most difficult questions that I think the legislature may well wish to face is the idea of corporations being used in a manner which is very, very unlike the classical image of a corporation. Remember now I am talking about limited liability. The corporation is the only vehicle for the conduct of business which carries with it the presumption of limited liability for all participants. For both tort and contract claimants the theory is that the assets of the individual shareholders are not at risk beyond the assets which they have contributed by the way of capitalization of corporation in subscribing for stock. Limited liability was extended to corporations in the United States in the 19th Century on the assumption that this permitted individuals who were risked at first, but who had surplus assets to give those assets over to individuals who were without assets themselves, but who had management talents and were very interested in taking other people's money and developing them into businesses which would later on become manufacturers and employers. And, in other words, major economic entities for the benefit of everybody. Limited liability to those shareholders was thought to be essential because the shareholders almost by definition were going to play an extremely passive role in the corporation. Having large public issue corporations today, that is still generally true. I have inherited fifteen shares of stock in Western Union Corporation, an entity for whatever virtues it may have, I would state on the record has never produced large dividends for me and is an entity which has had some substantial difficulties. There is literally nothing which I as an owner of fifteen shares in Western Union can do to meaningfully influence the business decisions of those in management of Western Union. The notion that I should enjoy limited liability for the debts of Western Union or even the tort claims against Western Union is probably senseless. But since 1950, and there have been several books, if you ever fly on an airliner, you are aware that you see constantly ads in all the airline magazines, how to set up

your own corporation. So you've been bankrupt five times, so you don't have any assets, etc., you, too, can have a great tax dodge. You don't have to put up any money at all, and none of your personal assets are at risk here. The sad part about that forty-nine dollar trap is that it is pretty much true. And I think it became true not because any legislature in any state ever said that that should be what would happen. That I as a one single sole could incorporate myself, or that two or three people could incorporate, put up a few dollars in assets, conduct the business so long as it was to our interests. And when it was no longer to our self advantage to simply walk away from that business in this state and you are not at all unique. You have several thousand more corporations that you haven't heard from in months or years. They were never dissolved. They just went away. And they likely went away owing lots of relatively small people money that to those individuals meant a lot. There were employees who weren't paid, and then they found out that the owner of the business didn't owe them the money because business had been incorporated. There were materialmen and suppliers who were not paid because the business had been incorporated. The same enterpriser not infrequently goes on the start another business in another corporate personna and operate that business so long as it is convenient. In other words, what I am suggesting is that limited liability, just as the airline magazines now advertise, has become a very, very simple means of abusing one's creditors. You can only take bankruptcy once every six years, but you can walk away from a corporation once every six days, and there is nothing illegal about it. Banks aren't too interested in this problem. Insurance companies and other institutional lenders are not too concerned about this problem, because when an individual in a business goes to them and wants to borrow money they always ask for individual cosigners. They ask for the incursion of personal liability. The people who are the fall guys in this situation are the hundreds of small creditors who extend credit on open account. So, one of the questions which was debated at length in the Code Revision Commission was what could be done to make people running corporations have any greater sense of responsibility to creditors. In theory, of course, each of you who is a lawyer well knows, that limited liability has never been guaranteed, and there are numerous common law doctrines for quote piercing the corporate veil. Indeed, in California the idea that the business has been thinly capitalized, a term not well defined but at least well conceptualized, is a ground for a court to overturn the limited liability of some or all the shareholders. But if you are an individual who has a four or five thousand dollar claim against the business, you certainly do not have the assets to prosecute through the court system a suit designed to pierce the corporate veil and gain the personal liability of shareholders who have abusively conducted business in the corporate forum. The time and cost of litigation means this is a fairly availing strategy. Now New York, which was the first major American jurisdiction to

permit corporations to come into existence, has never granted total limited liability. This is not well known outside of New York, but it has been the content of New York statutory law from 1834 until this afternoon. And they appear to have no intention of changing it. In New York with regard to employee claims to compensation, wages owed, etc., the ten largest shareholders in the corporation have always been totally statutorily liable, jointly and severally, in their personal assets. Now the problem isn't limited just to employees, and we felt that putting the liability on the ten largest shareholders was not the best way to go. Most corporations doing business under the Alaska Corporations Code as it exists today would have fewer than ten shareholders. Some of those shareholders would be very active in the conduct of the business but others might be quite passive, either because they have retired, they are the surviving spouses of individuals who were active in the business, or they have inherited stock from parents who were active in the business, or because they never planned to be active in the business to begin with. Therefore, putting liability on those individuals seemed to be putting liability on individuals who have not made the decisions which created the liability to third party claimants. So, the act has come up with this notion of secondary liability of officers and directors. Those are the people who make the business decisions. They incur the liabilities to third parties. They are active. If the legislature were to adopt the Code Revision Commission's recommendations, directors and certain named officers of the corporation, or individuals who were discharging the functions of those offices even if they were given different titles. You can see that if the president of the corporation has statutory liability, you might try to create a corporation that had a great pooh-bah but no president on the theory that nobody would be behind the label to whom the statute can pin the liability. So the persons who would occupy and discharge the functions which were normally to be attributed to the president, vice president, etc., of the corporation are liable to creditors for an amount up to twenty-five thousand dollars. Now, that is per creditor. So there could be very significant liability under this statute. If you have ten creditors then there could be a quarter of a million dollars in total liability here. The liability is joint liability with the right of contribution. The liability extends in favor of a statutorily defined class of creditors. Those creditors include employees, materialmen and suppliers and others who extend credit to the corporation on open account. The liability is not mandatory. The statute specifically says, and some individuals who read this statute have either refused to recognize that this is the way it is written or they just simply don't wish to read it carefully. The statute plainly says that the liability which was created can be contracted away. In other words, in writing any individual who is made the beneficiary of this liability can release

any or all of the individuals who are incurring the liability. Therefore, if the corporation and its officers and directors desire to do business if you ran a restaurant in this town and you habitually bought fresh fish down on the wharves. Almost always that is presently sold to you on open account. You get a little bill at the end of the month. There is nothing in writing. At the present time if you closed the restaurant and walk away from it, the individual to whom you owe five thousand dollars or ten thousand or twelve thousand dollars for fish if you incorporate the business has no tactical recourse against you. He can't afford to get a lawyer, he can't afford to try to pierce the corporate veil, he just eats the loss. Now, you could go to that individual and say do you realize that my restaurant is a corporation, and I would like you to agree that in the event that this business fails, you will right here in writing state and you will not look to any of us for payment, but you will accept whatever payment the corporation is able to make. But unless the corporation takes the precaution to gain the written release of reduction of that liability, it is open to total contractual modification. This statute would create that secondary liability.

JEFF BERRY: Is that provision in the statute?

PROFESSOR FESSLER: It certainly is.

JEFF BERRY: So an employer could go to an employee and say it is a term or condition of your employment that you must release us from any liability if we strip the corporation.

PROFESSOR FESSLER: If we what?

JEFF BERRY: Strip the corporation. In other words, strip all the assets out along the way.

PROFESSOR FESSLER: Well, that would certainly be done in form, sir, but I mean whether or not that contract would stand up against an assault in could would be another question. And there are going to be some problems with allowing this contractual modification. You pose a very difficult one of the employer saying to somebody, I want your conscience, your conscious waiver of this right you have. Not on the theory that I am going to strip the corporation, but that I am not guaranteeing that this business will be successful. And, therefore, I want you to help share the risk with me if the business . . . [END OF FIRST SIDE OF TAPE] of the commission. I would find that this is probably a tolerable pattern of behavior.

JEFF BERRY: I think it would run afoul of some labor laws. The rights of employees cannot be waived of minimum wage, for instance, and that may run afoul to federal labor law statutes which guarantee certain rights to individuals that would be setting a term or condition of employment that cannot be waived . . .

JOHN ABBOTT: Okay, but you have to keep in mind that the present corporation law doesn't provide this cause of action or this liability against officers and directors.

PROFESSOR FESSLER: So they don't have that right today.

JOHN ABBOTT/SENATOR RODEY: They don't right now.

JOHN ABBOTT: We are not talking about doing away with some protection that employees presently have.

PROFESSOR FESSLER: You might want to look into, in terms of the Labor Committee, might wish to look into the question as to whether or not it thinks it's a good idea that employees could be put in a position to be asked to waive this secondary liability. But right now it's a right they don't have. So I doubt that any existing legislation would protect it.

JEFF BERRY: Well, if you put it in this form, it may be a right that they would never have. It would exist only on paper.

JOHN ABBOTT: No, no. You are assuming that there is some right there presently that there is not. There is . . .

JEFF BERRY: Well, we hopefully would be creating that right.

PROFESSOR FESSLER/JOHN ABBOTT: Sure.

PROFESSOR FESSLER: Yes, that's fine.

JEFF BERRY: For potential abuses or for, particular for potential abuses because that is really the only area that it would go into. If a person had started a corporation and it failed, they are not going to have anything anyway. And they are going to take everything that they have traditionally and attempt to satisfy the creditors. I think it is a pretty safe assumption that we could make. The question would be in those cases where they may have transferred the funds for whatever purposes elsewhere and walked away. . . then you may not be creating that right. Maybe as far as wages, certainly it's a different bargaining position, employer and employee as opposed to that. I am willing to open an account with you and everything. I think that there is a balancing effect that we could quite possibly look at as to say, can an employee actually bargain with the employer on an equal footing. And that basis would be really creating a right or a disservice, perhaps.

PROFESSOR FESSLER: Well, again, the section we are referring to, sir, that everyone can look at it later is section 488, which shows up at page 67 of SB 246. The group of individuals who are made liable are defined by section 488(a). They are the president, secretary and treasurer or individuals performing the functions of those offices. Notice that section 488 also extends to foreign

corporations doing business in Alaska. This is necessary if you are going to conclude an end run around whatever the legislature does by the simple expedience of foreign incorporation, and then coming back to Alaska to do business as a Delaware corporation, or as an Oregon corporation, or a Nevada corporation. So that this act is applied to foreign corporations doing business in the state. And then you'll notice that there is language here that says to the extent that the act as a corporate entity prove insufficient. In other words, the person seeking to be covered under section 488 would first have to exhaust the liability of the corporation. You couldn't come after a director just because that individual was a more obvious target as a defendant. Now, you'll notice that the liability is for contract indebtedness, whether formal or otherwise, for materials, supplies, inventory or services furnished, and that's what covers the employees. During the period of service, so if a director wants to know how long would I be liable and for what amount. Well, it would only be for those contract indebtedness claims arising during my period of service on the board. (b) is the point that I was making a few minutes ago. The terms of a written contract, not an oral understanding, but a written contract between a corporation and a third party may modify or preclude the liability. And then (c) is designed to keep a large creditor from dividing the claim and assigning twenty five thousand dollar portions of the claim to friends or family members, etc., in order to get more liability than the legislature intends here. Large creditors were perfectly willing to fend for themselves in dealing with corporations. It is the small person who we are interested in protecting here. And then you'll notice under (d) that a party against whom a claim is asserted under this section is entitled to a contribution from others under (a) so that there is a right of contribution that is created to spread the loss. Yes, sir.

JEFF BERRY: I have a tangential question, since you said the word foreign corporation. A question was asked from the insurance administrator. At the current time the Director of Insurance is the registered agent for all foreign corporations. And they are exempt from registering under the corporation statutes. How would this proposed legislation affect that? Would they then become subject to dual registration for the purpose of legally serving anyone who is an admitted insurer, whether it is excess or insurance for that state. I looked through and I really didn't see it and . . .

PROFESSOR FESSLER: The answer, sir, is clear in section 5, that a corporation may be organized under this chapter for any lawful purpose except for the purposes of banking and insurance. So insurance corporations are totally excluded from this legislation. They would face no dual reporting or . . .

JEFF BERRY: They weren't really too sure.

PROFESSOR FESSLER: Well, I mean, one of the problems which I certainly recognize is that a bill of this complexity which has evolved through drafts, repeated drafts, and hearings, most recently six months work with the Alaska Federation of Natives study subcomittee on this subject It is itself now, by the time it comes to the members of the House and Senate an extremely lengthy, and I think it does not betray the reality to say, a complex piece of legislation. And even I who find gardening thrilling in my pastoral existence in Davis, would not find this the most exciting reading in the world. But we have to the extent possible attempted to provide very extensive comments that are designed to explain, not only to members of the House and Senate and professional staff, but also to citizens, lawyers, and other interested persons in the greater world that lies outside this building, exactly what the intentions were. You will notice that one of the other things which the official comments seeks to do is to give Alaska an instant common law heritage by taking into account certain of the very major common law decisions in allied areas. And stating whether or not in the commission's view, hopefully in the legislature's view, adherence to those famous decisions in other jurisdictions would or would not be consistent with the rules and philosophies that are being framed legislatively here. This is very important where we have continued provisions of existing law, because they were model act provisions and we felt that they were adequate. But when you went outside of Alaska you found that they were the object of conflicting interpretation. The comments will tell you which line of common law interpretation are being approved and specifically which common law decisions are being disapproved. So that a lawyer now would be able to advise a client as to what the legislative history was and to be able to integrate it with the greater body of common law. Senator, do you have any other specific questions?

SENATOR RODEY: Not any specific questions, no.

PROFESSOR FESSLER: Fine. The other factor which I would commend to the general attention of the members is that the rights of members when a corporation is going through what is called an organic change where there is going to be a merger, corporation (A) merges into corporation (B), a consolidation. Corporations (A) and (B) emerge as new corporation (C), or a sale of all or substantially all corporate assets other than in the usual course of business where a corporation sells virtually all of its assets to (B) corporation which takes them over. These organic changes which are very ill defined in existing Alaska statutory law are now very clearly defined, and the rights of shareholders to be allowed to vote before such a plan is affected and not a fait accompli is guaranteed by this new statute. And also shareholders who vote no on the question of organic change are given the statutory rights which are called dissenter's rights which

is a right to have the new corporation buy the shares of the dissenting stockholders at a fair value which is to be determined on the day before the vote in favor of the organic change is taken. And as we always do, you'll notice consistently here when value comes up, the statute first gives to the shareholder and the corporation made liable to pay the dissenting shares the opportunity to fix the value by mutual agreement. If they are unable to do so, the statute provides that the court may appoint appraisers, and the decision of the appraisers as to the value of the stock is binding both on the dissenting shareholders all of them so no one is paid five dollars, and somebody else is paid three-fifty, and the corporation, and that this matter can be expeditiously settled within sixty days, because the last thing that the corporation which has just gone through an organic change needs is protracted uncertainty as to the dimension of its liabilities to any dissenting shareholders.

JEFF BERRY: What is the ratio of percentage of what a shareholder can buy into this new corporation that's in a sell-out situation. Corporation (C) sells out to a multinational corporation, what percentage do they automatically get to buy. The shareholder can't do that with a multinationational.

PROFESSOR FESSLER: The statute creates the general presumption that they are entitled, in other words, all shares must be treated equally. So that if any of the shares in the corporation are going to be given shares of stock in the multinational purchaser then all of the shareholders must be accorded similar rights. You cannot discriminate between shareholders of the same class of stock and say, we find it very convivial to bring in the family of the new corporation. All of the shareholders in this room, except Fessler, and we really don't want him as a participant in our new business, so we are going to give him a thousand dollars for his stock. That would be discriminatory treatment, and we either have to give everybody money or everybody stock.

JEFF BERRY: But what percentage of stock? What portion of the corporation?

PROFESSOR FESSLER: That would be framed by the boards of directors of the two corporations. In other words, if there is a merger the statute puts upon the board of directors of "X" corporation framing the terms of the merger and upon the board of "Y" corporation consent to those terms. That's done at the board level. Then each corporation is obliged to go to its respective shareholders and bring to those shareholders the terms of the proposed organic change. The statute grants a right to all shareholders to vote on this organic change even if they otherwise hold nonvoting classes of stock. And if the corporation has classified its stock, there is an obligation that before the organic change can be affected it must command a majority, not only of all the shares, but of each class of the shares. So we do not seek to build in any guaranteed

ratio of the shares, but we do seek to have it brought to the attention of the shareholders of the respective corporations. And then by giving everybody voting rights, we are trying to make certain that in their self-interest the shareholders will reject or accede to the request. And as I say, any shareholder who votes no on the organic change is given the right to have the successor corporation buy out those percentage shares at a value that was supposed to be the fair value not taking the organic change into account at all. So it is an elaborate balancing of values, but generally what we are doing is we are saying that we like the result that the Supreme Court of Delaware came up with in the Singer v. Magnavox case, and we don't care for the Panzer decision which came along ten months later. And you'll notice that the comments specifically confer a seal of approval on Singer and Magnavox, both as a result and its reasoning, and indicate that the legislature has adopted and framed this statute to carry into effect the Magnavox decision. And if the legislature would regard a judicial construction of this act in a manner that is consonant with the Panzer case as being contrary to the legislature's intention. So we tried to stay on top of the major decisions that have come along and influenced corporate law. Just as in the area of derivative suits, you will find that we are literally, thoroughly up to date. We know all about Flynn and Muldinaro cases; we know about Barr v. Wackman. And therefore, the commentaries to the provisions on derivative causes of action in section 435 specifically indicates to what extent we are willing to sanction the result and reasoning in Barr v. Wackman, on the opinion of disinterested directors, their business judgment and to what extent we are favoring the Muldinaro case decided by the Supreme Court of Delaware. We specifically indicate that our statute would be subverted by the interpretation of the Delaware law given by the federal district court in some of the instances . . . which said that the opinion of the board of directors that in their business judgment the litigation was not meritorious. This is one of the problems in Alaska, that in so many of these areas counsel just simply cannot advise clients because we don't know what the law is, and none of us has an interest in perpetuating that. And that's not good for business. You take in . . . comments, and that's antithetical to the economic evolution of this jurisdiction. Senator, I have no further observations other than to indicate that at any time I will be, if my schedule at the University permits it, be willing to answer questions in writing or by conference calls or by personal appearances for any of the committees of either house.

SENATOR RODEY: I am very unable to predict exactly the course of the legislation will be, and John is, of course, available to help out on it also. Essentially, the recommendation of staff is very important on this. That's why we have a number of staff people here today, because a complicated corporations code has

to be taken in part on faith because most of the legislators will be unfamiliar with the content. The fact that it has had a broad review in the state, has been signed off on by a variety of interested individuals, I think that speaks well for it. I am going to talk with Senator Ray who is Chair of the Judiciary Committee. I don't know what the Chairman of Labor and Commerce will wish to do with the bill. Hopefully, we will move it out in a very timely fashion so it can go to Judiciary again, having that staff and members look at it. There are a number of attorneys on the Judiciary Committee, which is helpful. I don't know whether we'll pass the corporations code this year, given the amount of time it takes for everybody to become familiar with it. It is a complicated piece of legislation, but a very important piece of legislation for the business community. Perhaps nothing else is as important as the structuring of corporate activity in the State of Alaska. And you very eloquently set forth some of the difficulties we have had in the State of Alaska or the lack of any real corporate history or law. And it, of course, was reflected in the statutes and other areas which is the reason for the code commission. The legislature simply doesn't have the tiem to redraft completely in many cases what is law generally taken from the State of Oregon wholesale at the time it was taken or slightly before. Perhaps the best course is for myself to talk with the Chairman of Labor and Commerce, and at that point talk with Chairman Abbott. We very much appreciate your efforts, and we probably will at some point in time call on you to answer questions or make comments. I think that the only way that the bill will really pass, at least pass comfortably, is with the broadest possible dissemination of information about the bill, and I will try to do that. Are there any other questions from anyone that is here today about the contents of the bill or anything that is attended to the bill? If there are no other comments then the subcommittee meeting is . . . Willis.

WILLIS KIRKPATRICK: I don't know whether I should bring it up now, would there be other hearings on this?

SENATOR RODEY: There probably will, but go ahead.

WILLIS KIRKPATRICK: Let me point out, for the record my name is Willis Kirkpatrick. I am Director of Banking, Securities, Small Loans and Corporations. On the corporation part there are three areas that have come to mind, and I have discussed it with the commission. One of them is that there is a requirement for foreign corporations to file their articles of incorporation with the State of Alaska. We have been in touch with other state jurisdictions, and this is a provision that has been deemed eliminated actively as far as foreign corporations are concerned in filings. We have done some research on it, and prepared a paper in that respect, but we feel that it would be for the amount of usage that it would be, that it would get as far as the

practicing attorney and find out what the articles are. This is probably more current and better obtained when they . . . regardless of whether they are . . . The other thing is that there is a requirement in the proposed act that the department file with the Superior Court some updated records weekly, and we would like to have the intent of the legislature if that is passed to make it a microfische copy acceptable for filing in the division. If we print weekly, the updates are going to be very expensive and very encumbering, a massive paper production. So we would request that microfische be considered as meeting the provisions of that section. The other section that we had some concern about is section 910 that gives the provisions for filing writings with the department, and we would like the writings to be specifically suitable for microfilming. Everything is microfilmed now, and we are totally dependent upon microfilming. So we don't want to be in a position where we have no statutory authority to turn down a filing because it is not legible for microfilming. Those are the only comments that we have at this time, Senator.

SENATOR RODEY: Thank you, Willis. Are there, Professor Fessler, Mr. Abbott, did you have any comments this?

JOHN ABBOTT: Well, the code commission is not opposed to any of those changes. And as to the last two, I don't think there is anything in the statute that precludes these microfilm and microfilming format, so I know of nothing in the act that would preclude the director from promulgating any regulations which would provide for microfische. . . district courts or in the districts or requiring documents be susceptible for microfilming. So we have no objection to the foreign corporation articles.

SENATOR RODEY: Actually it fits in with recordations ideas that the code has expressed in the past.

PROFESSOR FESSLER: I would point out, Senator, that I had hoped that we had accommodated this by the provisions of section 868 which say that the reports required by this chapter to be filed with the department by the commissioner shall be on forms prescribed and furnished by the commissioner.

JOHN ABBOTT: I was under the same opinion.

PROFESSOR FESSLER: We are trying to give you the broadest possible authority to prescribe the forms and say what scheme you want in. Your liability with regard to processing them under section 910 presupposes their conformity under section 890.

WILLIS KIRKPATRICK: We weren't quite sure whether actually under 910 weakened the other section.

PROFESSOR FESSLER: Well, if there is any concern circling what Chairman Abbott has stated, there is nothing in this draft that

was intended to do anything other than what you are now seeking to accomplish. And we didn't want to wed you to microfische if at some point in the future there was some other dazzling means of handling information and you were statutorily burdened with a statement that you had to come to the legislature and get it changed.

WILLIS KIRKPATRICK: We wrestled with the fact that we didn't specifically want you to name microfische in there.

PROFESSOR FESSLER: Oh.

SENATOR RODEY: If you could get the committee a memo on that and perhaps consider artful language that would allow you to do what you've stated, give you the authority to make the administrative decisions. I don't think they will have any difficulty with that. Are there any other questions? If not, the subcommittee meeting is adjourned.

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Ken Johnson, Committee Assistant
House Labor & Commerce Committee

Sheila Peterson, Administrative Assistant
Senate Labor & Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 13, 1984

RE: Profit corporations--HB 343/SB 246

You may wish to include the following background information with materials for the Joint House/Senate Labor and Commerce Committee hearing at 8:30 a.m., Monday, January 23, 1984, in the House Labor and Commerce Committee Room in the Behrends Building.

HB 343/SB 246 would replace the Alaska Business Corporations Act, AS 10.05, with the Alaska Corporations Code (ACC). The bill was introduced in both houses on April 8, 1983, to facilitate joint committee work.

On May 17, 1983, a joint hearing was set up on the bill. However, last minute conflicts developed that prevented the House committee's participation and also prevented most of the Senate members attendance.

The meeting was held, however, as a Senate Labor and Commerce meeting, chaired by Senator Pat Rodey, subcommittee on the bill. Staff of some legislators and other interested persons attended. An overview of the bill was given by Professor Dan Fessler who drafted the bill with the code revision commission, and questions were asked and answered.

A transcript of that hearing is attached. It was retyped in the code revision commission office from a garbled original. The original is available in Senate Labor and Commerce and in the code revision commission office.

The hearing set for Monday, January 23, will be the first hearing on the bill for the House committee and the second hearing on the bill for the Senate committee. However, it is anticipated that the hearing will lead off again with an explanation of the bill by Professor Fessler as in the May 17, 1983 hearing.

A general overview of the bill is also contained in the transmittal letter at the start of a section commentary on the bill in House and Senate Joint Journal Supplement No. 11. That overview is followed by in-depth commentary on the bill.

Attached also is a miniature summary of the bill.

DR:chw

Attachments

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Ken Johnson, Committee Assistant
House Labor & Commerce Committee

Sheila Peterson, Administrative Assistant
Senate Labor & Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 13, 1984

RE: Profit corporations--HB 343/SB 246

You ask who should be notified of the Monday, January 23, joint hearing on the profit corporations code.

There are some 12,000 business corporations, so individual notice to them is not practical.

I called the Alaska Bar office in Anchorage. I think its mailout date for a newsletter will just miss being practical for inclusion of notice of the joint committee hearing.

Enclosed is a draft letter to the Juneau Bar president.

Also enclosed is a note we sent to Willis Kirkpatrick, Director of the Division of Banking, Securities and Corporations.

We will notify members of an AFN subcommittee who worked on the bill and a couple of persons who have expressed an interest.

I have no grand plan for notice, though.

DR:chw

Enclosures

Draft

January 13, 1984

John Clough, President
Juneau Bar Association
801 W. 10th St., Suite 30
Juneau, Alaska 99801

Dear Mr. Clough:

Please inform persons attending the next Juneau Bar lunch:

Regarding HB 437/SB 313. On Friday, January 20, at 1:30 p.m., in Court Room A, Dan Fessler, a UC Davis law professor and consultant to the code revision commission on corporation law, will review the bill now in the legislature for a revision of law on nonprofit corporations. The attached notice which is going out to nonprofit corporations further explains the purpose of the session. It will be a teleconference.

Regarding HB 343/SB 246. On Monday, January 23, at 8:30 a.m., in the House Labor and Commerce Committee Room in the Behrends Building, a joint hearing of the House and Senate Labor and Commerce Committees will be held on the proposed revision of the business corporation law. Fessler will be on hand there, too, to explain the bill.

Persons interested in corporation law can attend these meetings, get an overview of the proposed codes, and offer testimony on good or bad features of the bills.

Very truly yours,

Dick Regan, Research Director
Alaska Code Revision Commission

DR:chw
Enclosure

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Ken Johnson, Committee Assistant
House Labor & Commerce Committee

Sheila Peterson, Administrative Assistant
Senate Labor & Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 17, 1984

RE: Profit corporations [Alaska Corporations Code]--HB 343/SB 246

As further backup for the joint House/Senate Labor and Commerce Committee hearing on the referenced bill scheduled for 8:30 a.m., Monday, January 23:

Enclosed is a subject index for the ACC.

In the index the three-digit decimals are sections numbers of proposed AS 10.06.

The numbers marked with an asterisk are section numbers of the bill.

Since the index should be helpful in reviewing the bill, we sugggest you may wish to include the index with backup materials on the bill for your committee members.

DR:chw

Enclosure

INDEX TO THE ALASKA CORPORATIONS CODE

NOTE: In this index, the three-digit decimals are section numbers of proposed AS 10.06. The numbers marked with an asterisk are section numbers of the bill.

ALASKA CODE REVISION COMMISSION

Sheila Information copy

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Willis Kirkpatrick, Director
Division of Banking, Securities & Corporations
Dept. of Commerce and Economic Development

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 30, 1984

RE: Proposed amendments to HB 343/SB 246 on profit corporations

Attached is a memorandum from Dan Fessler enclosing proposed amendments to the ACC, HB 343/SB 246.

Also attached is our note to Sheila Peterson and Ken Johnson, aides to the Labor and Commerce Committees in the Senate and House, respectively.

We understand you will be preparing a fiscal note before the Senate Labor and Commerce Committee hearing February 2, 1984. If you wish anything from us, we will help in any way we can.

DR:chw

Attachments

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: ✓ Sheila Peterson, Researcher
Senate Labor and Commerce Committee

Ken Johnson, Committee Aide
House Labor and Commerce Committee

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 30, 1984

RE: Proposed amendments to HB 343/SB 246

We have just received the attached proposed amendments to HB 343/SB 246.

Professor Fessler has agreed by a telephone conversation that another suggestion was made by Director Willis Kirkpatrick and was informally agreed upon when Kirkpatrick testified to the joint committee January 23rd. The additional change:

Page 138, line 28: Insert "Class A" before "misdemeanor".

Page 139, line 9: Insert "Class A" before "misdemeanor".

That change should be included, also. [Parenthetically, it is just a matter of drafting style, since AS 11.81.250(c) of existing law provides: ". . . A misdemeanor under Alaska law defined outside this title for which no penalty is provided is a Class A misdemeanor."]

All changes encompassed by the attached amendments were agreed to long ago by the code revision commission and the group proposing the amendment. It was understood that they would be proposed to the appropriate committee of the legislature when the bill was heard. This submittal following the January 23 hearing are in furtherance of that understanding.

Please note there is a word of explanation preceding each proposed amendment in the attachment.

Unless you advise otherwise, we will put the amendments into the appropriate form for the committee's consideration.

DR:chw

TO: MEMBERS OF THE CODE REVISION COMMISSION January 27, 1984

FROM: Professor Daniel Wm. Fessler

RE: Amendments to House Bill 343 / Senate Bill 246, "An Act Revising the Corporations Code and Providing for an Effective Date".

At testimony provided by Chairman Abbott and Professor Fessler before the Joint House and Senate Labor and Commerce Committees, the Commission affirmed its agreement to a series of minor amendments to the existing text of the above referenced bills. These amendments were initially suggested by the Department of Commerce and Economic Development, the Alaska Federation of Natives Subcommittee, and Alaska Airlines. This document will provide a draft of the changes which the Commission intends to seek and support as the ACC moves through the legislature toward enactment. In accordance with the understanding of all parties, a copy of this document will be circulated to Willis Kirkpatrick, Elizabeth Johnston, and Irv Bertram.

> [Where language is to be deleted it is struck over in this version. Additional language is indicated by being placed in upper case and underscored. Where the additional language supplants current text, the supplanted text is overstruck.]

I. AMENDMENT SUGGESTED BY THE DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT TO WHICH THE COMMISSION IS AGREEABLE AND SUPPORTIVE:

Scope of Amendment: The Department has suggested that the preservation of a zero fiscal note on the ACC is dependent upon

removal of a provision of existing Section 10.06.733 which relates to using the Department as a depository of the content of the articles and articles of amendment of foreign corporations which have sought a certificate of authority to transact business in Alaska.

The Department's testimony was to the effect that such a procedure is very cumbersome and is at variance with current Alaska practice as well as the usage in other states. The Commission has become convinced that the Department's position is sound and thus recommends that Section .733 of H.B. 343 [p. 127, lines 2-11] be amended as follows:

> Sec. 10.06.733. FILING OF APPLICATION FOR CERTIFICATE OF AUTHORITY. The application of the corporation for a certificate of authority shall be on forms prescribed and furnished by the commissioner. Duplicate originals of the application executed by its president or vice-president, and by its secretary or an assistant secretary, and verified by one of the officers signing the application, ~~together with a verified copy of its articles of incorporation and all amendments to the articles,~~ shall be delivered to the commissioner for processing according to AS 10.06.910 and for issuance of a certificate of authority.

II. AMENDMENTS SUGGESTED BY THE ALASKA FEDERATION OF NATIVES TO WHICH THE COMMISSION IS AGREEABLE AND SUPPORTIVE:

Scope of Amendments: The Subcommittee of the Alaska Federation of Natives has suggested a number of wording changes and deletions from the current text. The Commission is agreeable to and supportive of the following amendments to Sec. 10.06.960 of H.B. 343 [pp. 147-149].

Sec. 10.06.960. CORPORATIONS ORGANIZED UNDER

P.L. 92-203. (a) A corporation organized under the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688), ~~except a village corporation that may be incorporated under either this chapter or AS 10.20,~~ shall be incorporated under and is subject to this chapter except

(1) each corporation shall issue without further consideration the number of shares of common stock that may be necessary to comply with the requirements of the Alaska Native Claims Settlement Act and all stock so issued is considered fully paid and nonassessable when issued;

(2) unless otherwise provided in the articles of incorporation ~~approved by the United States Secretary of the Interior~~,

(A) the capital is considered the consideration for the initial issuance of shares; and

(B) the capital of a corporation organized under P.L. 92-203 includes

(i) the land or interests in it conveyed to the corporation by the United States under the federal Act, except that which is required to be conveyed under sec. 14(c)(1), (3), and (4) of that Act, entered at its fair value to the corporation upon receiving the conveyance of it; and

(ii) the money, when received under secs. 6, ~~7(i),~~ and 9 of that Act, that is retained by the corporation and that is not immediately distributed or required to be distributed under sec. 7(j) of that Act.

(b) Notwithstanding the provisions of AS 10.06.300---10.06.390, payment from the money of a corporation organized under P.L. 92-203 that is required by the language of P.L. 92-203 to be distributed to shareholders or to other corporations so organized ~~may not be considered to be a distribution in partial liquidation.~~ IS NOT A "DISTRIBUTION TO ITS SHAREHOLDERS" AS DEFINED BY AS 10.06.990(17).

(c) Notwithstanding the provisions of AS 10.06.546, a plan of merger, consolidation, or exchange in which each participating corporation either (1) was organized under the Alaska Native Claims Settlement Act (P.L. 92-203; 85 Stat. 688), within the same one of the 12 regions of Alaska established under the Alaska Native Claims Settlement Act, or (2) resulted from the prior merger, consolidation, or exchange of other similarly organized corporations within the same region, is approved if it receives the affirmative vote of the holders of at least a majority of the out-

standing shares of each corporation. If a class of shares of a corporation specified in this subsection is entitled to vote as a class, the plan of merger, consolidation, or exchange is approved if it receives the affirmative vote of the holders of at least a majority of the outstanding shares of each class of shares entitled to vote as a class and of the total outstanding shares. NOTWITHSTANDING THE PROVISONS OF AS 10.06.574---10.06.586, A PLAN OF MERGER, CONSOLIDATION, OR EXCHANGE QUALIFIED UNDER THIS SECTION SHALL NOT INCLUDE THE RIGHT OF SHAREHOLDERS TO DISSENT.

(d) Notwithstanding the provisions of AS 10.06.488, a director or officer of a corporation organized under the Alaska Native Claims Settlement Act ~~that is required by the language of the Act~~ is not personally liable to the contract creditors specified in AS 10.06.490 except as otherwise provided by law.

III. AMENDMENTS SUGGESTED BY ALASKA AIRLINES TO WHICH THE COMMISSION IS AGREEABLE AND SUPPORTIVE:

Scope of Amendments: The circulation of an exposure draft of the Commission's work came to the attention of Alaska Airlines with the result that useful suggestions were received which require amendments to two provisions of H.B. 343 and expansion or clarification of the Official Comments to three sections. The suggested amendments to the text of H.B. 343 are first listed following the modifications to the Official Comments.

The Code Revision Commission is agreeable to and supportive of the following amendments to H.B. 343:

*[p. 12, line 12 -- p.14]

Sec. 10.06.208. ARTICLES OF INCORPORATION. The articles of incorporation shall set out

(1) the name of the corporation;

(2) the purpose or purposes for which the corporation is organized that may be stated to be, or to include, the transaction of any or all lawful business for which corporations may be in-

corporated under this chapter;

(3) the address of its initial registered office if incorporation is after ~~March 29, 1957,~~ JANUARY 1, 1983, and the name of its initial registered agent ~~at that address~~;

(4) the name and address of each alien affiliate or a statement that there are no alien affiliates;

(5) if the corporation is authorized to issue only one class of shares, the total number of shares that the corporation is authorized to issue;

(6) if the corporation is authorized to issue more than one class of shares, or if a class of shares is to have two or more series,

(A) the total number of shares of each class the corporation is authorized to issue, and the total number of shares of each series that the corporation is authorized to issue or of which the board is authorized to fix the number of shares;

(B) the designation of each class, and the designation of each series or that the board may determine the designation of any series;

(C) the rights, preferences, privileges, and restrictions granted to or imposed on the respective classes or series of shares or the holders of the shares, or that the board, within any limits and restrictions stated, may determine or alter the rights, preferences, privileges, and restrictions granted to or imposed on a wholly unissued class of shares or a wholly unissued series of any class of shares; and

(D) if the number of shares of a series is authorized to be fixed by the board, the articles of incorporation may also authorize the board, within the limits and restrictions stated in the articles or stated in a resolution of the board originally fixing the number of shares constituting a series, to increase or decrease, but not below the number of shares of the series then outstanding, the number of a series after the issue of shares of that series; if the number of shares of a series are decreased, the shares constituting the decrease shall resume the status they had before the adoption of the resolution originally fixing the number of shares of the series.

*[p. 56, line 29]

Sec. 10.06.455. CLASSIFICATION OF DIRECTORS.

(a) If the board consists of nine or more members, the articles of incorporation may provide that instead of electing all the directors annually the directors be divided into either two or three classes, each class to be as nearly equal in number as possible, with the term of office of directors of the first class to expire at the first annual meeting of shareholders after their election, that of the second class to expire at the second annual meeting after their election, and that of the third class, if any, to expire at the third annual meeting after their election. At each annual meeting after the classification the number of directors equal to the number of the class whose term expires at the time of the meeting shall be elected to hold office until the second succeeding annual meeting if there are two classes, or until the third succeeding annual meeting if there are three classes. A classification of directors is not effective before the first annual meeting of shareholders.

(b) Unless cumulative voting rights have been eliminated by the articles of incorporation (AS 10.06.420(d)), an amendment of the articles that would establish or require classification of the board under (a) of this section may not be adopted if the votes cast against the amendment would be sufficient to elect a director if voted cumulatively at an election of the entire board.

(c) A PROVISION IN THE BYLAWS OF A CORPORATION WHICH, WERE IT A PROVISION OF THE ARTICLES OF INCORPORATION, WOULD ACCORD WITH (A) OF THIS SECTION SHALL BE VALID PROVIDED THAT IT WAS ADOPTED PRIOR TO JANUARY 1, 1971.

The Commission is agreeable to and supportive of the following changes to the text of the Commentary to Accompany Proposed Bill on the Alaska Corporations Code (ACC):

*[At page 89 of the House and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 388 should be amended to read]:

Official Comment to ACC Section 10.06.388. ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT.

SCOPE: ACC sec. 388 specifies the treatment to be given redeemed or repurchased shares. They revert to the status of authorized but unissued shares unless the articles of incorporation prohibit reissuance. If reissuance is prohibited, the article stating the number of authorized shares

must be amended to reflect the lowered number. Such an amendment of the articles must be filed with the commissioner. Shareholder approval of the required amendment is not necessary.

WHILE SEC. 388 ABOLISHED THE ANTIQUATED ACCOUNTING CONCEPT OF "TREASURY SHARES", NOTHING IN THIS SECTION IS INTENDED TO PREJUDICE THE PRESENT OR CONTINGENT CONTRACT RIGHTS WHICH PRE-ACC CORPORATIONS MAY HAVE CREATED IN REACQUIRED SHARES DESCRIBED AS "TREASURY SHARES."

CHANGE IN FORMER ALASKA LAW: ACC sec. 388 is taken from GCL Section 510. It continues prior Alaska law (former AS 10.05.312-345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies prior law by the elimination of the concept of "treasury shares."

*[At page 123 of the house and Senate Joint Journal Supplement for April 8, 1983, the Official Comment to Section 455 should be amended to read]:

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

SCOPE: Sec. 455 provides for optional classification of a board consisting of a minimum membership while taking steps to preclude the adoption of such a scheme for a corporation which has not eliminated cumulative voting from adopting such a classification scheme by amendment if shares sufficient to elect one director under cumulative voting oppose such amendment. Sec. 455 replaces former AS 10.05.186.

CHANGE IN FORMER ALASKA LAW: Sec. 455(a) is an enactment of Model Act Section 37 and works an important change from former AS 10.05.186 respecting the election to classify the board. Under prior Alaska law this decision could be taken by a bylaw adopted by the board without shareholder participation. The danger to minority share representation in such circumstances led to subsection (a)'s requirement that the election be taken in the articles, which insures shareholder participation.

Subsection (b) is new. Continuing the concern for minority share representation on the board of a corporation which has not eliminated cumulative voting, sec. 455(b) precludes amendment of the articles to classify the board if the number of shares voting "no" on the amendment or refusing to consent in writing would be sufficient to elect one director if voted cumulatively at an election of

the entire board.

SUBSECTION (C) IS NEW. IT PERMITS BOARD CLASSIFICATION PURSUANT TO THE TERMS OF A PROVISION IN THE BYLAWS RATHER THAN THE ARTICLES OF INCORPORATION. IN ORDER TO CLASSIFY A BOARD UNDER SEC. 455(C) IT IS NECESSARY THAT THE BYLAW HAVE BEEN ADOPTED PRIOR TO JANUARY 1, 1971, WITH OR WITHOUT SHAREHOLDER PARTICIPATION, AND THAT IT CONTAINS NOTHING WHICH, WERE IT A PROVISION IN THE ARTICLES OF INCORPORATION, WOULD OFFEND SEC. 455(A). THUS, ALL OF THE RESTRICTIONS ON THE MINIMUM SIZE OF THE BOARD, THE MINIMUM NUMBER OF CLASSES, AND THE TERMS OF THE DIRECTOR OFFICE SET FORTH IN SEC. 455(A) LIMIT THE TERMS OF ANY BYLAW WHICH WOULD BE EFFECTIVE UNDER SEC. 455(C).

Daniel Wm. Fessler
THE CODE REVISION PROJECT
719 Second Street
Davis, California 95616

916-752-2896

Dick Regan, Esquire
Director of Research
Alaska Code Revision Commission
Pouch Y - State Capitol
Juneau, Alaska 99811

Dear Dick:

Enclosed please find a copy of the amendments to both the ACC (H.B. 343), and the Official Comments at they appeared in the House/Senate Joint Journal Supplement under date of April 8, 1983. In each instance I have fully produced the text of the provision as altered or amended. I believe that the procedure is self-evident.

I am sending an extra copy for Willis Kirkpatrick. A copy has also been sent, express mail, to Eliz Johnston and Irv Bertram. Each has been directed to telephone your office if there are any problems.

Thank you for your kindness during our recent adventure. I look forward to seeing both you and Katie on about a month.

Sincerely,

Daniel Wm. Fessler

Enclosures: (2)

ALASKA CODE REVISION COMMISSION

ALASKA STATE LEGISLATURE
POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
(907) 465-4878

MEMORANDUM

TO: Members and staff
House Judiciary Committee
House Labor & Commerce Committee
Senate Judiciary Committee
Senate Labor & Commerce Committee

FROM: Sen. Patrick M. Rodey P.M.R.

DATE: May 13, 1983

RE: SB 246/HB 343--Corporations

I have been appointed by Dick Eliason to chair a hearing Tuesday, May 17, 1983, at 3:00 p.m., in Room 504 of the Capitol on SB 246 for a general revision of the corporations code. Probably it will be a joint hearing with House Labor & Commerce covering the identical house bill, HB 343, as originally contemplated. In any event, the hearing will cover the content of the two identical bills.

Some last minute scheduling uncertainties kept the hearing off the calendars, but a hearing on SB 246 on shortened notice has been approved.

Professor Daniel Wm. Fessler, a recognized authority on corporations law, will explain the bill. He worked with the code revision commission and interested groups for over two years in developing the revised code.

The hearing is an opportunity for education on the corporate structure and information on the bill for as many legislators and staff as can attend it.

PMR:chw

alaska federation of natives, inc.

411 W. 4th Avenue, Suite 1A • Anchorage, Alaska 99501 • Phone 907-274-3611

April 8, 1983

Mr. John W. Abbott, Chairman
Alaska Code Revision Commission
Pouch Y
State Capitol
Juneau, Alaska 99811

Dear Mr. Abbott:

I would like to take this opportunity to thank the Commission for fully providing the AFN with the opportunity to review and comment on the proposed Alaska Corporations Code. The AFN now supports the passage of Senate Bill No. 246 and House Bill No. 343.

The proposed Corporations Code is a comprehensive and generally careful legislative scheme of good quality. Further, it is accompanied by a technical commentary which can serve to reduce Native corporations' extensive litigation costs. The finance section is an important reform, making possible some distributions from capital, but not jeopardizing creditors' security. If you need us to testify on behalf of the Bill, we will do so.

Sincerely,

Janie Leask

Janie Leask
President

cc: Honorable Joe L. Hayes
Honorable Jay M. Kerttula
Honorable Walter R. Furnace
Honorable Charlie Bussell
Honorable Richard I. Eliason
Honorable Bill Ray
Honorable Al Adams
Honorable Don Bennett
Honorable John C. Sackett

eklutna INC.
TELEPHONE (907) 276-5701
840 "K" STREET, SUITE 202
ANCHORAGE, ALASKA 99501

April 17, 1984

Senator Joe. Josephson
Judiciary Committee
Pouch V
Juneau, Alaska 99811

Dear Sen. Josephson;

I am writing regarding cs for Senate Bill 246 (L&C), the Corporation Code Revision Bill.

I am very concerned with the provision on page 2, line 1-3 authorizing loans to corporate officers and directors. I feel that this provision has potential for great abuse. I don't think that corporate officers and directors should vote on loans to themselves, this just isn't proper. No matter what kind of approval system is set up, the officers and directors have final approval over corporate matters. They would also have control over the repayment schedule. I feel this could lead to abuse.

I strongly oppose the inclusion of this provision in this bill. If this provision is retained, I think, at the very least any loans authorized under this provision should be listed in the corporation's annual report under the compensation section. If corporate officers and directors make loans to themselves of corporate assets that should be noted in the corporation's annual report.

Sincerely,

Dan Alex

Dan Alex
President

cc: Sen. Ray
Sen. Eliason
Sen. Ziegler
Sen. Petty John

SB 246 SIGN-IN SHEET Proposed Legislation SB246

Name (please print)	Address	Representing	Testify?? (YES or NO)	Phone Number
Willis F Kirkpatrick	Director Banking, Securities Corporations		yes	2521
~~Darlene Kelly~~	Licensing Admn. Commercial Fisheries Entry Comm	Pouch KB	~~yes~~	4081

SENATE LABOR AND COMMERCE COMMITTEE HEARING DATE 2/2/84

Revising Corporation Code

COMMITTEE REPORT

SENATE

FURTHER:

Date: _____

Mr. President:

The Committee on _____ has had _____

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

_____

_____

_____

_____

_____

_____

_____

_____

_____

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

_____

_____

_____

_____

_____

_____

CHAIRMAN

COMMITTEE REPORT

SENATE

FURTHER: JUDICIARY

Date: _____

Mr. President:

The Committee on STATE AFFAIRS has had SB 240

Revising the Corporations code; eff. date.

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] replace with CS for _____ [ ] same title [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

_____

CHAIRMAN

HB 343 SB 246
on
Business Corporations

Summary

The bill provides for replacing the Alaska Business Corporation Act, AS 10.05, with the Alaska Corporation Code (ACC), a comprehensive revision.

The proposed ACC sets minimum requirements that must be met for the privilege of doing business in the corporate form.

Within limits it leaves to incorporators how to divide powers between shareholders and directors.

It standardizes reporting required to shareholders and the state.

It seeks to clearly define in what circumstances it is permissible to pay a dividend.

While maintaining the right of shareholders to sue corporate officers and directors in appropriate circumstances, it seeks to control the misuse of these "derivative suits".

It also seeks to control misuse of the limited liability of officers and directors that the corporate form provides.

In the covering letter at the start of the commentary that follows in this binder, there is an expanded summary of the bill. Following that is a section analysis which includes the background and basis for choices that have been made in drafting the bill.

Status

The bill is introduced in both houses for greater flexibility and for the possibility of joint hearings should that be the choice of the house and senate committees.

Status going into the Second Session of the Thirteenth Legislature: In House and Senate Labor and Commerce Committees, the first committees of reference. Second reference: House and Senate Judiciary Committees.