HOUSE AND SENATE JOINT
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April 10, 1987

Bill on the Alaska Corporations Code
HB 322/SB 306

"An Act revising the corporations code; amending Alaska Rules of Civil Procedure 4, 10, 11, 19, 20, 23.1, 24, 65, 73, and 82, Alaska Rules of Appellate Procedure 204 and 609, and Alaska Rule of Evidence 803(8); and providing for an effective date."

Identical text in both bills

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Letter to Senator Bettye Fahrenkamp: Pages 1 - 9

Sectional Analysis: Pages 1 - 203

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 99811
(907) 465-3800

April 10, 1987

The Honorable Bettye Fahrenkamp
Chair, Alaska Legislative Council
Pouch V, State Capitol
Juneau, Alaska 99811

RE: Bill on the Alaska Corporations Code

Dear Senator Fahrenkamp:

Pursuant to the authority granted in AS 24.20.075(c), the Alaska Code Revision Commission has prepared the attached bill on the Alaska Corporations Code and requests its introduction.

For more than six years the Commission has labored to review the content of existing Alaska statutory law on profit corporations. Comment has been invited and received from numerous Alaskans including a special subcommittee set up by the Alaska Federation of Natives. An ad hoc committee of the business law section of the Alaska Bar Association examined a draft of the Commission's recommendation to the Thirteenth Legislature and made numerous formal and informal suggestions and comments. While there remain differences of opinion among some commentators, there appeared at that time to be widespread agreement that existing legislation on this subject is in serious need of revision. Let me comment first upon the general need for revision, then describe the approach taken by the Commission, and conclude by pointing out some of the more important features of the recommendation that I am forwarding with this letter.

The need for reform of Alaska's statutory law respecting profit-seeking corporations: Existing legislation on this subject, currently found as Chapter 5 of Title 10 of the Alaska Statutes, was adopted in 1957 and was predicated upon the then existing content of Oregon law. At that time, the State of Oregon had adopted a 1953 version of the Model Business Corporation Act, which was formulated by a committee of the American Bar Association. From the date of that enactment until the present time, this model has served as the foundation of all Alaska legislation in the corporate field.

The interest of the Alaska Code Revision Commission in reviewing the current legislation was prompted by several factors. First was a recognition that the level and diversity of business operations in our state has expanded to the point that many of the basic assumptions valid in the 1950's may have produced a statute no longer serviceable as Alaska approaches the 1990's. We were aware that corporations formed in response to the Alaska Native Claims Settlement Act found themselves under the provisions of a statutory scheme adopted long before Congress conceived the scheme of forcing the corporate organization upon substantial segments of our population and economy. Within less than five years the stock of these corporations will become freely transferable, special federal law provisions will expire, and Native corporations will be subject to state corporations law for all purposes. These developments and challenges convinced the Commission that no legislation enacted or recommended in other states could be blindly relied upon to best function in the conditions encountered by Alaskans.

In particular, the Commission became convinced that the 1953 version of the Model Act, which represented an "off the rack" wholesale adoption of a statute never intended for the needs of any particular state, represented a poor choice for current Alaska law and an even poorer vehicle for our future. Other states have reached similar conclusions. Both New York and California have undertaken systematic revision of their corporate statutes in the past decade, and their work products differ significantly from the Model Act. Even as the Commission was making these determinations, the Business Law Section of the American Bar Association concluded that the original Model Act was in serious need of revision. In 1983, a tentative draft of that Section's recommended content of a Revised Model Business Corporation Act was brought to our attention by our consultant. In July, 1984, a final draft form for this recommended statute was agreed upon by the American Bar Association Committee. The Commission has reviewed both drafts of the Revised Model Act, as well as the current content of corporate statutes in California, New York, Oregon, Washington, and Delaware. In each instance our goal has been to determine the most useful approaches to the enabling of corporate activity in Alaska and securing accountability for such conduct.

The Commission's approach to a recommended revision: In undertaking a revision of the Alaska profit-seeking corporations code the Commission found philosophical as well as technical differences in the corporate legislation of sister states. Delaware is widely regarded as a "pro management" jurisdiction with an approach to corporate regulation that places emphasis upon a strong board of directors calculated to be in a dominant position relative to the interests of shareholders. Standing at the opposite extreme is California, long regarded as a "pro shareholder" jurisdiction with statutes designed to enhance the protection of shareholders at the expense of incumbent management.

A basic enabling statute that leaves the major decisions respecting the power of shareholders and management to the individuals framing the articles of incorporation: An initial decision of the Commission was to avoid mandating either the Delaware or California extreme. Instead, the Commission sought to design a statute that was first and foremost understandable to the average individual desiring to do business in the corporate form. Both the organization and content of the new act are designed to clearly impart the minimum requirements established by the state as a price tag for the privilege of doing business in the corporate form; to set forth the choices which ought to be made by each group seeking incorporation with respect to the division of powers between shareholders and directors; and to standardize the methods of essential reporting on corporate activities made to shareholders and the state.

Finally, the proposed statute has gone to substantial length to replace complex and frequently misunderstood accounting concepts with clearly defined guidelines as to the circumstances in which it is permissible to pay a dividend to shareholders. Few areas have presented greater opportunity for abuse in the past. The potentially adverse interests of corporate creditors, shareholders, and directors require that all concerned be readily able to apply the minimum standards for socially responsible behavior that are mandated by the statute.

No attempt to subject foreign corporations to the organizational framework of this recommended statute: The status of "foreign corporations" in Alaska came under close scrutiny. A foreign corporation is organized under the laws of another state or nation and thereafter seeks permission to transact business in Alaska. The degree to which these corporations ought to conform to the structure and practices mandated for entities organized under the laws of Alaska was debated in view of the recent experience in California. California legislators felt that foreign incorporation was frequently used by businesses intending to conduct the bulk of their affairs in California and intending to have as the majority of their employees and shareholders Californians, and yet organized under the laws of other jurisdictions (frequently Delaware) for the sole purpose of avoiding the public policy judgments expressed in the California General Corporations Law. To counter this perceived abuse, the 1977 California Act developed the concept of "pseudo foreign corporations" and as to these entities attempted to apply California law regarding internal management and financial operations. This bill does not attempt to subject foreign corporations to the organizational framework of this statute.

Foreign and domestic corporations treated alike for purposes of disclosure and reporting: After substantial discussion, it was concluded that Alaska should not, for the present, follow the California approach. As noted, the proposed Alaska Corporations Code is a middle-of-the-road statute that does not attempt to force upon domestic corporations a particular bias toward shareholder status. Under the proposed Code, it is possible to create a corporation that features rights for shareholders that go beyond even the California model. However, this is not mandatory. Because the proposed Code has left these matters up to the Alaskans forming the corporation, it was felt that the idea of foreign incorporation was less objectionable. However, the Commission is interested in making foreign corporations that elect the privilege of doing business in Alaska as responsible for their activities as are domestic (Alaska) corporations. To that end, the proposed Code has made uniform the basic reporting and disclosure requirements and has applied them to both domestic and foreign entities. The organizational framework of the Code is designed to make it easy for a non-Alaskan to determine the scope of these responsibilities, since they are gathered together in a single article rather than being intermixed throughout the text, as in the existing statute.

Evolving needs of Alaska Native Corporations anticipated and accommodated within a unitary statute: The proposed Code will enable the Legislature to ensure that when the exemptions and special provisions in federal law relating to Native corporations expire, those vital entities will be governed by statutory law developed after an extensive survey of their needs. The Commission has adopted the strongly felt sentiment of the Alaska Federation of Natives Task Force that Native corporations should not be governed by a separate code. If they are to play a vital social and economic role in advancing the interests of their shareholders, it was felt that these corporations cannot be hobbled by some unique statutory scheme causing doubt and encouraging litigation as to their powers and responsibilities.

Specific features: Two specific features of the proposed legislation are worthy of special mention. They relate to shareholder litigation and an abuse of limited liability.

Shareholder actions brought in the name of the corporation (derivative suits) were previously unregulated by statute in Alaska. In other jurisdictions few areas of corporate law have proven a greater source of conflict. On the one hand, the ability of a single shareholder to bring an action against a director or officer of that corporation and to recover for a breach of the duty of loyalty or care owed to the entity has been hailed as an essential weapon in the fight for social responsibility. Yet it cannot be denied that such litigation is both time-consuming and costly. Further, there is an unhappy history of shareholders commencing an action on the most tenuous of grounds in the hope that the defendants would buy their peace with an out-of-court settlement rather than stand and defend their records. Money paid in this fashion was usually pocketed by the shareholder even though the alleged injury had been to the corporation. This obvious abuse has been termed a "strike suit". The challenge is to draft a statute that facilitates the legitimate derivative action while at the same time removing the financial incentives from the strike suit.

Section 10.06.436 of the proposed Code is the most balanced and specific derivative suit statute in the United States. It combines the best features of federal, California, New York, and Delaware approaches to this previously unregulated area. In a June, 1984 address before a section of the Alaska Bar Association, Professor Robert Hamilton, who acted as the reporter in framing the recommended content of the

Revised Model Act, praised the Commission's efforts and work product in this important regard.

Limited liability is an extraordinary advantage afforded to those citizens who elect to do business in the corporate form. In undertaking its study, the Commission has been concerned with the balance between the legitimate interest of enterprisers against the not infrequent fact of and constant potential for abuse of other citizens who must deal, voluntarily or involuntarily, with a corporate entity. No provision of the proposed Code has drawn more interest, comment, and criticism than Section 488 of the draft introduced by Legislative Council as HB 343 and SB 246 in the Thirteenth Legislature. (The section number is the same in this bill) Because of this interest and the variety of strongly held beliefs advanced by a number of attorneys who have testified in hearings before the Legislature, I would like to explain the Commission's perception of a social problem, recount how the Commission originally proposed to resolve that problem, and explain the changes now suggested by the Commission in that approach.

It is an assumption on the part of those doing business in the corporate form that their personal assets are insulated from creditor claims against the corporation. This insulation from personal responsibility is a privilege conferred by the state upon some citizens that works to the substantial economic injury of others. The Commission suggests that such an extraordinary privilege is not, and should not be, without limits. In the marketplace, large institutional lenders and suppliers are protected by the presence of market leverage, the advice of counsel, and significant experience. This strength allows them to insist that participants in a corporate venture considered a poor risk pledge their personal liability as guarantors of the corporate obligation. If a tort claim arises, and the victim's injury or loss exceeds the corporation's assets, there are common law doctrines to "pierce the corporate veil" and obtain the personal assets of shareholders. Contingent fee arrangements, whereby the tort victim's lawyer is paid only if there is a recovery from the defendant, offer a reasonable probability that the tort victim can find legal representation.

However, this combination of economic and legal self-help for third parties has failed to protect the class of individuals most frequently victimized. These are the creditors of businesses that are incorporated with insubstantial assets and thereafter operated for the convenience of owners for as long as this proves advantageous. Thereafter, the corporation is simply abandoned, usually without any effort to comply with the statutory procedures for corporate dissolution. When this happens, suppliers, materialmen, employees, and others who have extended informal credit to the business are left without practical recourse. Because their business relationships have been informal, it is rarely the case that they will have contracted for the personal liability of those operating behind the corporate veil. Because their unpaid claims rarely exceed a few thousand dollars, the cost of litigation makes legal remedies impractical. The net result is that these creditors absorb a loss that they then pass on to the general public in the form of higher prices for their goods and services. In the worst case, they simply go out of business, depriving the public of their presence as competitors, employers, and taxpayers in the community.

To date, the only jurisdiction that has consistently attempted to address this problem has been New York. As early as 1848, that state imposed personal liability on shareholders for any unpaid claims of corporate servants or employees. While that liability has been modified, it remains a feature of New York's Business Corporation Law. After lengthy debate, which included consultation with immediate past and present officials in the Department of Commerce and Economic Development, the Commission decided to confront the problem in a different manner. Placing liability on the shareholders was rejected because it would frequently expose individuals who may have had no active part in running the business along with those who should be held accountable. Instead, the Commission proposed a secondary liability on the part of the designated directors and officers, on the theory that these individuals have either made all of the business decisions or have had it within their immediate power to discipline those who have run the corporation.

As initially proposed, their liability was both secondary and limited. It was secondary in that all creditors must first exhaust the assets of the defunct corporation before any claim against directors or officers may arise. It was also limited in that Section 488 made no effort to bargain for greater liability, such as banks and other institutional lenders. Liability arose only in favor of contract indebtedness for materials, supplies, inventory, or services furnished within Alaska. Further, that liability was limited to twenty-five thousand dollars on any contract indebtedness. Finally, individuals were free to preclude the liability created by Section 488 by the terms of a written contract.

Critical comment directed at Section 488 has been reviewed and given serious consideration by the Commission. While some persons felt that there should be no discipline of the limited liability privilege beyond that suggested at common law, others objected to two features of the Commission's suggestion: the very large potential for liability when the limitation was $25,000 per creditor; and the potential that a court could interpret the original language to fix liability on an assistant secretary or some other subordinate officer. Upon reconsideration, these criticisms have been deemed valid and accordingly the Commission now recommends a significantly altered provision on secondary liability for incorporators, directors and certain officers.

As currently revised, the recommended provision on secondary liability differs in three important particulars from the one submitted to the Thirteenth Legislature. First, subsection (a) has been amended to make clear that the only persons potentially liable are incorporators, directors (or their delegates) and three specific officers in any Alaska corporation. In the instance of a foreign corporation doing business in Alaska, if the law of its state of incorporation permits substitutes for the officers who would otherwise have liability, such persons are liable to Alaskans for debts arising from transactions in our state. The objection that any employee performing at the command of the corporate president might be liable is thus expressly precluded. Second, the period of liability for an incorporator is now clearly defined by the new subsection (b). Third, the maximum exposure has been reduced by 90% to $2,500 per claimant, rather than $25,000, by the amended content of subsection (d). As redrafted, the liability preserved by this provision will work only in favor of the smallest creditors for whom the cost of litigation would be totally out of proportion to any vindication of their just claims.

As the Council is doubtless aware, prior versions of this proposed Alaska Corporations Code were introduced in March, 1982 and March, 1983, and in February, 1985. The press of business precluded its consideration in the first session of the Thirteenth Legislature. In the second session, the recommended Code was reported with a "do pass" recommendation out of the Senate Labor and Commerce Committee. It had not moved further at the expiration of the Thirteenth Legislature. The Commission has attempted to find in such circumstances further opportunity to refine the proposed Code and to expose its contents to interested segments of the community. The bill was not acted upon in the Fourteenth Legislature as HB 246 and SB 199.

In addition to the activities summarized in my letter of March 3, 1983, members of the Commission appeared as witnesses before both House and Senate Committees. Representatives of the Alaska Federation of Natives also appeared expressing orally their support for passage of this Code, which they have asserted in writing to members of the leadership in both bodies. The initial and final drafts of the proposed Revised Model Business Corporation Act were carefully reviewed, as well as the comments of its reporter who appeared in Anchorage during the June, 1983, convention of the Alaska Bar association. Many positive suggestions were found in the comments received from numerous quarters. The original recommended content of the Alaska Corporations Code continued the strong influence of the original Model Act. In a much simplified and more understandable organizational scheme, that influence continues, but is now heavily augmented by the work product of the drafters of the Revised Model Act.

The Commission recommends that the organization scheme of the new Code be adapted from that of the New York Business Corporation Law. In contrast to the more elaborate organization adopted for the Revised Model Act, the attached proposal draws related provisions of the statute together into twelve substantive articles creating a comprehensive and easily understandable organization.

Respectfully submitted,

John W. Abbott

John W. Abbott, Chairman
Alaska Code Revision Commission

JWA:mkr
m9/006
cc: Hon. Steve Cowper
Hon. Jay Rabinowitz, Chief Justice
Executive Director, Legislative Affairs Agency

# STATE OF ALASKA
## THE LEGISLATURE
### LEGISLATIVE AFFAIRS AGENCY

POUCH • STATE CAPITOL
JUNEAU ALASKA [illegible]
[illegible]

M E M O R A N D U M May 7, 1987

SUBJECT: Sectional Analysis of proposed Code Revision Bills revising the Corporations Code (Work Orders 5-0482 and 5-1076)

TO: Senator Bettye Fahrenkamp
Chair, Legislative Council

FROM: Theresa L. Bannister
Legislative Counsel

This is the revised sectional analysis that you requested for the proposed Code Revision Commission bills (House and Senate) on the revised corporations code. It accompanies the latest version of the bills. The bulk of the analysis and language is taken directly from House and Senate Joint Journal Supplement No. 8 of February 27, 1985; I have merely brought it up to date for the proposed bills.

ABBREVIATIONS USED

In this commentary the following abbreviations are used:

ACC--Alaska Corporations code (the short title of the comprehensive revision of corporation law to be made by this bill).

MBCA or "the Model Act"--Model Business Corporation Act as revised through July 1, 1969 (A product of a committee of the American Bar Association first published in 1950 and carried forward with changes until generally revised in 1984. The 1953 version became the basis of the existing Alaska Business Corporation Act, ch. 126, SLA 1957, now AS 10.05.003 -- 10.05.828).

RMBCA or Revised Model Act--Revised Model Business Corporation Act (1984) (the 1984 comprehensive revision by a committee of the American Bar Association of its earlier Model Business Corporation Act).

CGCL or GCL--California General Corporation Law (the 1977 omnibus revision of California's for-profit corporations code, one of the two principal sources for the ACC).

NYBCL or BCL--New York Business Corporation Law (the second of the two principal sources for the ACC).

ANCSA--Alaska Native Claims Settlement Act (Public Law 92-203, as amended, 43 U.S.C sec. 1601, et seq., the federal Act of December 18, 1971, and its amendments settling land claims and providing for the formation of regional and village corporations. The Act and its amendments are reprinted in Volume 1 of Alaska Statutes).

## CHAPTER 06. ALASKA CORPORATIONS CODE

### ARTICLE 1. CORPORATE PURPOSES AND POWERS

Sec. 10.06.005. Purposes
Sec. 10.06.010. General Powers
Sec. 10.06.015. Defense of Ultra Vires
Sec. 10.06.020. Limitations on Authority of Corporate Agents
Sec. 10.06.025. Contracts or Conveyances Binding Domestic and Foreign Corporations

### ARTICLE 2. NAME AND SERVICE OF PROCESS

Sec. 10.06.105. Corporate Name
Sec. 10.06.110. Reservation of Corporate Name
Sec. 10.06.115. Application to Reserve Corporate Name
Sec. 10.06.120. Transfer of Reserved Name
Sec. 10.06.125. Registration of Corporate Name
Sec. 10.06.130. Use of Same or Deceptively Similar Name
Sec. 10.06.135. Procedure for Registration of Corporate Name
Sec. 10.06.140. Fee for and Duration of Registered Name
Sec. 10.06.145. Renewal of Registered Name
Sec. 10.06.150. Registered Office and Registered Agent
Sec. 10.06.155. Registration of Agent by Nonresident With Controlling Interest
Sec. 10.06.160. Filing List of Registered Corporations With Superior Court; Updating and Publishing
Sec. 10.06.165. Change of Registered Office or Agent
Sec. 10.06.170. Change or Resignation of Registered Agent
Sec. 10.06.175. Service of Process on Corporation

### ARTICLE 3. FORMATION OF CORPORATIONS

Sec. 10.06.205. Incorporators
Sec. 10.06.208. Articles of Incorporation
Sec. 10.06.210. Articles of Incorporation: Optional Provisions
Sec. 10.06.213. Filing of Articles of Incorporation

Sec. 10.06.360. Prohibited Distribution: Inability to Meet Maturing Debts and Liabilities
Sec. 10.06.363. Prohibited Distribution of Junior Shares; Liquidation Preference
Sec. 10.06.365. Prohibited Distribution to Junior Shares; Ratio of Retained Earnings
Sec. 10.06.368. Exception for Purchase or Redemption of Shares of Deceased Shareholder
Sec. 10.06.370. Inapplicability to Regulated Investment Company
Sec. 10.06.373. Share Dividends; Restrictions
Sec. 10.06.375. Additional Restrictions in Articles, Bylaws, Indentures or Agreements
Sec. 10.06.378. Liability of Shareholders Receiving Prohibited Distributions; Suit Against Shareholders
Sec. 10.06.380. Identification of Distribution in Notice to Shareholders
Sec. 10.06.383. Inapplicability to Winding up and Involuntary or Voluntary Dissolution
Sec. 10.06.385. Redemption of Shares at the Option of Corporation; Manner
Sec. 10.06.388. Acquisition of Corporation's Own Shares; Reissuance or Retirement
Sec. 10.06.390. Capitalization of Retained Earnings

ARTICLE 5. SHAREHOLDERS

Sec. 10.06.405. Meetings of Shareholders
Sec. 10.06.408. Closing of Transfer Books and Fixing Record Date
Sec. 10.06.410. Notice of Shareholders' Meeting
Sec. 10.06.413. Voting List; Liability
Sec. 10.06.415. Quorum of Shareholders
Sec. 10.06.418. Proxies
Sec. 10.06.420. Voting of Shares
Sec. 10.06.423. Actions Taken Without Meeting: Written Consent; Revocation of Consent
Sec. 10.06.425. Voting Trusts and Agreements Among Shareholders
Sec. 10.06.428. Shareholders' Preemptive Rights
Sec. 10.06.430. Books and Records
Sec. 10.06.433. Annual Report to Shareholders: Content; Financial Statement on Request
Sec. 10.06.435. Shareholders' Derivative Action
Sec. 10.06.438. Liability of Shareholders and Subscribers

ARTICLE 6. DIRECTORS AND OFFICERS



ARTICLE 7. AMENDMENTS AND CHANGES

Senator Bettye Fahrenkamp
Page 7
May 7, 1987

## ARTICLE 8. ORGANIC CHANGE

Sec. 10.06.530. Merger
Sec. 10.06.532. Procedure for Merger
Sec. 10.06.534. Consolidation
Sec. 10.06.536. Procedure for Consolidation
Sec. 10.06.538. Share Exchange
Sec. 10.06.540. Procedure for Share Exchange
Sec. 10.06.542. Disparate Treatment of Shares of the Same Class or Series Prohibited: Exceptions
Sec. 10.06.544. Notice to and Approval by Shareholders
Sec. 10.06.546. Manner of Approval by Shareholders
Sec. 10.06.548. Abandonment of Plan of Merger, Consolidation, or Exchange
Sec. 10.06.550. Articles of Merger, Consolidation, or Exchange
Sec. 10.06.552. Filing of Articles of Merger, Consolidation, or Exchange
Sec. 10.06.554. Merger of Subsidiary Corporation
Sec. 10.06.556. Procedure for Merger of Subsidiary Corporation
Sec. 10.06.558. Filing of Articles of Merger of Subsidiary Corporation
Sec. 10.06.560. Effect of Merger, Consolidation, or Exchange
Sec. 10.06.562. Merger, Consolidation, or Exchange of Shares between Domestic and Foreign Corporation
Sec. 10.06.564. Reorganization: Disclosure of Alien Affiliates
Sec. 10.06.566. Sale of Assets in Regular Course of Business; Mortgage or Pledge of Assets
Sec. 10.06.568. Sale of Assets not in Regul. . Course of Business
Sec. 10.06.570. Approval of Transaction by Shareholders
Sec. 10.06.572. Abandonment of Transaction by Board
Sec. 10.06.574. Right of Shareholders to Dissent
Sec. 10.06.576. Rights of Dissenting Shareholders: Procedure to Enforce Shareholder's Right to Receive Payment for Shares; Withdrawal of Demand
Sec. 10.06[illegible] [illegible]er and Payment to Dissenting Shareholders; Circumstances Where Prohibited
Sec. [illegible]. Action to Determine Value of Shares Upon Failure to Accept Corporate Offer
Sec. 10.06.582. Status of Shares Acquired From Dissenting

Shareholders

ARTICLE 9. DISSOLUTION

Certificate of Authority

Sec. 10.06.735. Effect of Certificate of Authority
Sec. 10.06.738. Amended Certificate of Authority
Sec. 10.06.740. Powers of Foreign Corporation
Sec. 10.06.743. Revocation of Certificate of Authority
Sec. 10.06.745. Limitations on Revocation of Certificate of Authority
Sec. 10.06.748. Issuance of Certificate of Revocation
Sec. 10.06.750. Effect of Certificate of Revocation
Sec. 10.06.753. Registered Office and Registered Agent of Foreign Corporation
Sec. 10.06.758. Change of Registered Office or Registered Agent of Foreign Corporation
Sec. 10.06.760. Filing of Statement of Change
Sec. 10.06.763. Service of Process on Foreign Corporation
Sec. 10.06.765. Service on Commissioner
Sec. 10.06.768. Records Kept by Commissioner
Sec. 10.06.770. Procedure not Exclusive
Sec. 10.06.775. Organic Change of Foreign Corporation
Sec. 10.06.778. Withdrawal of Foreign Corporation
Sec. 10.06.780. Contents of Application for Withdrawal
Sec. 10.06.783. Form of Application for Withdrawal
Sec. 10.06.785. Filing of Application for Withdrawal
Sec. 10.06.788. Effect of Certificate of Withdrawal

ARTICLE 11. REPORTS, FEES, AND PENALTIES

Sec. 10.06.805. Biennial Report of Domestic and Foreign Corporations
Sec. 10.06.808. Contents of Biennial Report
Sec. 10.06.811. Filing of Biennial Report
Sec. 10.06.813. Filing Notice of Change of Officers, Directors, Five Percent Shareholders, and Alien Affiliates
Sec. 10.06.815. Penalty for Failure to File Biennial Report
Sec. 10.06.818. Interrogatories by Commissioner; Judicial Proceeding to Contest
Sec. 10.06.820. Confidentiality of Information Disclosed by Interrogatories
Sec. 10.06.823. Failure to Answer Interrogatories
Sec. 10.06.825. Penalties Imposed Upon Officers and Directors
Sec. 10.06.828. Incorporation or Filing Fees
Sec. 10.06.830. Fees on Appointment or Revocation of Appointment of Process Agent or Change of Agent's Address

Sec. 10.06.833. Fees and Penalties Payable on Withdrawal of Foreign Corporation
Sec. 10.06.835. Fees on Dissolution of Domestic Corporation
Sec. 10.06.838. Taxes, Penalties, and Fees on Filing Certificate of Dissolution of Foreign Corporation
Sec. 10.06.840. Fees for Certified Copies of Document
Sec. 10.06.843. Other Filing Fees
Sec. 10.06.845. Biennial Corporation Tax; Penalty for Nonpayment
Sec. 10.06.848. Failure to Pay Tax or Make Report as Precluding Suit by Corporation
Sec. 10.06.850. Commissioner to Institute Suits to Compel Payment
Sec. 10.06.853. Failure to Pay Tax as Evidence of Insolvency
Sec. 10.06.855. Payments to be Made in Advance
Sec. 10.06.858. Accounting for and Disposition of Taxes and Fees
Sec. 10.06.863. Appeal From Revocation of Certificate of Authority
Sec. 10.06.865. Cancellation of Certificates Issued and Filings Accepted
Sec. 10.06.868. Forms to be Furnished by the Commissioner
Sec. 10.06.870. Identification Code

ARTICLE 12. MISCELLANEOUS PROVISIONS

Sec. 10.06.905. Voting of Shares; Quorum; Status of Disqualified Shares
Sec. 10.06.910. Processing of Writings Filed With the Commissioner
Sec. 10.06.915. Disapproval of Writing by Commissioner; Appeal
Sec. 10.06.920. Writings; Corrections
Sec. 10.06.925. Writings as Evidence
Sec. 10.06.930. Corporate Seal as Evidence
Sec. 10.06.935. Waiver of Notice

ARTICLE 13. GENERAL PROVISIONS

Sec. 10.06.950. Powers of Commissioner
Sec. 10.06.953. Regulations
Sec. 10.06.955. Applications
Sec. 10.06.958. Provisions Construed as Restatements and

Continuation

Sec. 10.06.960. Corporations Organized Under P.L. 92-203
Sec. 10.06.963. Severability
Sec. 10.06.965. Reservation of Power
Sec. 10.06.968. Signature
Sec. 10.06.970. Rules of Construction and Interpretation
Sec. 10.06.990. Definitions
Sec. 10.06.995. Short Title

* Sections 2-4 amend the references to the present corporation code in three statutory sections.

* Sec. 5. Repealer

* Sec. 6. Application of Provisions to Domestic and Foreign Corporations

* Sec. 7. Exercise of Reserve Power

* Sec. 8. Application to Articles of Existing Corporations

* Sec. 9. Amendment of Articles of Incorporation

* Sec. 10. Indemnification by a Corporation

* Sec. 11. Distributions and Reacquisition of Shares

* Sec. 12. Tenure of Officers Preserved

* Sec. 13. Existing Actions

* Secs. 14-35 describe how the proposed new code amends the state's court rules

* Sec. 36. Effective date section.

ALASKA CODE REVISION COMMISSION

COMMENTARY TO ACCOMPANY

PROPOSED BILL ON THE

ALASKA CORPORATIONS CODE (ACC)

MAY 1987

Official Comment to ACC Section 10.06.050. PURPOSES.

SCOPE: ACC sec. 005 permits an Alaska corporation to be formed for any lawful purpose(s) other than insurance and banking. Stock and mutual insurance companies are formed under AS 21.69; the companies are of a corporate nature and are governed by the ACC to the extent provided in sec. 21.69.020, the "bridge" statute. Reciprocal insurance companies, noncorporate in nature, are formed under AS 21.75.

CHANGE IN FORMER ALASKA LAW: ACC sec. 005 alters the content of former AS 10.05.003 to conform to the content of Section 3 of the Model Business Corporation Act (MBCA).

Official Comment to ACC Section 10.06.010.

GENERAL POWERS.

SCOPE: In the earliest societal experience corporations were chartered by the sovereign for limited purposes and had, correspondingly, limited powers. Such concepts have been totally supplanted by general incorporation statutes which typically confer upon corporate entities all of the powers of a natural person. ACC sec. 010 adheres to this contemporary practice. However, it is not necessary that a corporation enjoy the plenary powers conferred by the ACC, and sec. 010 makes it clear that these powers may be curtailed, modified, or eliminated by aptly drafted provisions of the articles of incorporation.

CHANGES IN FORMER ALASKA LAW: ACC sec. 010 is predicated upon former AS 10.05.009 and Section 4 of the MBCA. The introductory phrase is adopted from Section 207 of the

California General Corporation Law (CGCL or GCL) and makes explicit that the general powers are subject to limitation by provisions in the articles of incorporation or other laws. Subsection (5) makes direct reference to the new provision on loans to officers and directors (ACC sec. 485). Subsection (15) adds "stock option plans" to the list of incentive plans which a corporation formed under the ACC may establish for its directors, officers and employees.

Official Comment to ACC Section 10.06.015.

DEFENSE OF ULTRA VIRES.

SCOPE: ACC sec. 015 governs the limited circumstances in which a claim of "ultra vires" may affect the rights of third parties who have dealt with a corporate entity and the impact of such behavior in creating liability on the part of corporate officers and directors to the corporation. While the concept of "ultra vires" is frequently included in the discussion of agency problems within the corporate framework, properly understood it is not a traditional doctrine of agency law. A transaction is ultra vires when it is beyond the powers of the corporation as those powers are conferred by law and the terms of the articles of incorporation. Within the constructs of the law of agency the corporation, acting through its board, is the principal and the officers are its agents. Sec. 015 is not concerned with restrictions upon the authority of these agents which may be defined by the articles, the bylaws or resolutions of the board. Rather, concern is with transactions to which they have committed the corporate entity which exceed the power of that corporate principal.

For the purpose of determining the powers of a corporation, reference must be made to ACC sec. 010 (general powers) and to the articles of incorporation of that entity. From these two sources one can determine the extent of the express real authority which the corporate officers and directors may exercise in the service of the corporate principal. To these express powers are to be added authorization to enable the corporate agents to efficiently and effectively carry on the purposes or tasks for which the corporation was created. Physical necessity and business custom are the traditional fonts of this evidence. See Park v. Alta Ditch & Canal Co., 458 P.2d 625 (Utah, 1969). For the purpose of minimizing the assertion of "ultra vires" charges, effective limitations upon the powers of the corporation may not be placed in the corporate bylaws. <u>See</u>, ACC sec. 210(1)(F). <u>Accord, Jennings v. Ruldoso Racing Ass'n.</u>, 441 P.2d 42 (N.M., 1966); and, <u>In re Dinkard</u>, 25 A.D.2d 34, 280 N.Y.S.2d 959 (1967).

Sec. 015(a)(1) governs a derivative action by a shareholder to enjoin the doing of any act or the transfer of real or personal property or by or to the corporation on the theory that the transaction is ultra vires to the entity. In the extent that the activity of which complaint is made involves the rights of third parties, sec. 015 remits the matter to the equity powers of a reviewing court. There is an express limitation that the court, in computing and awarding damages to any party, may not include the "expectation interest", being the anticipated profits of the ultra vires transaction. Unaffected by this statutory limitation are damages calculated upon a theory of restitution (quasi-contract) and reimbursement (costs incurred in good faith detrimental reliance).

Sec. 015(a)(2) grants standing for either a direct or derivative action to obtain judgment in the name of the corporation against such officers and directors who may be guilty of the ultra vires act. Compensatory damages for any loss or damage sustained by the corporate entity (including any liability incurred by the corporation to a third party under sec. 015(a)(1) would be the appropriate remedy under sec. 015(a)(2).

Sec. 015(a)(3) coordinates with the authority of the commissioner to bring action for involuntary dissolution of any corporation which has continued to exceed or abuse the authority conferred upon it by law. ACC sec. 633(a)(2).

Sec. 015(b) extends the provisions of sec. 015(a) as consequence of an ultra vires contract or conveyance made by a foreign corporation within the State of Alaska or of real estate within the State of Alaska.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC. sec. 015(a) is predicated upon Section 203 of the New York Business Corporation Law (NYBCL or BCL). It is a modified version of former AS 10.05.018 and Section 7 of the MBCA. Sec. 015(b) is new and is taken from Section 208 of the GCL.

Official Comment to ACC Sections 10.06.020--025.

LIMITATIONS ON AUTHORITY OF CORPORATE AGENTS; CONTRACTS OR CONVEYANCES BINDING DOMESTIC AND FOREIGN CORPORATIONS.

SCOPE: Unlike transactions or conduct assailed as beyond the powers of the corporation, a subject covered by ACC sec. 015, sec. 020 deals with the consequences of an abuse of authority which was within the power of the corporate principal to confer. The provisions of sec. 015 confront the common law of agency as it has been applied to the unique problems generated by an artificial, corporate person as a principal. The basic premises if agency law are unquestioned. A corporate principal is liable for any authorized conduct of its agents. This authority may be either express (imparted by the terms of the articles, bylaws, board resolution or [where competent] a shareholders' agreement); or, implied as being sanctioned by either custom or necessity in the agent's otherwise uninstructed pursuit of the goal defined for accomplishment by the principal. When a corporate agent acts within the scope of either express or implied authority, authorities speak of the "real authority of the agent."

ACC sec. 020 presumes that a corporate agent has acted without real authority (express or implied) from the corporate principal. Notwithstanding, if "apparent authority" supported the transaction, the statute makes it clear that the third party acquires the full liability of the betrayed corporate principal upon the executory terms of the unauthorized agreement. In the event such liability is asserted, the language also makes clear that the corporation acquires full rights upon all terms of the unauthorized agreement.

In many jurisdictions "apparent authority" is a poorly understood concept. Alaska is an exception. In 1967, and again in 1973, the Supreme Court clearly defined and applied the concept. "Apparent authority to do an act is created as to third persons by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Perkins v. Willacy, 431 P.2d 141, 142 (1967). Accord, Bruton v. Automatic Welding & Supply Corp., 513 P.2d 1122, 1125 (1973). These cases clearly indicate that apparent authority must be traced to appearances created by the principal. It cannot arise upon the statements, acts or representations of the agent. Further, the belief of the third party as to the real authority of the agent must go beyond the "white heart and empty head" standard of subjective "good faith" and rise to the level of "reasonable belief." Such language is intended to embrace cases demanding proof that a reasonable person, situated as was the third party and exercising reasonable prudence in evaluating not only the indications of the principal's consent but also those which would warn of a lack of authority, would have formed a belief as to the real authority of the agent. See Walker v. Pacific Mobile Homes, Inc., 68 Wash.2d 623, 347 P.2d 677 (1962). The burden of proof to establish these elements is that of the third party. Booth v. Litchfield, 201 N.Y. 466, 469 94 N.E. 1078 (1911).

Within the realm of litigation against corporate defendants, peculiar problems arise as to the agency status of officers. Unlike a human being, a corporation cannot act directly but must rely upon the actions of officers and employees. The contact with the law of agency is inevitable. Generally speaking, if a corporation confers an office upon an individual, that act alone clothes the officer with such powers of agency as are necessary to accomplish his or her duties. Carney v. New York Life Insurance Co., 162 N.Y. 453, 57 N.E. 78 (1900). If these powers are not expressly articulated they represent a specie of implied real authority. The "president of a corporation" enjoys the broadest grant of implied real authority in the absence of limiting instruction. Joseph Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co., 34 Del. 567, 156 A.2d 350 (1931). Such powers are not mandatory and as with any agent may be curtailed by the principal. However, if such limiting instructions are secret and the officer acts in dealings with third parties in the marketplace who are unaware of them, the corporate principal is liable on a theory of apparent authority. Lee v. Jenkins Brothers, 156 F.Supp. 358 aff'd. 268 F.2d 357 (2d Cir. 1959). The "profile of authority" of other corporate officers is obviously of a lesser magnitude. Many valuable authorities are collected and reviewed in Goldenberg v. Bartell Broadcasting Corporation, 47 Misc.2d 105, 262 N.Y.S.2d 274 (1965), which is commenced as sound in every aspect save for the confusing formulation of the concept of apparent authority as ". . . the authority which the principal permits the agent to represent that he possesses." 262

N.Y.S.2d at 282. To the extent that this language suggest that apparent authority can be constructed upon the statements of the agent, it is misleading. See Perkins v. Willacy, supra, 431 P.2d at 142.

Sec. 025 recognizes "ratification" as an independent basis for establishing the liability and rights of the corporate principal for an unauthorized act or transaction. Bruton v. Automatic Welding & Supply Corp., 513 P.2d 1122 (Alaska 1973), has defined that doctrine in accordance with the better common law authorities. Ratification is an after-arising manifestation by a betrayed principal who has become aware of the unauthorized nature and content of the transaction in question that he intends to be bound by its terms. Aildrin v. Lucas, 260 Or. 373, 490 P.2d 141, 144-45 (1971). While it is generally in the form of an express manifestation of the intention to be bound, ratification may be implied from the principal's knowing acceptance of the benefits of the unauthorized transaction. When an unauthorized transaction is ratified, the want of authority in the agent is "cured" and the liability of the principal upon all of the terms of the previously unauthorized contract "relates back" to the date of its formulation by the faithless agent. Rakestraw v. Rodrigues, 8 Cal.3d 67, 500 P.2d 1401, 1404-05 (1972).

While unmentioned in sec. 025, the ACC does not intend to arrest the common law development of estoppel as a means of imposing liability upon a principal who becomes aware of an unauthorized transaction and then watches the third party change position in detrimental reliance incurring out of pocket expenses which could have been avoided by a timely warning from the betrayed principal. In these fact patterns liability is not upon the terms of the unauthorized contract but is limited to making the third party whole for the out of pocket expenditures or loss which were foreseeable in their nature, reasonable in their magnitude, and avoidable by a timely indication from the principal that the transaction was unauthorized and would not be ratified.

Peculiar to corporate practice is the concept of "adoption." This doctrine arises when an individual associated with the formation of a corporation attempts to contract or otherwise incur liability in its name at a point in time before corporate existence has begun. An after-arising corporation could not "ratify" such a contract for at the time it was made there was no corporate principal betrayed by the agent.

However, that corporation can become liable upon the terms of the transaction by an express manifestation of a willingness to "adopt" it. The knowing receipt of the fruits of a pre-incorporation transaction has been held sufficient to work an implied adoption. Air T[illegible] Service Corp. v. Fay, 90 U.S. App. D.C. 319, [illegible] F.2d 40 (1952); and Gardiner v. DuPont, 250 Fed. 227 (2d Cir. 1918).

Recognizing the intrinsic difficulty of agency qu[illegible]stions in the corporate context and the desire of third parties to eliminate the possibility of the corporation successfully contesting liability, sec. 483(d) was added to the ACC. This innovative provision establishes for the first time a strategy which will insure the liability of a corporate principal which has two officers, one of whom is the chairman of the board, the president or any vice president and the other the secretary, any assistant secretary, the treasurer or any assistant treasurer. See the official comment to ACC sec. 483.

CHANGE IN FORMER ALASKA LAW: ACC sec. 020 and 025 are both taken from California GCL Section 20[illegible] and are new to Alaska statutory la[illegible].

Official Comment to ACC Section 10.06.105.

CORPORATE NAME.

SCOPE: Because a business conducted in the corporate form is an entity with rights and liabilities distinct from those of its shareholders, it is imperative that third parties have notice of this status. The requirement that the name contain the word "corporation," "company," "incorporated" or "limited" (or an abbreviation of one of these words) is intended to provide that basic notice. ACC sec. 105 also forbids the corporate name to be misleading as to the nature of the business or to be the same as or deceptively similar to that of another corporation, foreign or domestic, authorized to do business in Alaska. Specifically precluded under sec. 105(b) is the inclusion of the word "city," "borough," or "village" in a corporate name or any other wording which would imply that the corporation is a municipality.

CHANGE IN FORMER ALASKA LAW: ACC sec. 105 is a reenactment of former AS 10.05.027 as amended, and is modification of

Section 8 of the MBCA. No substantive change in prior Alaska law is intended in the enactment of ACC sec. 105.

Official Comment to ACC Sections:

Sec. 10.06.110. RESERVATION OF CORPORATE NAME;
Sec. 10.06.115. APPLICATION TO RESERVE CORPORATE NAME;
Sec. 10.06.120. TRANSFER OF RESERVED NAME.

SCOPE: ACC secs. 110, 115, and 120 set forth the natural or corporate persons who may reserve a corporate name, the procedure to be followed, and the rights thereby acquired.

CHANGE IN FORMER ALASKA LAW: ACC secs. 110, 115, and 120 are reenactments without change of former AS 10.05.024, 027, and 030 and are based upon Section 9 of the MBCA.

Official Comment to ACC Sections:

Sec. 10.06.125. REGISTRATION OF CORPORATE NAME;
Sec. 10.06.130. USE OF SAME OR DECEPTIVELY SIMILAR NAME;
Sec. 10.06.135. PROCEDURE FOR REGISTRATION OF CORPORATE NAME;
Sec. 10.06.140. FEE FOR AND DURATION OF REGISTERED NAME;
Sec. 10.06.145. RENEWAL OF REGISTERED NAME.

SCOPE: ACC secs. 125, 130, 135, 140, and 145 provide for the registration, protection, duration and renewal of a corporate name. Registration of a corporate name presupposes the existence of a corporation; thus only a reservation of a corporate name under ACC secs. 110-120 may be accomplished prior to incorporation. Registration has a longer duration than reservation of a corporate name and is subject to different fees, which may be established by regulation. Under sec. 130, registration of a corporate name gives the registered holder the right to seek an injunction against the use of that name or a deceptively similar name by another. The registered name must be renewed each year under sec. 145.

CHANGE IN FORMER ALASKA LAW: ACC secs. 125, 130, 135, 140, and 145 are reenactments of former AS 10.05.033, 034, 036, 039, and 042 and are based on Sections 10 and 11 of the MBCA. Minor language changes have been incorporated to recognize the recently enacted scheme to allow the

Department of Commerce and Economic Development to determine various fees by administrative regulation.

Official Comment to ACC Section 10.06.150.

REGISTERED OFFICE AND REGISTERED AGENT.

SCOPE: ACC sec. 150 establishes the requirement that a corporation maintain both a registered office and a registered agent in the State of Alaska. The agent is necessary for service of process; and, the office is required to serve as the depository for various books and records as provided or required by the ACC.

CHANGE IN FORMER ALASKA LAW: ACC sec. 150 is a reenactment without change of former AS 10.05.045 which was based upon Section 12 of the MBCA.

Official Comment to ACC Section 10.06.155.

REGISTRATION OF AGENT BY NONRESIDENT WITH CONTROLLING INTEREST.

SCOPE: In order that the commissioner may readily establish official contact with a nonresident possessed of a controlling interest (sec. 955(12)) in any corporation subject to the reporting requirements of the ACC, sec. 155 requires such a person to designate an agent within the State of Alaska upon whom notice and process may be served. Note that while the ACC, sec. 955(29) defines "person" to include, in addition to natural persons, business vehicles whether or not generally recognized as having entity status, sec. 155(a) makes explicit reference to foreign corporations not authorized to do business in Alaska. The inclusion of this last reference is a deliberate duplication of the concept of a "person" intended to draw attention to the presence of this important ACC requirement.

Service on the sec. 155 agent is equivalent to personal service on the controlling nonresident. Sec. 155(b) enforces this requirement by forbidding, in the event of noncompliance with sec. 155(a), either the controlling person or the controlled corporation use of the courts of the State of Alaska. Such noncompliance would not defeat the right of a plaintiff to commence an action against either the controlling person or controlled corporation, but would preclude an Alaska court from entertaining any counterclaim or affirmative prayer for relief by such defendants.

For the purpose of sec. 155 it will be noted that the reference is to the more restrictive concept of "controlling interest" (sec. 955(12)) and not to the ACC's general concept of "control" as defined in sec. 955(11).

CHANGE IN FORMER ALASKA LAW: ACC sec. 155 is a reenactment without substantive change of former AS 10.05.791 as amended in 1980. A rewording has been undertaken to make it explicit that the designated agent must be within the State of Alaska.

Official Comment to ACC Section 10.06.160.

FILING LIST OF REGISTERED CORPORATIONS WITH SUPERIOR COURT; UPDATING AND PUBLISHING.

SCOPE: It is vital that the practicing attorney be able to quickly ascertain information concerning the name, address of registered office, and the name and address of the registered agent of both domestic and authorized foreign corporations. Both geographical and communications considerations have dictated that such information be available locally and updated frequently. ACC sec. 160 imposes the duties of filing, updating, and annually compiling such information upon the commissioner.

CHANGE IN FORMER ALASKA LAW: ACC sec. 160 is a reenactment of former AS 10.05.040 which has been changed to require yearly compilation and weekly updating of the stipulated information.

Official Comment to ACC Section 10.06.165.

CHANGE OF REGISTERED OFFICE OR AGENT.

SCOPE: ACC sec. 165 establishes the procedure whereby a domestic or foreign corporation may change its registered office or registered agent.

CHANGE IN FORMER ALASKA LAW: ACC sec. 165 is a reenactment of former AS 10.05.051 which was based upon Section 13 of the MBCA.

Official Comment to ACC Section 10.06.170.

CHANGE OR RESIGNATION OF REGISTERED AGENT.

SCOPE: ACC sec. 170 establishes the procedure by which a registered agent may change address or resign. Section 170(a) creates a duty in a registered agent who desires to change address. Such a change may be effected only by executing a statement disclosing the name of the agent, the current address, the proposed new address, and the corporation or corporations served as registered agent. This statement executed by an individual agent or by the president or vice president of a corporation serving in that capacity shall be delivered to the commissioner for filing in accordance with the standard procedures of the ACC. Unless and until the registered agent follows the procedures outlined in sec. 170(a), the commissioner may continue to regard the last address of record as effective for all notice provisions under the ACC. The risk of nonfeasance or misfeasance of a registered agent is that of the corporate principal and not that of the State of Alaska.

Sec. 170(b) sets forth the procedures which must be observed in order for a registered agent to effectively resign. Unless and until such procedures are followed the commissioner may continue to deal with the agent and effectively notice or bind the corporate principal. In the event that such an agent ceases to function without observing the provisions of sec. 170(b) there would be a breach of the contract of agency with the corporation but such a breach would not serve as a defense to the corporate principal in dealing with or accounting to the commissioner.

CHANGE IN FORMER ALASKA LAW: ACC sec. 170 is a reenactment of former AS 10.05.054 which was based on Section 13 of the MBCA. The final sentence has been changed to permit a resignation of the registered agent to become effective sooner than 30 days after the filing of written notice with the commissioner if the corporation appoints a successor within this shortened period. This change is based upon Section 57.070(3) of the Oregon Revised Statutes.

Official Comment to ACC Section 10.06.175.

SERVICE OF PROCESS ON CORPORATION.

SCOPE. ACC sec. 175 establishes the registered agent as the person upon whom process, notice or demand may be served with the consequence that it is effective upon the corporation. If a corporation does not maintain a registered agent or if the designated agent cannot be located, service may be made on the commissioner as provided in sec. 175(b).

CHANGE IN FORMER ALASKA LAW: ACC sec. 175(a), (c), and (d) are a reenactment of former AS 10.05.057 and are based upon Section 14 of the MBCA. ACC sec. 175(b) is new to the law of Alaska. It is taken from Section 57.075(3) and (4) of the Oregon Revised Statutes and eliminates the commissioner's burden under prior law to transmit process served on the commissioner in default of a registered agent. Under ACC sec. 175(b) that burden is placed upon the party seeking to initiate litigation against the corporation (the moving party). To assure that notice sent to a corporation without a registered agent is the best available under the circumstances, sec. 175(b)(2)(B) requires that the moving party send notice to such address as it knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice. Under sec. 175(b)(3) the moving party is obliged to file proof of the attempted service in the appropriate superior court or other tribunal.

Official Comment to ACC Section 10.06.205.

INCORPORATORS.

SCOPE: One or more incorporators compile and file the articles of incorporation which initiate the attempt to form a de jure corporation. Beyond framing and filing the articles of incorporation, the acts of incorporators may be of little significance or lasting effect in the corporation's life. The articles of incorporation may be amended by the board prior to the issuance of stock; after stock is issued, a majority of the shares must agree to amendment. Any bylaws which the incorporators adopt may be amended or repealed by either the board or the shareholders. By following the procedures outlined in ACC Article Three, an incorporator does not subject himself to personal liability, although he must pay filing fees and franchise taxes to successfully perfect the application for the certificate of incorporation.

If there are dealings between the incorporator(s) and third parties on behalf of the not yet formed corporation, care must be taken to avoid personal liability as a "promoter." While not defined in the ACC, ". . . In a comprehensive sense, 'promoter' includes those who undertake to form a corporation and to procure for it the rights, instrumentalities and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business . . . ." 1 Hornstein, CORPORATION LAW AND PRACTICE, 92, Section 91 (1959). From this definition it is evident that an incorporator will evolve into the status of a "promoter" by attempting to deal on behalf of the yet to be formed corporation with third parties. As demonstrated by cases such as O'Rorke v. Geary, 207 Pa. 240, 56 A. 541 (1903); and King Features Synd. v. Courier, 241 Iowa 870, 875, 43 N.W. 2d 718, 41 A.L.R.2d 467 (1950), such preincorporation transactions are fraught with a danger of personal liability to the promoter.

Preincorporation contracts can only be made on behalf of, not with, a yet to be formed corporate entity. Any transaction prior to the issuance of the certificate of incorporation, ACC sec. 218, is thus a preincorporation transaction. During this period liability on the part of third parties can only be gained in exchange for the personal preincorporation liability of those who would act on behalf of the after arising entity. In this connection, see ACC sec. 220, infra, and the official comment thereto.

ACC sec. 205 requires that incorporators be "natural persons", which would preclude a corporate entity from acting in this role.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 205 is a reenactment of former AS 10.05.252 as amended by sec. 6, ch. 170, SLA 1976. The minimum age for an incorporator has been reduced from 19 to 18 to bring sec. 205 in line with the general state policy on legal majority. ACC sec. 205 varies from section 53 of the MBCA in the requirement that incorporators be natural persons. This is a continuation of prior Alaska law. The original articles of incorporation and a photocopy or xerographic copy of the original are to be delivered to

the commissioner instead of duplicate originals, the former requirement.

Official Comment to ACC Section 10.06.208.

ARTICLES OF INCORPORATION.

SCOPE: Within the governance structure of any particular corporation the articles of incorporation function much like a constitution. Because they are far more difficult to amend than the bylaws (which are thus analogous to statutes), the articles are deemed the appropriate place to cement the basic structure of the corporation. In company with other modern statutes, the ACC requires that fundamental decisions concerning the purpose for which the corporation is organized, its stated duration, and the number of shares into which the ownership claims will be divided (including whether they will be distinguished into "classes") be articulated in the articles. This requirement accomplishes two goals.

First, sec. 208 enables the potential investor to have recourse to a single document which imparts much of the basic information needed to evaluate a decision whether or not to become a shareholder.

Second, once shares are outstanding the relative difficulty encountered in any attempt to amend the articles insures stability with respect to these basic decisions. To lay the foundation for this statutory scheme, ACC sec. 208 denominates six fundamental items which must be addressed in the articles.

Peculiar to ACC sec. 208 is the requirements of subsection (4) that the articles state the name and address of each alien affiliate or a statement that there are no such affiliates.

CHANGE IN FORMER ALASKA LAW: ACC sec. 208(1), (2), and (3) are predicated upon former AS 10.05.255(1), (3), and (10) which were derived from Section 54 of the MBCA; subsections (4) and (5) are taken from Section 202 of the GCL; subsection (6) reenacts former AS 10.05.255(13) as amended. The format of the ACC governing the content of the articles is modeled upon Sections 202 and 204 of the GCL. In addition to the specific changes noted, infra, secs. 208 and

210 make vital a drafting decision which was unimportant under prior Alaska law. As noted, sec. 208 requires that several fundamental decisions be addressed in the articles. While the provisions may be amended by following the procedures outlined in the ACC, at all times the subject matter content of sec. 208 must be defined in the current corporate articles.

Sec. 210 enumerates provisions which are optional as contents of the articles. The critical point is that if the subject matters enumerated in sec. 210(1) are not settled by the initial or amended provisions of the articles they may not be resolved or governed by the bylaws, shareholder agreements, or any other form of treaty. Former Alaska law did not make this critical distinction.

Two provisions of the ACC are relevant to corporate purpose. Sec. 208(2) requires that the articles set forth the purpose or purposes for which the corporation is organized. Such statement may be a declaration that the corporation is organized to transact any and all lawful business permitted under the ACC. Such an open ended statement of purpose is not mandatory; but, if the articles contain a more precise statement of purpose but do not explicitly declare that the corporate entity is limited within this defined scope, operations undertaken in the good faith judgment of the board which go beyond the defined scope are not necessarily ultra vires. Doubt can be resolved by following sec. 210(1)(F) and inserting "a provision limiting or restricting the business in which the corporation may engage or the powers which the corporation may exercise or both . . . ."

In sec. 208(5) references to "par value" have been removed in a departure from former AS 10.05.255. This change follows the elimination of par value as a concept basic to the financial accounting of a corporation. See the introductory and specific comments to provisions of Article Four, the "Financials of the ACC." A statement of par value in the articles is not prohibited, but it will have no legal significance.

Sec. 208(6) makes minor changes in prior law. It has been organized to parallel Section 202 of the GCL. Questions of designation, rights, privileges, preferences and restrictions which multiple classes or multiple series create may be either settled in the articles or left to board resolution by a provision in the articles specifically empowering the board. Notwithstanding, only the articles may fix the number of shares in a class. This power may not be delegated to the board. While the tolerance of article provisions delegating the determination of restrictions and privileges of various classes and series of shares is consistent with prior Alaska law, the requirement that the number of shares in a class be fixed in the articles is new.

ACC sec. 208(6) continues prior Alaska law's concern regarding alien affiliates and adds language which directs the drafter to state that the corporation has no such affiliates if such is the case.

Official Comment to ACC Section 10.06.210.

ARTICLES OF INCORPORATION: OPTIONAL PROVISIONS.

SCOPE: ACC sec. 210 expressly permits the inclusion of a variety of provisions in the articles. No provision covered in sec. 210 must be included in the articles to procure a certificate of incorporation. However, for purposes of sound corporate planning, the drafter should carefully review the matters covered in sec. 210 due to the principle there established that the subjects enumerated by subsection (1) can only be ordered or determined by provisions of the articles. The attempt to govern any subject denominated by sec. 210(1) by a provision in the bylaws, an extrinsic shareholder resolution, agreement, or treaty would be totally ineffective.

The common law doctrine of "pro tanto amendment" of the articles established in some jurisdictions is expressly disapproved by the legislature in the course of enacting ACC sec. 210. Under that doctrine a judicial inquiry is made to determine if a sufficient voting power of the directors and shareholders have acted so that, had they styled their attempt an "amendment of the articles" it would have been effective. If so, the doctrine would recognize such an effort as a "pro tanto" amendment and entitled to the dignity of a de jure provision in the articles.

The provisions for framing the initial content and thereafter amending the articles are explicit and simple under the ACC. They reflect a legislative evaluation of competing interests and procedures best adapted to insure informed decision making within Alaska corporations. Such

210 make vital a drafting decision which was unimportant under prior Alaska law. As noted, sec. 208 requires that several fundamental decisions be addressed in the articles. While the provisions may be amended by following the procedures outlined in the ACC, at all times the subject matter content of sec. 208 must be defined in the current corporate articles.

Sec. 210 enumerates provisions which are optional as contents of the articles. The critical point is that if the subject matters enumerated in sec. 210(1) are not settled by the initial or amended provisions of the articles they may not be resolved or governed by the bylaws, shareholder agreements, or any other form of treaty. Former Alaska law did not make this critical distinction.

Two provisions of the ACC are relevant to corporate purpose. Sec. 208(2) requires that the articles set forth the purpose or purposes for which the corporation is organized. Such statement may be a declaration that the corporation is organized to transact any and all lawful business permitted under the ACC. Such an open ended statement of purpose is not mandatory; but, if the articles contain a more precise statement of purpose but do not explicitly declare that the corporate entity is limited within this defined scope, operations undertaken in the good faith judgment of the board which go beyond the defined scope are not necessarily ultra vires. Doubt can be resolved by following sec. 210(1)(F) and inserting "a provision limiting or restricting the business in which the corporation may engage or the powers which the corporation may exercise or both . . . ."

In sec. 208(5) references to "par value" have been removed in a departure from former AS 10.05.255. This change follows the elimination of par value as a concept basic to the financial accounting of a corporation. See the introductory and specific comments to provisions of Article Four, the "Financials of the ACC." A statement of par value in the articles is not prohibited, but it will have no legal significance.

Sec. 208(6) makes minor changes in prior law. It has been organized to parallel Section 202 of the GCL. Questions of designation, rights, privileges, preferences and restrictions which multiple classes or multiple series create may be either settled in the articles or left to board resolution by a provision in the articles specifically policies would be subverted by the concept of pro tanto amendment which would substitute the expense and uncertainty of litigation for the procedures outlined in this chapter.

ACC sec. 210(1)(A) protects the expectation of a purchaser of shares that once the purchase price has been paid in full there is no further liability by way of financial assessments. Cases such as Watson v. Santa Carmelita Mutual Water Co., 58 C.A.2d 709, 137 P.2d [illegible] ([illegible]), holding a purchaser of stock in a water corporation to be charged with knowledge of the inherent assessability of his shares, are reversed. Under ACC sec. 210(1)(A) the articles must affirmatively permit assessability for the power to exist.

ACC sec. 210(1)(B) continues former AS 10.05.255(8), which required that preemptive rights obtain unless explicitly removed by a provision in the articles. See also, ACC sec. 428.

ACC sec. 210(1)(C) establishes that, absent an express provision in the articles, corporations may not create special qualifications for persons who may be shareholders. See also, the discussion on restrictions on transferrability, infra.

ACC sec. 210(1)(D) requires that, absent an express limitation on the duration of the corporation being set forth in the articles, the corporation is to endure until dissolved pursuant to the ACC.

ACC sec. 210(1)(E) requires that if there is to be restriction or elimination of the concurrent, independent power of the board and the outstanding shares to adopt, amend or repeal bylaws such provision must be made in the articles.

ACC sec. 210(1)(F) permits a corporation to depart from the majority.

ACC sec. 210(1)(G) is the appropriate place to define enforceable limitations upon the business which the corporation may pursue. Activities beyond such express limitations would be ultra vires to the corporation. See the comment to ACC sec. 208 for a further discussion of this point.

ACC sec. 210(1)(H) establishes the proposition that, absent an express provision in the articles, holders of corporate debt instruments do not have voting rights with respect to the election of directors or other matters committed by the ACC to shareholder decision.

ACC sec. 210(1)(I) furthers the policy of sec. 335 in recognizing that absent an express provision in the articles, the board, and not the shareholders, shall determine the consideration to be received for the issuance of shares.

AAC sec. 210(1)(J) reflects the policy of sec. 450(a) which vests control and management of the corporation in the board of directors. However, by the terms of an express provision in the articles, any corporate action may be subjected to a prior requirement that it receive the approval of the shareholders (sec. 990(6)) or the approval of the outstanding shares (sec. 990(5)). If the requirement is the latter, then the requirement is for approval by an absolute majority of the outstanding shares with voting rights.

Absent an affirmative provision under ACC sec. 210(1)(K), a corporation is without power to redeem its shares as provided in sec. 325.

ACC sec. 210(1)(L) permits any corporation with fewer than 100 shareholders of record to include an express provision in its articles exempting itself from the annual report requirements of ACC sec. 433(a). In this particular ACC sec. 210 differs from GCL Sections 204 and 1501 which permit the requirement of an annual report to be waived in the bylaws. It was the judgment of the legislature that it is better to require that such a waiver be placed in the articles; otherwise, incumbent directors would be competent to pass a bylaw waiving a requirement intended to provide a check on the board.

Finally, ACC sec. 210(1)(M) requires that any delegation of board powers, duties, or privileges to delegates, as permitted by ACC sec. 450, be set forth in an explicit provision in the articles.

It will be noted that the remaining provisions of sec. 210 do not contain the injunction that they cover subjects which can only be determined by provisions of the articles.

ACC sec. 210(2) confronts the difficult subject to restrictions on the free transferrability of shares. By declaring that there may only be "reasonable restrictions" the legislature intends to venerate the traditional bias of the law in favor of free alienation of property interests. However, this bias must be balanced against recognition that there may be valid business objectives furthered by restrictions. See V. & H. Warehouse, Inc. v. Atlas Van Lines, Inc., 490 F.2d 816 (5th Cir. 1974).

Note that no restriction on transferrability adopted after shares are outstanding may bind holders of those shares unless they have affirmatively voted for the restriction. While the language of sec. 210(2) would not prohibit transfer restrictions from being introduced in a bylaw, it would have to be a bylaw adopted by the vote or consent of the shareholders and could not bind shares outstanding prior to its adoption which neither voted for nor consented to such a scheme. Tu-Vu Drive-In Corp. v. Ashkins, 61 Cal.2d 283, 38 Cal. Rptr. 348, 391 P.2d 828 (1964), is thus disapproved and its holding precluded under sec. 210(2).

ACC sec. 210(3) permits the names and addresses of initial directors to be included in the articles. Former AS 10.05.255(1) required that this information be included in the articles.

ACC sec. 210(4) permits any other provision, not in conflict with law, pertaining to the management of the business and the conduct of its affairs, including any provision required or permitted by the ACC to be stated in the bylaws, to be included in the articles.

CHANGE IN FORMER ALASKA LAW: ACC sec. 210 is based upon GCL Section 204, Delaware Section 102(b)(4) and (5), and former AS 10.05.255 which it replaces. The changes have been incorporated in the scope note to this section and the ACC sec. 208.

Official Comment to ACC Section 10.06.213.

FILING OF ARTICLES OF INCORPORATION.

SCOPE. ACC sec. 213 contains a self-explanatory procedure for filing the articles of incorporation with the commissioner.

CHANGE IN FORMER ALASKA LAW: ACC sec. 213 reflects without substantive change procedures set forth in former AS 10.05.258 and Section 55 of the MBCA. The section reflects the general scheme of the ACC to standardize the procedures for filing with the commissioner as set forth in ACC sec. 910.

Official Comment to ACC Section 10.06.215.

DISCLOSURE OF CORPORATE PURPOSES.

SCOPE: Under ACC sec. 208(2) a corporation may fulfill the statutory requirement of a statement of purpose in its articles with a declaration that it intends to engage in "any lawful purpose." Notwithstanding, the Department of Commerce and Economic Development is interested in gathering information about the actual business in which incorporated entities intend to engage.

ACC sec. 315 supports this interest by imposing an obligation to disclose the activities in which the corporation will initially engage. This statement does not bind the corporation as to the future although it must be accurate as of the time of utterance at peril of providing the commissioner with grounds for involuntary dissolution under ACC sec. 630(6). If a corporation subsequently changes or expands the focus of its business activity, an "updating" of its disclosure of corporate purpose is required in the biennial report under ACC sec. 808(3).

CHANGE IN FORMER ALASKA LAW: ACC sec. 215 is a reenactment without change of former AS 10.05.259 as amended in 1980.

Official Comment to ACC sec. 10.06.218.

EFFECT OF ISSUANCE OF CERTIFICATE OF INCORPORATION.

SCOPE: ACC sec. 218 fixes the issuance of the certificate of incorporation as the point in time when the de jure existence of a corporation commences. In adopting this "bright line", rule the legislature has gone beyond the text of Section 56 of the MBCA, and former AS 10.05.310, to expressly abolish the common law doctrines of de jure compliance, de facto incorporation, and corporation by estoppel.

The liability consequences befalling individuals who have sought the advantages of incorporation while failing to follow the statutory requirements for the creation of such a vehicle have plagued courts. Notwithstanding the evident attempt of the Model Act to focus upon the issuance of the certificate of incorporation as the event which effectuated de jure formation, courts have been uncertain and inconsistent in reacting to recurrent conflicts among third parties (who thought they were dealing with a corporate entity); enterprisers who purported to act for the defectively formed corporation (who may include individuals unaware of any defect); and, the state.

Assuming that there has been defective compliance with statutes on corporate formation, the following questions recur. Do the enterprisers achieve limited liability with respect to transactions carried on in the name of the purported corporation? If they do not, is their liability joint and several as would be the case if they were partners? May the defectively formed entity sue or be sued? If defective incorporation is later remedied, does the corporate entity then formed achieve automatic succession to the rights and liabilities which had been attempted by the defective predecessor?

Although the terminology adopted in decisional law has not been consistent, the common law reaction is generally categorized under three overlapping doctrines: de jure compliance; de facto incorporation; and, corporation by estoppel.

At least two of these doctrines have been reviewed by Alaska courts. Swindel v. Kelly, 499 P.2d 291, n.8 (1972); and, Willis v. City of Valdez, 546 P.2d 570, 574 (1976), illustrate that the de facto and corporation by estoppel doctrines have intruded into the decisional law of this jurisdiction. The conclusions suggested in those opinions as well as the more extensive treatment of these topics in the decisional law of Oregon and Washington are repealed with the legislative enactment of sec. 213.

In framing the terms of the ACC the legislature has simplified the steps required to form a corporation and defined a bright line event upon which the corporate existence begins. That event is the issuance of the certificate of incorporation. Once issuance has taken place all of the attributes of corporate status (including limited liability) are attained. Third parties are precluded from pointing to any other defect as a means of gaining the personal liability of any or all of the corporate enterprisers. The event cuts both ways. If corporate existence is attained under sec. 218, there can be no denial on the part of that entity or any investor that actions taken by its agents would obligate the corporation.

Sec. 218 was adopted with the view that incorporation is a privilege and compliance with this section is the minimum price tag exacted for that privilege. Failing issuance of the certificate of incorporation, it is the intention of the legislature that no attributes of corporate status may be claimed by any party. Cases such as Timberline Equipment Co., Inc. v. Davenport, 267 Or. 64, 514 P.2d [illegible] (1973); and, Cranson v. International Business Machines Corp., 234 Md. 477, 200 A.2d 33 (1964), are fatally inconsistent with the content of sec. 218. The rationales of these decisions which dwell upon the intention of the third party claimant to deal with a corporate entity are rejected.

Issues of the intention of private parties or the materiality of the failure to comply with statutory norms are an invitation to litigation which is needlessly consumptive of public time and convenience.

CHANGE IN FORMER ALASKA LAW: ACC sec. 218 is a reenactment of former AS 10.05.261 (based on Section 56 of the MBCA) with modifications intended to preclude recognition of any legal status for an entity which has not obtained the issuance of a certificate of incorporation.

Official Comment to ACC Section 10.06.220.

ASSUMPTION OF PURPORTED POWERS OF NONEXISTENT CORPORATION: LIABILITY.

SCOPE: ACC sec. 220 determines the liability consequences of persons who assume to act as a corporation for which there has been no issuance of a certificate of incorporation (sec. 218). While this section is based upon Section 146 of the MBCA, it has been modified to resolve conflicting interpretations of that section with respect to promoter's liability. See e.g., Heintze Corp. v. Northwest Tech-Manuals, Inc., 7 Wash.App. [illegible], [illegible] P.2d [illegible] (Div.One, 1972) (holding that language predicated upon Section 146 codified the common law rule on promoter's liability); and, Sherwood & Roberts-Oregon, Inc. v. Alexander, 269 Or. 389, 525 P.2d 135 (1974) (noting that language based on Section 146 had nothing to do with promoter's liability but was aimed at extinguishing the doctrine of de facto incorporation).

Under the ACC, common law doctrines respecting defective incorporation are extinguished by sec. 218. Sec. 220 resolves the liability of persons who assume to act as a corporation for which there has been no issuance of the certificate demanded in sec. 218. Under subsection (a) they are jointly and severally liable for debts and liabilities incurred or arising as a result of that action. The fact that the third party may have understood that no corporation was yet extant does not preclude the liability created by sec. 220 from arising or being asserted. To the extent that it is inconsistent with this position, Sherwood & Roberts-Oregon, Inc. v. Alexander, supra, is disapproved.

Under subsection (b) it is possible for the liability created by sec. 220 to be modified or precluded, but it must be terms of a written contract.

Subsection (c) makes it clear that oral promises, agreements, or understanding are not effective to modify or preclude the liability created by (a) of sec. 220.

CHANGE IN FORMER ALASKA LAW: ACC sec. 220 is a modification of former AS 10.05.310 which had expressed the text of Section 146 of the MBCA. The change substitutes an explicit reference to the certificate of incorporation (ACC sec. 218) for the words ". . . without authority . . . ", and expressly focus the section upon the liability of promoters.

Official Comment to ACC Section 10.06.223.

ORGANIZATION MEETING.

SCOPE: ACC sec. 223 defines the transition by which the entity being formed passes from the control of incorporators to that of the initial board of directors. Mandatory provisions set a minimum agenda for this initial meeting, requiring that directors be elected (if not named in the articles), bylaws be adopted, and officers be elected.

The naming of initial directors in the articles is optional under ACC sec. 210. If directors are so named, it is they who hold the organizational meeting at the call of their majority. If directors have not been named, the organizational meeting is to be held by the incorporators at the call of their majority. While postponing the decision as to the identity of the initial directors to the organizational meeting may be desirable in some instances, under ACC sec. 225 the powers of incorporators are limited to perfecting the organization of the corporation, adopting the amending bylaws and electing directors.

The first sentence of sec. 223 makes it unambiguous that the organization meeting is not a second step in the attainment of corporate existence. Existence is achieved in a single step by issuance of the certificate of incorporation under sec. 218. If incorporators should attempt to do business for a corporate entity following issuance of the certificate but before the election of directors at the organization meeting their acts would be ultra vires their licit powers and the source of personal liability under sec. 015.

In the event they were to transact business, incorporators would also be exposed to secondary liability under sec. 448(a). However, the corporate existence having been attained with the issuance of the certificate, the irregular actions of the incorporators in conducting business would not preclude either the corporation or third parties from acquiring de jure rights.

CHANGE IN FORMER ALASKA LAW: ACC sec. 223 is a reenactment of former AS 10.05.267 and is based upon Section 57 of the MBCA. Language modifications have been made to coordinate with sec. 210(3), which makes optional the naming of initial directors in the articles, and the phrase in the first sentence which is intended to preclude a construction of sec. 223 as a precondition to the attainment of corporate existence.

Official Comment to ACC Section 10.06.225

POWER OF INCORPORATORS BEFORE DIRECTORS' ELECTION.

SCOPE: Since the naming of initial directors in the articles is optional under ACC sec. 210, sec. 225 is necessary in order to define the powers which incorporators shall have until such time as a board of directors is elected. These powers are of a very limited nature. The incorporators may perfect the organization of the corporation, adopt bylaws and elect directors; they may do no more in the name of the corporation. The limitation on their exercise of additional powers is rooted in the policy of permitting a corporation to do business only when its board has been properly elected.

<u>CHANGE IN FORMER ALASKA LAW:</u> ACC sec. 225 is new and without precedent in the former code due to the now discarded requirement that directors be named in the articles. ACC sec. 225 derives from Section 210 of the CGCL and Section 107 of the General Corporation Law of the State of Delaware. It has been altered from the form in which it is found in the California and Delaware acts by the omission of the election of officers as a power permitted incorporators.

This deletion is intended to preclude an abuse of the corporate structural norm whereby incorporators could elect officers who would begin to transact business and then omit to formally elect directors. Such an arrangement would frustrate the scheme of the ACC which is to make the board serve as the corporate principal and officers as agents of the corporation in conducting its business operations.

<u>Official Comment to ACC Section 10.06.228.</u>

BYLAWS: ADOPTION, AMENDMENT OR REPEAL.

<u>SCOPE:</u> In determining the status of shareholders with respect to the power of the board of directors, few provisions are of greater importance than those determining the power to adopt, amend or repeal the content of the bylaws. Absent provision in the articles, ACC sec. 228 vests equal powers in the board and the shareholders with respect to determining the content of the bylaws. However, the articles are competent to restrict or eliminate the power of either the board or the outstanding shares.

There are thus three possibilities: (1) concurrent, independent power in the board and the outstanding shares (the default rule); (2) an article provision rest[illegible] or eliminating the power of the board; or, (3) an article provision restricting or eliminating the power of the outstanding shares. Note that a corporation organized and existing under the former provisions of AS 10.05 has five years following the effective date of the ACC to comply with AS 10.06.208 and 10.06.210. See * Sec. 5, Application to Articles of Existing Corporations.

Pending the expiration of this five year period the corporation may continue to observe the machinery and procedures for adopting, amending or repealing bylaws permitted under former AS 10.05. If, upon the expiration of the five year period, the corporation has not amended its articles to restrict or eliminate the powers conferred by sec. 228, shareholders shall achieve a concurrent, independent power over the content of the bylaws.

By way of general comment, the bylaws of a corporation are regarded as a contract between the corporation and its members. Dentel v. Fidelity Savings and Loan Assn., 539 P.2d 649 (1975). As such they are to be construed according to the general rules governing the construction of statutes and contracts. American Center for Education v. Cavnar, 26 Cal.App.3d 26, 102 Cal. Rptr. 575 (1972). The intent and understanding of the parties at the time of adoption is generally controlling. Area Inc. v. Stetenfeld, 541 P.2d 755 (Alaska 1975).

The wisdom of bylaws is generally to be weighed and evaluated by the contracting parties and not a reviewing court. Leon v. Chrysler Motors Corporation, 359 F.Supp. 877 (D. N.J. 1973); aff'd 474 F.2d 1340 (3rd Cir. 1973). Courts interfere only upon finding that powers were exercised in an unlawful, arbitrary or malicious fashion and in such manner as to affect property rights of the person complaining. STP Corp. v. U.S. Auto Club, Inc., 286 F.Supp. 146 (D. Ind. 1968).

Absent an ability of the opponent of a bylaw to demonstrate one of these grounds, bylaws may be amended freely and shareholders have no vested right in having any bylaw remain in force. Superior Bedding Co. v. Serta Associates, Inc., 353 F.Supp. 1143 (D. Ill. 1973). Notwithstanding these rules, no provision of the bylaws may infringe upon the content of the articles or any provision of the ACC.

CHANGE IN FORMER ALASKA LAW: ACC sec. 228 is taken from Section [illegible] of the GCL and works a major change in former AS 10.05.135. Under the former Alaska scheme the power to adopt, amend, and repeal provisions of the bylaws was vested exclusively in the board unless reserved to the shareholders in the articles of incorporation. Under the ACC, as noted, the power is shared equally subject to the power of the articles to limit or extinguish it in the board but not the shareholders.

It should be noted that shareholder action on the bylaws must be accomplished by "approval of the outstanding shares." This requirement places the burden on proponents to obtain an absolute majority of the voting shares in favor of any change in the bylaws.

The ACC does not discuss or settle the issue of who is to prevail in the event of disagreement between the board and the shareholder over the content of the bylaws. Since in the absence of limitation in the articles the two have equal powers, the action last in time would establish the content of the bylaws. Relevant to any such disagreement would be the power of the shareholders under ACC sec. 460 to remove directors at any time for any reason.

Shareholders have a right under ACC sec. 410 to have management distribute, at the shareholder's expense, communications to other shareholders. This procedure may prove to be extremely useful in shareholder attempts to exercise power over the bylaws as conferred by sec. 228.

Official comment to AAC Section 10.06.230.

BYLAWS: NUMBER OF DIRECTORS AND OTHER CONTENT.

SCOPE: Bylaws are the depository for rules governing procedures for shareholder and director meetings, the qualifications, duties, authority and compensation of directors and officers, and such other matters relating to the day to day management of the corporation as are usefully stabilized in a formal treaty. The structure of Article 3 has made the number of directors, an issue of no small importance, a matter which may be settled by the bylaws.

To the extent that there is a conflict or overlap, any bylaw is limited by any article or statute on the same subject matter. It is important to note that the ability of the bylaws to take a position on numerous corporate characteristics has been eliminated by ACC sec. 210 (1) which requires that certain fundamental matters be resolved in the articles and not elsewhere. See official comment to sec. 210. Also precluded is the common law doctrine which would treat bylaws as pro tanto amendments to the articles.

CHANGE IN FORMER ALASKA LAW: ACC sec. 230 is predicated upon Section 212 of the GCL and substantially enlarges the overage of former AS 10.05.135 which had been based on Section 27 of the MBCA.

Neither ACC sec. 208 nor 210 requires that the number of directors be established in the articles. If such provision has not been made under sec. 210 (4), the bylaws are required to resolve the question. Such flexibility was not available in prior Alaska law which required that the number of directors be established in the initial articles. The ACC provides latitude in planning the size of the board allowing the decision to be delayed until the organizational meeting and action by the incorporators. Flexibility is also provided by sec. 230(a) which permits the bylaws to set a minimum and maximum number of directors if an accompanying procedure for determining the exact number within those parameters is also provided.

Sec. 230(b) establishes an exception to the norm that, absent a provision in the articles, the power to adopt and amend bylaws resides both with the shareholders and the directors. After shares are outstanding, a bylaw altering the number of directors or the previously established formula for deriving that number can only be adopted by approval of an absolute majority of the outstanding shares with voting power.

Furthermore, protection of shareholder cumulative voting power is given in sec. 230(b)'s provision which permits a substantial minority to veto a change in the bylaws which would lower the number of directors below five. Former Alaska law provided much the same protection to minority interests by requiring that the number of directors be set in the articles and that a 2/3 vote of the shareholders was necessary to amend the articles.

The reader will note that ACC sec. 453(a) and (b) are also relevant to the issue of fixing the number of directors in the bylaws. If the articles or bylaws establish a formula under which the board may set the number of directors, this power must be exercised by a majority of the entire board and may not be used to shorten the term of any incumbent director.

Official Comment to ACC Section 10.06.233.

BYLAWS TO BE KEPT AT OFFICE; INSPECTION BY SHAREHOLDERS.

SCOPE: Given their enhanced role regarding the content of the bylaws (ACC sec. 228), a plenary right of inspection is granted to shareholders by ACC sec. 233. The scope of this right extends to the original or copy of the original bylaws together with all amendments, whether currently in force or superseded to date. Such records are to be maintained, subject to inspection by any shareholder at all reasonable times, at the principal business office of the corporation in Alaska. If the corporation does not maintain its principal business office in Alaska, then it shall, upon the written request of any shareholder, furnish to such party a copy of the original bylaws together with all amendments to date.

Corporate officers refusing to follow the mandate of ACC sec. 233 would be subject to the same penalty and civil consequences as are imposed for violation of ACC sec. 430.

CHANGE IN FORMER ALASKA LAW: ACC sec. 233 is taken from Section 213 of the GCL. Under prior law, a right to inspect bylaws existed only under the general right of inspection of books and records under former AS 10.05.237-249.

ACC sec. 230 varies from section 213 of the GCL in that it makes explicit the requirement that the record of the bylaws include all prior provisions which have been amended or repealed.

Official Comment to ACC Section 10.06.305.

CREATION, CLASSES, AND ISSUANCE OF SHARES.

SCOPE: AAC sec. 305 permits great flexibility to the corporation in creating distinctions as among various classes or series of shares with respect to voting rights as well as preferences or privileges regarding distributions during the life or at the dissolution of the entity. Sec. 305(a) contains an important procedural restriction in the requirement that these basic attributes of the shares must be stated or authorized in the articles of incorporation. Under ACC secs. 308 and 315 it is competent for the articles to delegate the function of determining the rights and preferences of various authorized classes or series of shares to the board of directors.

Sec. 305(b) expresses a substantive limitation with the command that all shares of the same class shall have identical rights, privileges, and restrictions unless that class shall have been subdivided into "series" in which case the section commands that shares within the same series be identical with respect to these particulars. See also ACC secs. 310 and 313.

CHANGE IN FORMER ALASKA LAW: ACC sec. 305 is premised upon GCL Section 400 with modification to accomodate MBCA Section 15 and 16, which were the basis of former Alaska law. Sec. 305(a) replaces former AS 10.05.060 without substantive change. Sec. 305(b) replaces former AS 10.05.069 without substantive change.

Official comment to ACC Section 10.06.308.

ISSUANCE OF PREFERRED OR SPECIAL CLASSES OF SHARES.

SCOPE: ACC sec. 305 generally allows the establishment of classes and series with varying rights and liabilities. Sec. 308 specified a number of particulars which may be the subject of variation between different classes. This list of particulars should aid the practitioner in discussing with his client what variations in rights and liabilities are possible in such areas as redemption, dividend preferences, liquidation preferences and conversions options.

CHANGE IN FORMER ALASKA LAW: This section is largely a reenactment of former AS 10.05.063 which was predicated upon Section 15 of the MBCA. Note that the second sentence of subsection (5) of the older section has been deleted as unnecessary under the new ratio assets surplus financial test which eliminates any necessity for the concept of par value and the limitations on share convertibility which accompanied the prior system's reliance on par value as a fundamental concept.

Official Comment to ACC Sec 10.06.310.

ISSUANCE OF SHARES IN SERIES.

SCOPE: This section makes clear that preferred and special classes of shares may be divided into series as well as the common class of shares.

CHANGE IN FORMER ALASKA LAW: ACC sec. 310 is based upon MBCA Section 16 and former AS 10.05.066 without substantive change.

Official Comment to ACC Section 10.06.313.

VARIATION IN RIGHTS AND PREFERENCES OF SHARES.

SCOPE: This section provides a list of rights and preferences which may vary between series of the same preferred or special class.

CHANGE IN FORMER ALASKA LAW: MBCA Section 16 and former AS 10.05.069 form the basis for the new ACC sec. 313. Subsection (7) which permits a variation to exist in voting rights if there are any in the preferred or special class is new to Alaska law. The provision was added to MBCA Section 16 in 1966, after enactment of former AS 10.05.069. The current amendment thus represents an updating of Alaska law to conform to the MBCA provision. The addition of subsection (7) provides further flexibility for the draftsman.

Official Comment to ACC Section 10.06.315

SERIES RIGHTS AND PREFERENCES ESTABLISHED BY BOARD.

SCOPE: This section specifies that the board may be granted power by the articles to divide a class into series and fix and determine the relative rights and preferences of the shares of a series. This power is subject to any limitation placed upon it by the articles or by ACC secs. 305-323. It should be noted that ACC sec. 208(5)(c) specifically allows an article which gives the board power to fix rights, preferences, privileges, and restrictions for a class as well as a series. Sec. 315 is not meant in any manner to limit this power.

CHANGE IN FORMER ALASKA LAW: ACC sec. 315 is predicated upon MBCA Section 16 and former AS 10.05.072. No change in prior law has been rendered by the reenactment of this section.

Official Comment to ACC Section 10.06.318.

MANNER OF ESTABLISHING SERIES.

SCOPE: This section simply specifies the procedure for establishing a series; it is a reenactment of prior law.

CHANGE IN FORMER ALASKA LAW: ACC sec. 318 is an enactment of MBCA Section 16 and former AS 10.05.075 without substantive change.

Official Comment to ACC Section 10.06.320.

FILING OF STATEMENT BEFORE ISSUANCE OF SERIES.

SCOPE: The manner in which the equity interests of a corporation are held, including the relative rights and preferences of the various classes and series into which such interests have been divided, is traditionally a subject of interest to the state. Under the ACC this information is supplied by the articles or any amendment thereto in cases not involving board power to fix the relative rights and preferences. However, when the power has been delegated to the board (sec. 208(5)(B)(C)), it is necessary to have statutory machinery requiring this information be supplied to the state. ACC sec. 320 requires filing with the commissioner.

CHANGE IN FORMER ALASKA LAW: ACC sec. 320 is essentially a reenactment of former AS 10.05.078 which was predicated upon MBCA Section 16. A modification has been made to the language of sec. 320(a) to accord with the broader power of delegation to the board to fix by resolution unissued class (sec. 208(6)). Sec. 320(b) reflects the streamlining made possible by sec. 910.

Official Comment to ACC Section 10.06.323.

EFFECT OF FILING STATEMENT.

<u>SCOPE</u>: ACC sec. 323 delays the effective date of a board resolution exercising the powers delegated under sec. 208(5) until the time that the commissioner has filed the statement whereupon it has the effect of an amendment to the articles of incorporation.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 323 is a reenactment of former AS 10.05.084 which was modeled upon Section 16 of the MBCA. A wording change has been made to reflect the broader power of delegation to the board to fix by resolution the rights and privileges of an authorized but wholly unissued class provided in the ACC (sec. 208(5)).

<u>Official Comment to ACC Section 10.06.325</u>.

REDEMPTION OF SHARES; CREATION OF SINKING FUND; REPURCHASE AGREEMENTS.

<u>SCOPE</u>: ACC sec. 325 covers three crucial questions:

(1) it establishes the right of the corporation to create classes or series of shares which are redeemable at the option of the corporate issuer; (2) it forbids (subject to an exception for an open-end investment company) the creation of shares which vest a right to demand redemption in the shareholder; and (3) it permits the creation outside of the terms of the articles agreements which provide for the redemption or repurchase of shares of the corporate issuer.

The first and second of the topics covered by sec. 325 are sufficiently detailed as to clearly indicate the disposition of the legislature toward case law. The third topic, covered by the provisions of sec. 325(c), address a matter of some complexity and disparate case law development. In general the ACC treats either the redemption or repurchase of shares by the corporate issuer as a "distribution" and thus makes it subject to the financial restraints of Article 4, secs. 358-390.

Beyond these limitations it is the intention of the legislature to subject the decision to redeem or repurchase shares to the duties of care and loyalty otherwise imposed upon directors and corporate officers. Such concepts have been clearly recognized by the Supreme Court of Alaska as impacting upon those who de jure or de facto exercise the powers of corporate management. See Wolf v. Arctic Bowl, Inc., 560 P.2d 758, 770 (1977).

Granting full recognition to such fiduciary duties does not support the conclusion that either redemption or repurchase must, in all circumstances, be employed on a pro rata basis to all shares of the class or series. Cases such as General Investment Co. v. American Hide & Leather Co., 98 N.J.Eq. 326, 331, 129 A.2d 244, 246, 44 A.L.R. 80 (1925), to the extent that they would establish such an absolute proposition, are disapproved.

If those vested with the powers of corporate management can establish a valid business purpose for the entry into an agreement to redeem or repurchase some but not all of the shares of a given class or series those who are not extended the terms of such a transaction have no complaint. See Martin v. American Potash & Chemical Corp., 33 Del.Ch. 234, 92 A.2d 295, 302 (Sup.Ct. 1952).

CHANGE IN FORMER ALASKA LAW: ACC Sec. 325 is new and has no precedent in former Alaska law. It is taken from GCL Section 402(a), (b) and (d), with the deletion of subsection (c) which makes explicit the requirement that in every corporation there be at least one class or series of shares which bear the ultimate financial risks of the enterprise and are thus nonredeemable. This provision was considered unnecessary in the former California Act, has never been litigated, and is deemed implicit in the ACC without the need of further expression.

Official Comment to ACC Section 10.06.328.

IRREVOCABILITY OF SUBSCRIPTIONS FOR SHARES.

SCOPE: A subscription for shares of a corporation to be organized is basically a promise to buy shares of that corporation when it is organized under specified terms. Under many common law cases, a subscription is considered to be an offer and as such remains inherently revocable until accepted. In order to settle the issue of the nature of a subscription, to provide a fair result to those who act in reliance on subscriptions and to put an end to any litigation over the question of the binding effect of a subscription, sec. 328 makes the subscription irrevocable for a period of six months.

Since both the corporation or its promoters and other subscribers may be relying on a subscription, the consent of all subscribers is required for a revocation of a subscription by agreement. The terms of the subscription agreement may alter the presumption of irrevocability established by this section.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 328 is a verbatim reenactment of former AS 10.05.087 which is modeled after MBCA Section 17.

<u>Official Comment to ACC Section 10.06.330.</u>

PAYMENT OF SUBSCRIPTION FOR SHARES.

<u>SCOPE</u>: This section places the power to determine the time of payment for subscriptions for shares with the board unless the subscription agreement provides otherwise. A call for payment by the board shall be uniform as to all shares of the same class or series.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 330 is in substance a reenactment of former AS 10.05.090. Minor changes have been made in language to conform Alaska law to the MBCA's Section 17.

<u>Official Comment to ACC Section 10.06.333.</u>

FORFEITURE OF SHARES FOR DEFAULT IN PAYMENT.

<u>SCOPE</u>: ACC sec. 333 establishes the general rights of the corporate issuer in the event of default by a subscriber in the payment obligation for shares. The scheme is to recognize that the payment obligation has the dignity of any debt due and owing to the corporation and as such may be asserted in any general civil process. In addition, the bylaws may have provided further remedies which are subject to the general policy of the law that consequences are to be remedial rather than punitive in character. The test for punitive qualities would be an exaction of any sum greater than the consequential and incidental damages inflicted upon the corporate issuer by virtue of the breach.

Sec. 333 reflects the legislature's appreciation that shares allotted to a subscriber who has breached his contract inhibit the corporate efforts to raise capital; thus there is an explicit provision for the forfeiture of rights upon the observance of the statutory notice and grace period. There is a split among common law authorities as to whether a corporate issuer which has exercised a right to forfeit the subscriber's interest in shares may seek further recovery in the event of a deficiency after resale of the shares.

In furtherance of the general policy aimed at compensation of the aggrieved issuer, damages which are not recoverable through forfeiture and resale may be asserted against the breaching subscriber. Cases such as Atlantic Dynamite Co. v. Andrews, 97 Mich. 466, 56 N.W. 858 ([illegible]), are approved and those typified by American Well & Prospecting Co., 184 Cal. 343, 193 P. 779, 19 A.L.R. 1337 (1920) are disapproved.

CHANGE IN FORMER ALASKA LAW: ACC sec. 333 is a reenactment of former AS 10.05.093 which was premised upon Section 17 of the MBCA. There is no substantive change. The terms "penalties" and "penalty" have been changed to "remedies" and "remedy" to reflect the approved case law construction.

Official Comment to ACC Section 10.06.335.

CONSIDERATION FOR SHARES.

SCOPE: Sec. 335 recognizes two modes for fixing the amount of consideration (expressed in dollars) for the issuance by the corporation of shares. Unless the power has been reserved to the shareholders by a provision of the articles (sec. 210(1)(H)), the power is vested in the board. The exercise of this power is subject to the Fraud Standard set forth in sec. 340.

CHANGE IN FORMER ALASKA LAW

ACC sec. 335 retains the essence of former AS 10.05.096, which was derived from MBCA Section 18. Much of the former section has been deleted in the wake of the new financials (secs. 358-370 of this Article) which has eliminated the concepts of par value, treasury shares, stated capital and surplus accounts.

Official Comment to ACC Section 10.06.338.

PAYMENT FOR SHARES.

SCOPE: ACC sec. 338 specifies what may and may not be received as consideration for shares. Common law authorities which have attempted to prevent "watered down shares" by requiring that consideration be limited to cash are rejected in favor of a more realistic recognition that the corporation may be advantaged by the receipt of other valuable property (tangible and intangible) as well as services.

Sec. 338(b) continues the prohibition against the receipt of a promissory note or pledge of future services as payment in whole or in part for shares. This section is not intended to overrule the decision in Area, Inc. v. Stetenfeld, 541 P.2d 755, 760 (S. Ct. Alaska 1975), which held that shares issued in exchange for a promissory note (and thus in violation of the statute) are not void but are voidable at the instance of the corporate issuer and that once the promissory note was fully paid the defect was cured beyond the capacity of the issuer to thereafter complain.

CHANGE IN FORMER ALASKA LAW: ACC sec. 338 is a verbatim reenactment of former AS 10.05.099 which was derived from Section 19 of the MBCA.

Official Comment to ACC Section 10.06.340.

JUDGMENT OF BOARD OR SHAREHOLDERS AS TO VALUE OF CONSIDERATION CONCLUSIVE.

SCOPE: ACC sec. 340 sets proof of fraud as the standard necessary to overturn a determination of the value of consideration received by the corporate issuer of shares. This standard was established in recognition of the reality that differences of opinion as to the value of property or services are commonplace and that a strict standard for misfeasance is necessary in order to prevent inordinate amounts of litigation over this issue. The most common victim of an improper valuation is a creditor whose claims against the corporation go unsatisfied in the wake of a corporate bankruptcy, dissolution, or simple door-closing.

The ACC provides considerable protection to creditors in its provisions on financials in the Article and in sec. 488 on the secondary liability of officers and directors. These provisions substantially mitigate the harshness of the fraud standard provided by sec. 340.

CHANGE IN FORMER ALASKA LAW: ACC sec. 340 is a reenactment of former AS 10.05.102 which is modeled upon Section 19 of the MBCA.

Official Comment to ACC Section 10.06.343.

STOCK RIGHTS AND OPTIONS.

SCOPE: Unless otherwise defined or restricted in the articles of incorporation ACC sec. 343 gives the corporation, acting through its board, broad powers to create and issue rights or options covering authorized but unissued shares of any class or classes. The only substantive command of sec. 343 is that if such rights or options are to be made available to directors, officers, or employees of the corporation or any subsidiary (sec. 990 (42)(A)) and not to the shareholders generally then their issuance shall not be licit until approved by the affirmative vote of the holders of a majority of the shares or authorised by and consistent with a plan approved or ratified by a vote of the shareholders.

Consistent with the policy reflected in sec. 340, the judgment of the board as to the adequacy of the consideration received for such rights or options may not be overturned except upon proof of fraud in the transaction.

Unless they have been eliminated or curtailed by provisions of the articles, the general power of a corporation to create options or rights in unissued or treasury shares is subject to the preemptive rights of existing shareholders (sec. 428). If the issuance of the rights or options is pursuant to a plan of executive compensation approved by the shareholders, such shareholder approval would eliminate the preemptive rights as to shares covered by that approved plan. See ACC sec. 428(3)(A).

CHANGE IN FORMER ALASKA LAW: ACC sec. 343 is new to Alaska law and is predicated upon Section 20 of the MBCA with a modification eliminating the final sentence of the Model Act provision to conform to the financial provisions of the ACC. Under prior Alaska law the right of a corporation to issue stock rights and options may have existed under the general power to contract. ACC sec. 343 was adopted to clarify and regulate the exercise of this power.

Official Comment to ACC Section 10.06.345.

EXPENSES OF ORGANIZATION, REORGANIZATION, AND FINANCING.

SCOPE: ACC sec. 345 recognizes that there are costs incurred in the issuance and marketing of shares and protects the purchasers of such shares from further liability to the corporation on the theory that since it received only a "net amount" from the gross price paid that the shares are not "fully paid" and thus "assessable."

CHANGE IN FORMER ALASKA LAW: ACC sec. 345 is a reenactment of former AS 10.05.111 with a minor language modification, the changing of "nonassessable" to "assessable," so that the section parallels MBCA Section 22.

Official Comment to ACC Section 10.06.348.

CERTIFICATES REPRESENTING SHARES.

SCOPE: ACC sec. 348 is designed to facilitate the trend toward electronic substitutes for the traditional share certificate by permitting the seal of the corporate issuer to be affixed in a facsimile form and to permit the signatures of corporate officers to be facsimiles so long as the "certificate" is countersigned by a transfer agent or a registrar who is not an employee of the corporation.

CHANGE IN FORMER ALASKA LAW: ACC sec. 348 is a verbatim reenactment of former AS 10.05.114 and is modeled upon Section 23 of the MBCA.

Official Comment to ACC Section 10.06.350.

INFORMATION REQUIRED TO BE STATED ON CERTIFICATE.

SCOPE: ACC sec. 350(a) recognizes that information regarding the rights, preferences, and limitations of the shares is of great importance to shareholders. If the corporation is authorized to issue only one class of stock such shares enjoy all attributes of participation, control, and ownership defined by this chapter. However, if the corporate articles authorize the issuance of more than one class it is both possible and likely that the relative rights, privileges, preferences, and limitations on the classes will differ. In this instance, sec. 350(a) requires that the corporation furnish to each shareholder either a statement or summary of the designations, preferences, limitations, and relative rights of shares of the class of shares he has purchased and similar basic information regarding the shares of any other authorized class.

In the case of preferred or special classes which may be divided into series with variant rights and privileges the corporation must provide a full or summary statement of such variations. The information required by sec. 350(a) may be printed on the certificate or the certificate may be imprinted with a statement that the corporation will furnish to any shareholder so requesting and without charge such summary or full statements.

In adopting the language of sec. 350(a) the legislature intends to approve the holding in Hampton v. Tri-State Finance Corp., 30 Colo.App. 420, 495, P.2d 566 (1972), that the failure of the corporation to furnish the information required renders the stock contract voidable at the option of the aggrieved shareholder but that it does not bar enforcement of the restrictions upon the shares.

CHANGE IN FORMER ALASKA LAW: ACC sec. 350 is a verbatim reenactment of former AS 10.05.117 with the deletion of paragraph (4) regarding par value which is no longer a matter of consequence under the ACC. With this modification sec. 350 is predicated upon Section 23 of the Model Act.

Official Comment to ACC Section 10.06.353.

FULL PAYMENT REQUIRED FOR CERTIFICATE.

SCOPE: As in text.

CHANGE IN FORMER ALASKA LAW: ACC sec. 353 is a reenactment of former AS 10.05.120 which is predicated upon Section 23 of the MBCA.

Official Comment to ACC Section 10.06.355.

ISSUANCE OF FRACTIONAL SHARES OR SCRIP.

SCOPE: ACC sec. 355 provides two basic options to the board of directors under which it may deal with claims to fractional share ownership: the board may issue a certificate for a fractional share in which case the holder is entitled to the privileges conferred by shares of that class; or, the board may issue scrip entitling the holder to receive a certificate for a full share upon surrender of scrip aggregating a full share.

If the second alternative is employed the holder of the scrip is not entitled to the privileges of share ownership until the exchange of scrip aggregating a full share. Under sec. 355(c) the board may establish machinery to eliminate the outstanding scrip so long as that machinery is noticed on the scrip at the time of issuance.

CHANGE IN FORMER ALASKA LAW: ACC sec. 355 is a verbatim reenactment of former AS 10.05.123 and as such is a modified version of Section 24 of the MBCA. The essential difference lies in the omission of the Model Act's option in the board to eliminate fractional shares by simply paying in cash the fair value of fractions. Given the difficulties experienced with this option, see Teschner v. Chicago Title & Trust Co., 59 Ill.2d 452, 322 N.E.2d 54 (1974), appeal dismissed, 422 U.S. 1002, 45 L.Ed.2d 666, 95 S. Ct. 2623 (1975), it was decided that the protection of minority interests were better served by its continued omission from Alaska law.

Official Comment to ACC Sections 10.06.358-383.

INTRODUCTION: STATUTORY RESTRAINTS UPON THE DISSIPATION OF CORPORATE ASSETS--THE "FINANCIALS" OF THE ALASKA CORPORATIONS CODE.

The seemingly innocent act of a corporation distributing assets to the holders of its voting stock, whether by dividend or share repurchase, poses grave dangers. The parties in harm's way are the creditors of the corporate entity and the holders of what are termed "senior securities." To the degree that assets are dissipated through distribution to the voting shareholders, the corporate debtor may be rendered unable to meet its obligations to creditors or to deep faith with the pledge to met the contractual preferences granted to holders of senior shares. The case for legal intervention is premised upon a recognition that the holders of the voting shares control election of the directors who, in turn, make the decision to distribute assets. The parties with an adverse interest in this distribution are generally nonparticipants in the selection of directors.

Thus to please their constituency directors are likely to err on the side of generosity to the holders of voting shares. In the nineteenth century corporate financial manipulations left many a victim from schemes which followed this plot.

AN HISTORICAL OVERVIEW: Prior law, whether statutory or judge-made, has proven less than a match for directors bent upon dissipation of corporate assets. The initial position was that a distribution of assets which rendered the corporation bankrupt was a fraud upon the rights of creditors. Since this test was applied only after the fact, it had little value as a deterrent.

In the 1870's there emerged a refinement of the insolvency test. It was recognized that the assets of a corporation should be divided into two categories: fixed assets for which there was no ready ability of the market to convert them into cash; and "liquid or current assets" which could easily be exchanged for money. The dissipation of assets in the form of dividends directly drew down the cash reserves of the corporation. In so doing, it threatened to leave the corporation unable to meet its current liabilities in the normal course of business.

A corporation which could not pay its debts as they became due was "equitably insolvent" and a faithless debtor. Creditors were forced to either postpone repayment or force the corporate debtor into bankruptcy. It was a no win situation viewed from the perspective of the public interest: disappointed creditors might default upon their own obligations; bankruptcy of the entity produced unemployment and eliminated a competitor from the marketplace.

New York was among the first jurisdictions to build a statutory scheme beyond the insolvency test. Still in use in that jurisdiction, it has come to be known as the "Balance Sheet Surplus Test." This legislation forbade a distribution to shareholders unless the assets of the corporation exceeded its liabilities to all third parties and an amount attributable to "stated capital." When the balance sheet test was first promulgated, it sought security for creditors by taking advantage of a popular custom to issue corporate stock with a high "par value."

Par value was a concept tricky at best. Many investors showed a preference for high par value on the theory that it somehow reflected an intrinsic worth for the new issue. What it in fact did was to play into the hands of the New York legislation. "Stated capital" was an accounting entry equal to that fraction of the total sum of the monies received by the corporate issuer amounting to the "par value" of the shares. If the corporation sold the shares for a price above the "par value" such additional consideration was carried on the books as "paid-in surplus" (referred to as "capital surplus" in other jurisdictions following essentially the same legislative scheme).

The board of directors was free to declare and pay dividends out of assets attributable to paid-in surplus, but they could licitly go no further. The net effect of the balance sheet surplus test was to create a cushion for creditors and holders of senior securities. Their protection was founded in the command that the assets of the corporation could not be drawn down to the point where they were no longer equal to total liabilities and stated capital.

No sooner was this statute in place than ways were devised to minimize, if not mock, its effectiveness. The Great Depression inadvertently helped by disabusing the public of the notion that there was much to the concept of "par value." Gilt-edged certificates with a par value of $1,000 were used to paper not a few bathrooms. In the post-World War II expansion of the economy, the public showed a willingness to purchase low or nominal par stock. The impact of this appetite created a remarkably thin cushion in the form of a stated capital account.

In the 1950's "no par" stock gained acceptance. The New York legislation was adjusted so that the board was given power to allocate the consideration received for no par shares between stated capital and paid-in surplus accounts. Such license permitted the board to make only a nominal attribution to state capital reducing the protection afforded creditors to de minimus dimensions.

By the time no par stock had come on the scene, many critics were calling for replacement of the balance sheet surplus test with a more meaningful statutory scheme. The result was the creation of the "Earned Surplus Test." Illinois was one of the first jurisdictions to adopt this approach and the Model Act, expanding upon the Illinois scheme, spread the new test. The gist of the new test was the belief that the board should have an unfettered discretion to distribute assets to common shareholders only so long as such assets were taken from the net corporate earnings.

Thus the assets realized from the sale of stock were not to be distributed to shareholders because such a move was correctly perceived as a partial liquidation--a return of as opposed to on shareholders' investments. In its most vigorous form, the earned surplus test would have denied the board discretion to pay a dividend unless corporate assets exceeded total liabilities to third parties and a further sum equal to the total consideration for the sale of shares.

If the earned surplus tests had been maintained without exceptions it would have gone far beyond the balance sheet surplus test in constructing a cushion for creditors and the holders of senior securities. Instead, the test has been riddled with exceptions.

Under Section 46 of the MBCA, a corporation was permitted to make a distribution of assets notwithstanding the fact that there were no net earnings during the accounting period. Such a distribution could be charged against capital surplus (funds attributable to the sale of shares) if the holders of a majority of the outstanding shares affirmatively voted for the distribution; or, if the articles contained a provision empowering the board to make distributions chargeable against capital surplus. If there was an outstanding class of preferred (senior) shares there could be no distribution chargeable to capital surplus without first having paid all accrued preferential dividends. This limitation functioned to protect the interests of senior securities while leaving creditors helpless to protest unless the distribution from capital surplus threatened equitable insolvency.

A further exception proved useful if the corporation had experienced a net operating loss. One might suppose that such a loss would have to be made up in future years before the board could gain the discretion to pay further dividends. The Model Act was more generous. Under Section

70, the board was able to meet this adversity by simply passing a resolution to apply any part or all of its capital surplus to the reduction or elimination of the deficit arising from such a loss. If in the succeeding accounting period there were net profits, dividends could be paid out of this "earned surplus." There was no requirement that the capital surplus account ever be restored to its original dimension. A return of capital had been accomplished and the creditor's cushion reduced for all times.

If business reverses were so severe that operating losses reduced assets below the total of liabilities plus stated capital, the board was without power to pay a dividend unless, pursuant to Section 69 of the Model Act, the shareholders were to concur in the generation of a "reduction surplus." The essence of this scheme was a permanent reduction in stated capital. The "surplus" so generated would become "capital surplus" and available for distribution as such.

The only limitation was a command that stated capital could not be reduced to an amount less than the aggregate preferential amounts payable to all shares having preferential right in the assets of the corporation in the event of involuntary liquidation, plus the aggregate par value of all issued shares having no such preferential rights. When it is recalled that par value of such shares was likely to be nominal it can be seen that the interests of creditors were protected by little more than the insolvency prohibition.

If the board was unable to gain the concurrence of the shareholders (including the voting by class of any holders of senior securities) in the creation of a reduction surplus, it was forced to enter the succeeding accounting period with "impaired stated capital." There would be no further licit dividends until future net earnings increased the assets of the corporation to the point at which they again exceeded total liabilities plus stated capital. Directors in such circumstances were likely candidates for defeat in the next election by disappointed shareholders.

The latest step in relaxing the earned surplus test was the creation of a concept aptly termed "nimble dividends." For the directors of a corporation with impaired stated capital it came as manna from heaven. Under an optional version of Section 45 of the Model Act, if a corporation has net earnings for two consecutive fiscal years, then, notwithstanding a continued impairment of stated capital, a dividend could be declared by the board and charged against the current net earnings.

While a rationale may be offered in support of each of these exceptions, their net effect upon the earned surplus test has been characterized by critics as the creation of a watch dog with no bite and little bark.

THE RATIO/ASSETS SURPLUS TEST: In the mid-1970's the California Legislature joined the bar association in the creation of a committee to study, with a view toward revision, the California Corporations Code. At that time California law relied upon the earned surplus test burdened by the possibilities of reduction surplus and nimble dividends. There were two major criticisms of the status quo: (1) the existing restraints upon dissipation of corporate assets afforded insufficient protection to corporate creditors; and (2) the language of the law meant little to accountants who were relied upon to prepare and audit the books and records.

After substantial debate, the 1977 California Corporations Code was framed in a manner designed to meet both of these problem areas. The earned surplus test was junked. Also disregarded were the concepts of par value, stated capital and all manner of capital surplus. In their place was substituted what is termed a "ratio/assets surplus test." For the purpose of complying with this test, the books of California corporations were to be kept in accordance with Generally Accepted Accounting Principles (GAAP).

In 1980 the Alaska Code Revision Commission concluded that both the substantive scheme and deference to the accounting profession pioneered in California were worthy models for the new Alaska Corporations Code. While this recommendation was pending in the legislature, a final recommended draft of the Revised Model Business Corporation Act was published. The official comment to Section 6.40 makes it clear that the framers of that recommended statute agree that classical concepts of legal accounting predicated upon various types of "surplus" are to be discarded.

However, the Revised Model Act relies upon an equitable insolvency test rather than the ratio/assets surplus standard pioneered in California. Further, the Revised

Model Act would not require utilization of Generally Accepted Accounting Principles, insisting only upon "practices and principles that are reasonable in the circumstances . . . ."

In 1984, the Commission considered the position of the framers of the Revised Model Act and partially concurred in their judgment. They rejected total reliance upon an equitable insolvency test and continued to recommend adoption of the ratio/assets surplus test now embodied in sec. 358. The Commission noted that the ratio/assets surplus test of Section 500 of the California General Corporation Law has been in effect in that jurisdiction since 1977 and appears quite successful. Not a single reported case exists suggesting that the concept is difficult to comprehend or apply. By contrast, there is no experience with the test suggested by the Revised Model Act.

Finally, the protection of creditors afforded by requiring the retention of five dollars in assets for every four dollars in corporate liabilities was judged part of the prudent balance sought between the legitimate quest for entrepreneurial activity and fiscal responsibility. Under the scheme of the ACC, the criteria of sec. 358 are supplemented by the equitable insolvency test embodied in sec. 360, and the protection of liquidation preferences for senior shares contained in sec. 363.

However, sec. 970(5) was amended to remove the general insistence upon the obligatory utilization of Generally Accepted Accounting Principles. For an elaboration of the standard now embodied in that section, see the specific official comment, infra. However, note that in certain sections (e.g., 358(c)), observance of Generally Accepted Accounting Principles for specific determinations is required. Accordingly, with the modifications hereinafter noted, Alaska has become the second state to adopt the ratio/assets surplus test.

<u>THE TEST</u>: As with the balance sheet and earned surplus tests, the ACC builds upon the basic injunction that no distribution (defined by sec. 990(17) as a transfer of cash or property by a corporation to its shareholders, without consideration, by way of dividend or the purchase or redemption of its shares) may be undertaken when the result would produce equitable insolvency. The content of the

equitable insolvency restraint has been altered in several particulars by ACC sec. 360:

> Neither a corporation nor any of its subsidiaries shall make any distribution to the corporation's shareholders (sec. 990(17)) if the corporation or the subsidiary making the distribution is, or as a result thereof would be, likely to be unable to meets its liabilities as they mature.

Two significant changes are incorporated in this statute.

The "likelihood" element of this formula is intended to be more restrictive than the traditional inquiry. Former Alaska law, AS 10.05.201, asked whether the corporation is now, or, giving effect to the dividend, would be insolvent. ACC sec. 360 is more cautious, prohibiting distributions if the corporation likely is, or, giving effect to the distribution, likely would be unable to meet its liabilities as they mature.

Substantively, the inclusion of subsidiaries is a restriction of greater importance. A parent corporation and its subsidiaries are to be considered as a unit; the various corporate shells are disregarded in favor of viewing the financial position of total operations of an affiliated group. For the definition of "subsidiary" see ACC sec. 990(42). For the differences between ACC sec. 360 and ACC Section 501, see the official comment to sec. 360, infra.

Assuming that insolvency within the meaning of ACC sec. 360 is not threatened, sec. 358 establishes two circumstances under which the board of directors enjoys discretion to declare and pay a distribution to shareholders.

Distributions in cash or other assets may be declared and paid against "retained earnings" (sec. 358(a)(1)). Like the earned surplus test, this requirement reflects a legislative judgment that routine distributions should only be made from operating profits. Unlike the Model Act, the ACC contains no provision for permitting net operating losses to be charged off by writing down capital surplus. There is no such concept. If the corporation cannot make the dividend payment out of assets charged against retained earnings, the ACC employs a revolutionary approach toward partial liquidations.

Under sec. 358(a)(2), a corporation which has no retained earnings may make a distribution if, immediately after giving effect to the plan, both prongs of a ratio/assets test are met.

The first requirement is that the assets of the corporation be at least equal to 1.25 times liabilities. Compliance with this rule guarantees a minimum cushion to creditors in that the corporation must continue to hold five dollars of assets for every four dollars of liabilities.

The second requisite focuses upon current liquidity of the corporation. The general rule requires that a corporation's "current assets" be at least equal to "current liabilities." Both terms are defined by Generally Accepted Accounting Principles. Special concern is manifest for corporations which have a recent history of paying more in interest on their debt than their earnings would reflect if interest and taxes were not deducted in computing net profits.

Such corporations must comply with a further requirement that current assets be at least 1.25 times current liabilities. This mandate is in addition to the equitable insolvency test defined in ACC sec. 360. It is a more stringent guarantee of liquidity, going beyond the somewhat ambiguous requirement of meeting debts as they mature by requiring that the dimension of current liabilities be reckoned and this figure exceeded by a ratio of 1.25:1.

In adopting the content of ACC secs. 358 and 360 the legislature has intended that corporate creditors attain a more reliable protection than that found in prior Alaska law which followed the Model Act. The virtue of the new provisions is their ease of application. Their strength is the absence of exceptions.

PROTECTION THE INTEREST OF SENIOR SHARES: In the initial passage of this comment it was asserted that the distribution of assets to holders of voting stock threatened two groups--creditors and the holders of "senior securities." The basic thrust of the three contemporary statutory restraints unon distributions (balance sheet, earned and ration/asset surplus tests) has been the protection of creditors. This emphasis is natural, for by definition the creditor is an "outsider" devoid of a voice in management. The ACC also focuses upon the second set of adversaries, the quasi-outsiders who have purchased shares with either a dividend or a liquidation preference.

Senior shares achieve this status by dent of a contract between the corporate issuer and the holders of the securities. The specific term used to identify this arrangement is "indenture." While the content of an indenture may reflect tailor-made understandings between the potential investors and the corporation, most are comprised of either or both of the following elements: the holders of this class of stock are "guaranteed" a dividend preference (usually the dimension of this dividend pledge is specified; e.g., the holders of these shares shall be paid an annual dividend of $4.00 per share); in the event of corporate dissolution the holders are guaranteed a preferential claim to assets which exceed the claims of all creditors (a liquidation preference).

While it varies with the content of particular indentures, it is common that holders of senior securities do not have a voice in the election of directors. This common arrangement sets the stage for conduct by the board which, while responding to the needs and interests of the holders of the voting shares, may prejudice either the will or ability of the corporation to keep faith with the indenture. The most common harm is that dividends are paid to the holders of common (or "junior") shares in such generous measure as to prejudice the ability of the corporation to meet its dividend obligations to the senior shares in subsequent accounting periods.

In Model Act jurisdictions, Section 46 makes it relatively easy for the board to pay a dividend on senior shares which must be charged against capital surplus. To pay such a dividend to holders of common stock the board had to have shareholder authorization (with senior shares being privileged to vote as a "class" and there being no operative consent unless that class voted affirmatively) or an enabling provision in the articles of incorporation. To invade such surplus to meet indenture obligations, the board could proceed on its own motion with the only statutory injunction being that specific notice must be given to the shareholders that this "dividend" was in fact a return of capital (a partial liquidation).

Section 46(c) of the Model Act declares that dividends chargeable to capital surplus may never be paid until all "cumulative dividends accrued to all preferred or special classes of shares entitled to preferential dividends shall have been fully paid." Finally Section 46(d) prohibits any distribution charged against capital surplus if the effect would be to reduce remaining assets of the corporation below the aggregate preferential amount payable in the event of involuntary liquidation to the holders of shares having preferential rights to the assets of the corporation in such an eventuality.

These protections of the Model Act, which were reflected in the content of former AS 10.05.207 and .210, have been strengthened by ACC secs. 363 and 365.

ACC sec. 365 restricts the board's authority under sec. 358 so that there can be no distribution to junior shares unless the amount of retained earnings of the corporation immediately prior thereto equals or exceeds the amount of the proposed distribution plus the aggregate amounts of cumulative dividends in arrears on all shares having a dividend preference. The net effect of ACC sec. 365 is to foreclose the use of partial liquidations under 358.

The liquidation preference of senior shares is guarded by ACC sec. 363. By its terms neither a corporation nor any of its subsidiaries may make any distribution to any junior shares if, after giving effect to the proposed distribution, the excess of corporate assets over liabilities would be less than the liquidation over the class or series to which the distribution is made.

<u>CHANGE IN FORMER ALASKA LAW</u>: Prior to the enactment of the ACC, Alaska used a mid-1950's version of the Model Act. Former AS 10.05.201 imposed an equitable insolvency injunction for distributions of dividends while former AS 10.05.012 and .309 imposed this limitation upon redemption or repurchase of shares. The test imposed was the classical "inability of the corporation to pay its debts as they became due in the regular course of business."

Former AS 10.05.369 the board was permitted to eliminate an operating deficit by simply writing down or "reducing" capital surplus. Any subsequent net profits were then free to be distributed as earned surplus notwithstanding the historical deficit. Such a provision reflected the content of Model Act Section 70.

Senator Bettye Fahrenkamp
Page 64
May 7, 1987

The possibility that dividends might be distributed by a corporation which has no earned surplus is provided by Section 46 of the Model Act. It was carried into former Alaska law and expanded by the terms of former AS 10.05.207. Unlike the Model Act, which permitted such distributions only if they could be charged against capital surplus, former .207 permitted distributions to be charged against stated capital or capital surplus. It would appear that the genesis of this extraordinary provision was Oregon's Section 57.221.

As is the case under the Model Act, under former Alaska law if the distribution attributable to capital accounts was to be made to holders of voting shares, the board had to obtain the affirmative vote of shareholders or act pursuant to an enabling provision of the articles. If recourse had to be made to shareholder approval, Alaska differed from the Model Act's requirement of a simple majority by demanding the authorization of at least two-thirds of the outstanding shares of each class whether or not entitled to vote by the provisions of the articles. This last provision reflected concern for the holders of senior shares who normally do not have voting rights.

Former Alaska law did not have a nimble dividends provision such as that suggested by alternative Section 45(a) of the Model Act.

As noted, protection for the holders of senior shares was provided by former AS 10.05.207 and .210 which had adopted the content of Section 46. There could be no distributions chargeable to capital accounts unless all cumulative dividends accrued on all preferred shares had been fully paid (.207(3)). No such distribution was licit if the effect was to reduce the remaining net assets of the corporation below the aggregate liquidation preference of any senior shares (.207(4)).

If the invasion of the capital accounts was for the purpose of honoring the corporation's indenture obligation to pay a dividend on preferred shares, former .210 permitted the board to take such action without shareholder approval or affirmative provisions of the articles. In such cases there was a mandatory requirement that the holders of the senior shares receive a specific notice to the effect that the dividend represents a return of capital by way of partial liquidation.

Official Comment to ACC Section 10.06.358.

DISTRIBUTIONS; CONDITIONS.

SCOPE: ACC sec. 358 specifies the financial conditions which must obtain before a corporation may make a licit distribution (defined in ACC sec. 990(17)) to its shareholders. Assuming that a corporation is equitably solvent under sec. 360, and subject to secs. 363 and 365, sec. 358(1) permits distribution to be made to the extent of retained earnings (defined in ACC sec. 990(33)).

If a corporation has insufficient retained earnings to make a proposed distribution, a distribution in partial liquidation is authorized as permitted by sec. 358(a)(2). A distribution in partial liquidation is licit if, immediately after giving effect to the plan of distribution, both criteria of the ratio/assets surplus test are met. The first prong, sec. 358(a)(2)(A), attempts to guarantee that after the distribution there will remain within the possession of the corporation "real" assets which exceed all liabilities to nonshareholders by a ration of 1.25 to 1.

To insure the soundness of this calculation the ACC specifies "assets" which may not be included because of their ephemeral quality or nonsusceptibility to being realized in cash. It is important to note that under sec. 358 the "paid-in capital" account (defined in ACC sec. 990(27)) is counted neither as an asset nor a liability.

The second restraining criteria imposed by the ACC is sec. 358(a)(2)(B) which focuses upon the current liquidity of the corporation. The norm established is that, after giving effect to the distribution (typically made in the most common of current assets, cash), the current assets of the corporation must be at least equal to current liabilities. Current assets and current liabilities to the extent they are not regulated by sec. 358(b)(2)(C), are to be defined according to Generally Accepted Accounting Principles (see ACC sec. 970(5)).

If the earnings of a corporation (before taxes and before interest expenses) for the two preceding fiscal years was less than the cost of debt service during that period the entity must pass a more stringent ratio whereby current assets must exceed current liabilities 1.25 to 1.

Sec. 358(b)(2)(C) specifies the accounting treatment to be applied in certain transactions. In the computation of corporate assets, profits realized from an exchange of assets are not to be included unless currently realizable in cash. However, "current assets" may be augmented by net amounts which the board reasonably expects to be realized during the 12-month period used in calculating current liabilities from existing contractual relationships. If this accounting is used, then costs anticipated over that same period with respect to those contracts must be included as "current liabilities."

In the event the corporation elects to make a distribution of property to shareholders, the value of that distribution is determined according to the value at which the property is carried in current corporate financial statements, as governed by Generally Accepted Accounting Principles.

CHANGE IN FORMER ALASKA LAW: ACC sec. 358 supplants the earned surplus test of former AS 10.05.234(1) (payment of dividends) and .012 (repurchase of shares). With the additions and deletions hereafter noted, it is premised upon the amended version of Section 500 of the ACC.

ACC sec. 358(a)(2)(A)'s mandate to exclude ". . . evidence of debts owing from directors or officers or secured by the corporation's own shares . . ." is unique to Alaska law. Under the ACC loans to a defined class of corporate insiders are treated as distributions. See ACC sec. 485 and official comment.

A significant deletion from the language of GCL Section 500 involves a concession to utility companies.

Finally, it should be noted that ACC sec. 990(33) defines "retained earnings," a term which is not defined in the GCL which leaves its meaning to Generally Accepted Accounting Principles. The sec. 990(33) definition is derived from Section 2 of the MBCA and former AS 10.05.325. Deleted from these parent definitions was language which permitted a corporation to "eliminate" a deficit against the earned surplus account.

The new definition makes clear that losses must be taken into account in a calculation of retained earnings and cannot be ignored. A definition was adopted so that corporations desiring to avoid accounting expenses could

Official Comment to ACC Section 10.06.358.

DISTRIBUTIONS; CONDITIONS.

SCOPE: ACC sec. 358 specifies the financial conditions which must obtain before a corporation may make a licit distribution (defined in ACC sec. 990(17)) to its shareholders. Assuming that a corporation is equitably solvent under sec. 360, and subject to secs. 363 and 365, sec. 358(1) permits distribution to be made to the extent of retained earnings (defined in ACC sec. 990(33)).

If a corporation has insufficient retained earnings to make a proposed distribution, a distribution in partial liquidation is authorized as permitted by sec. 358(a)(2). A distribution in partial liquidation is licit if, immediately after giving effect to the plan of distribution, both criteria of the ratio/assets surplus test are met. The first prong, sec. 358(a)(2)(A), attempts to guarantee that after the distribution there will remain within the possession of the corporation "real" assets which exceed all liabilities to nonshareholders by a ration of 1.25 to 1.

To insure the soundness of this calculation the ACC specifies "assets" which may not be included because of their ephemeral quality or nonsusceptibility to being realized in cash. It is important to note that under sec. 358 the "paid-in capital" account (defined in ACC sec. 990(27)) is counted neither as an asset nor a liability.

The second restraining criteria imposed by the ACC is sec. 358(a)(2)(B) which focuses upon the current liquidity of the corporation. The norm established is that, after giving effect to the distribution (typically made in the most common of current assets, cash), the current assets of the corporation must be at least equal to current liabilities. Current assets and current liabilities to the extent they are not regulated by sec. 358(b)(2)(C), are to be defined according to Generally Accepted Accounting Principles (see ACC sec. 970(5)).

If the earnings of a corporation (before taxes and before interest expenses) for the two preceding fiscal years was less than the cost of debt service during that period the entity must pass a more stringent ratio whereby current assets must exceed current liabilities 1.25 to 1.

ascertain the general meaning of this accounting term which is of such crucial importance to sec. 358.

Official Comment to ACC Section 10.06.360.

PROHIBITED DISTRIBUTION: INABILITY TO MEET MATURING DEBTS AND LIABILITIES

SCOPE: The "equitable insolvency" test was historically the first restriction placed on a corporation's right to make distributions; today, the ability of a corporation to meet its liabilities as they become due remains the initial check upon any plan of distribution.

CHANGE IN FORMER ALASKA LAW: ACC sec. 360 replaces AS 10.05.201; it is based on GCL Section 501. The "equitable insolvency" test created by sec. 360 differs from prior Alaska law in several particulars. Prior law prohibited distributions to a corporation which was insolvent or would be rendered insolvent by the making of the distribution. The new test errs on the side of caution by prohibiting a distribution that would be likely to leave the corporation unable to meet its liabilities as they mature.

Sec. 360 in combination with sec. 970(5) requires that the determination of the issue of solvency take into account both the corporation's and either its subsidiary's or parent's solvency; the entire corporate family's financial health is to be evaluated, not merely that of the most sound member.

ACC sec. 360 differs from GCL Section 501 in that it omits language which created an exception for liabilities "whose payment is otherwise provided for"; the deletion of this language reflects a concern about its ambiguity and potential for abuse.

Official Comment to ACC Section 10.06.363.

PROHIBITED DISTRIBUTION OF JUNIOR SHARES: LIQUIDATION PREFERENCE.

SCOPE: ACC sec. 363 gives limited protection to liquidation preferences of senior shares by forbidding any corporate distribution which would dissipate corporate assets to such an extent that the remaining "real" assets did not equal or exceed the sum of "real" liabilities and the amount of the liquidation preference of all shares having a preference on liquidation over the class or series to which the distribution relied upon a positive figure in the "retained earnings" account (sec. 358(a)(1)), or was a partial liquidation as permitted under sec. 358(a)(2).

CHANGE IN FORMER ALASKA LAW: ACC sec. 363 is taken from GCL Section 502. It replaces former AS 10.05.207(4). Although sec. 363 uses the same basic formula as prior law to protect dividend preferences, it strengthens the operative effect of that formula by excluding "paper assets" and distant and uncertain liabilities from the calculus. Note that the treatment of evidences of debts owing from directors and officers is treated as a "paper asset" in this section as in sec. 358. This is a variation from GCL Section 502 accomplished for reasons stated in the comment to ACC Section 358.

Section 363 does not protect liquidation preferences when a distribution is made to either shares of the same class or series or to a class with superior preferences upon liquidation. Thus, a repurchase of shares with the same liquidation preference is permitted under sec. 363 and may be harmful to the liquidation rights of the remaining shares in that class. Alert draftsmanship as permitted under secs. 210 and 375 may be used to prevent any inequity which could otherwise occur under the statutory protections provided in sec. 363.

Official Comment to ACC Section 10.06.365.

PROHIBITED DISTRIBUTION TO JUNIOR SHARES; RATIO OF RETAINED EARNINGS.

SCOPE: As a further limitation upon the power of a corporation to make a distribution under ACC sec. 358, sec. 365 imposes restrictions designed to protect shares with a dividend preference. Distributions to junior shares may not be made except from retained earnings (as opposed to a permitted partial liquidation) and then only if the amount of retained earnings immediately prior to the proposed distribution equals or exceeds the amount of that proposed distribution plus the aggregate amount of the cumulative dividends in arrears on all shares having a dividend preference over the class or series to which the distribution is to be made.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 365 adopts the language of GCL Section 503 and supplants former AS 10.05.207(3). The new provision gives a corporation greater flexibility than prior law since it merely requires that a portion of the retained earnings account be reserved to legitimate a distribution to junior shares. Prior Alaska law required that such dividend preferences be paid before any distribution to junior shares.

<u>Official Comment to ACC Section 10.06.368</u>.

EXCEPTION FOR PURCHASE OR REDEMPTION OF SHARES OF DECEASED SHAREHOLDER.

<u>SCOPE</u>: It is often desirable in smaller corporations to provide for the death of a shareholder with a plan permitting the corporation to purchase or redeem the shares of the deceased; such a plan prevents the potentially troublesome problems of having the deceased's heirs participating in the business. A common method used in deploying such plans is for the corporation to purchase insurance on the shareholder's life, naming the corporation as the beneficiary. The insurance proceeds are to be used for the purchase or redemption.

Sec. 368 anticipates the problem of a corporation which receives insurance proceeds under such a plan but is in such poor financial condition that it cannot licitly purchase or redeem the deceased's shares under secs. 358-365. The statute strikes a balance between the protection of creditors and senior shares and the execution of the share acquisition plan by permitting the amount of the proceeds from the policy in excess of the total amount of the premiums paid by the corporation to be freely used to purchase or redeem the deceased's shares. Any purchase or redemption in excess of this amount must be licit under secs. 358-365.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 368 is new to Alaska Law; it is taken verbatim from GCL Section 503.1.

Official Comment to ACC Section 10.06.370.

INAPPLICABILITY TO REGULATED INVESTMENT COMPANY.

SCOPE: In order to avoid any conflict with federal law an exception to the provisions of ACC sec. 358 is made for corporations defined as regulated investment companies under the United States Internal Revenue Code.

CHANGE IN FORMER ALASKA LAW: ACC sec. 370 is new to Alaska law; it is derived from UCL Section 504.

Official Comment to ACC Section 10.06.373.

SHARE DIVIDENDS: RESTRICTIONS.

SCOPE: Share dividends do not represent an immediate threat to the security of creditors since they constitute a further division of shareholder interests in the entity. If a share dividend is declared and paid with respect to a class or series which has a "fixed dividend" obligation there is potential harm to creditors in the enhanced number of shares asserting this claim. However, creditors are protected by ACC sec. 358's ratio/assets surplus test which, irrespective of the terms of any share indenture, disciplines the circumstances under which a distribution may be made.

The thrust of ACC sec. 373 is not with respect to the protection of creditors but rather with the integrity of share classification. If the board of directors were competent to declare and pay to the holders of common shares a dividend comprised of shares of a preferred class, the opportunities for undermining the position of those who parted with valuable consideration for the preferred shares would unfold in unfair distributions of the senior shares to common. In addition, dilution of the original senior shareholders percentage holdings of the senior shares with new shares held by holders of common might change the "class vote" of the preferred class in circumstances where such a class would be enfranchised, such as amendments to the articles and organic changes. To obviate these dangers, ACC sec. 373 erects a prohibition against a dividend payable in shares of a class to holders of shares of another class. The command is not absolute and if the articles so provide or there is an affirmative vote or written consent of the holders of the class of shares in which the dividend is to be paid in advance of the distribution such an arrangement is licit.

CHANGE IN FORMER ALASKA LAW: ACC sec. 373 is a reenactment without change of former AS 10.05.204(5) and is predicated upon Section 45(e) of the MBCA.

Official Comment to ACC Section 10.06.375.

ADDITIONAL RESTRICTIONS IN ARTICLES, BYLAWS, INDENTURES OR AGREEMENTS.

SCOPE: ACC sec. 375 makes it explicit that the provisions of the ACC on the declaration of dividends and purchase or redemption of shares do not "occupy the field" and thereby prevent further regulation of those issues by the articles, bylaws, indentures or agreements.

CHANGE IN FORMER ALASKA LAW: This section does not change prior Alaska law; it merely makes the law explicit.

Official Comment to ACC Section 10.06.378.

LIABILITY OF SHAREHOLDERS RECEIVING PROHIBITED DISTRIBUTIONS: SUIT AGAINST SHAREHOLDERS.

SCOPE: ACC sec. 378 provides a nonexclusive remedy against shareholders who have received any distribution with knowledge of facts indicating the impropriety thereof. The remedy runs to the corporation and may be asserted to the use of the corporation by any creditor for a violation of secs. 358 or 360 provided that the creditor's claim had arisen prior to the time of the distribution of which complaint is made and to which he did not consent.

Under sec. 378(b)(2) holders of senior shares may commence the action for violation of secs. 363 or 365 provided that the senior shares were held at the time of the distribution of which complaint is made and to which he did not consent. Note that the provisions of sec. 435 relating to derivative suits have been exempted for any action commenced under sec. 378.

The liability created by sec. 378 is not strict in the sense that the shareholder must have had knowledge of facts indicating the impropriety of the distribution. Cases such as Williams, Recr. v. Boice, 38 N.J.Eq. 364 (Ch. 1884), which imposed strict liability are thus rejected in framing the content of sec. 378. Likewise rejected are the old "trust fund" cases such as those reviewed in Wood v. National City Bank, 24 F.2d 661 (2d Cir. 1928). However, the standard created by sec. 378 is not that of a "white heart and empty head." A shareholder is liable within the meaning of sec. 378 if a reasonable person in like circumstances exhibiting reasonable effort would have recognized an indication of impropriety in the distribution.

Note that ACC sec. 378(a) creates liability, under designated circumstances, for the amount of an "improper" distribution. In adopting this language the legislature intends to approve the holding in Gray v. Sutherland, 124 Cal.App.2d 280, 268 P.2d 754 (1954), that a distribution is improper not only in the circumstances of a violation of the act's "financials" but also when it violates any other provision of the general corporation law. For example, if the distribution was declared under irregular circumstances by the directors it would be "improper" notwithstanding the absence of offense to sec. 358. In such circumstances the suit in the name of the corporation could be brought by either a contemporaneous and nonconsenting shareholder or a creditor.

To reduce duplicative litigation, sec. 378(c) provides that any shareholder sued may implead all other shareholders as liable under the section and compel contribution from such shareholders either in the present or an independent action.

CHANGE IN FORMER ALASKA LAW: ACC sec. 378 is new to Alaska law. CCL Section 506 provides the basis for its current form and content. It supplements the provisions of ACC sec. 480(b) which is a reenactment of former AS 10.05.225 which allowed directors sued for illicit distributions to seek contributions from shareholders who knowingly accepted them.

Official Comment to ACC Section 10.06.380.

IDENTIFICATION OF DISTRIBUTION IN NOTICE TO SHAREHOLDERS.

SCOPE. In order to set the stage for recovery of illicit distribution under ACC sec. 378 and to inform shareholders be paid in advance of the distribution such an arrangement is licit.

CHANGE IN FORMER ALASKA LAW: ACC sec. 373 is a reenactment without change of former AS 10.05.204(5) and is predicated upon Section 45(e) of the MBCA.

Official Comment to ACC Section 10.06.375.

ADDITIONAL RESTRICTIONS IN ARTICLES, BYLAWS, INDENTURES OR AGREEMENTS.

SCOPE: ACC sec. 375 makes it explicit that the provisions of the ACC on the declaration of dividends and purchase or redemption of shares do not "occupy the field" and thereby prevent further regulation of those issues by the articles, bylaws, indentures or agreements.

CHANGE IN FORMER ALASKA LAW: This section does not change prior Alaska law; it merely makes the law explicit.

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Under sec. 378(b)(2) holders of senior shares may commence the action for violation of secs. 363 or 365 provided that the senior shares were held at the time of the distribution of which complaint is made and to which he did not consent. Note that the provisions of sec. 435 relating to derivative suits have been exempted for any action commenced under sec. 378.

The liability created by sec. 378 is not strict in the sense that the shareholder must have had knowledge of facts when a dividend represents a partial liquidation of the corporation as opposed to a pro rata distribution of corporate profits, ACC sec. 380 requires that management identify the source and accounting treatment of a dividend charged against any source other than the retained earnings account.

CHANGE IN FORMER ALASKA LAW: ACC sec. 380 is taken from GCL Section 507. It replaces former AS 10.05.207(5) which required identification of distributions in partial liquidation of the corporation as "partial liquidations."

Official Comment to ACC Section 10.06.383.

INAPPLICABILITY TO WINDING UP AND INVOLUNTARY OR VOLUNTARY DISSOLUTION.

SCOPE: The provision of Article 9 for the winding up of corporate affairs and the involuntary or voluntary dissolution of the corporation are plenary in their coverage; no additional law is required to protect the interest of creditors and the holders of senior shares. Thus, the provisions of secs. 358-365 are made inapplicable to such procedures by this section.

In order that there is not time during which neither the provisions of Article 4 nor the provisions of Article 9 are operative, it is the intent of the legislature in enacting this provision that the exemption from secs. 358-365 which is created does not take effect until either a certificate of election of voluntary dissolution is delivered to the commissioner in accordance with ACC sec. 608(c), the issuance of a certificate of involuntary dissolution by the commissioner under sec. 630(c) or a decree of involuntary dissolution rendered by a superior court under ACC sec. 633. Any stay of a certificate of involuntary dissolution or a decree of involuntary dissolution shall also stay the exemption from Article 4 created by sec. 383.

CHANGE IN FORMER ALASKA LAW: ACC sec. 383 is taken from GCL Section 508 with no change whatsoever.

Official Comment to ACC Section 10.06.385.

REDEMPTION OF SHARES AT THE OPTION OF CORPORATION; MANNER.

SCOPE: ACC sec. 385 creates a statutory procedure for redemption. The notice provisions of subsection (b) are subject to modification by the articles of incorporation.

CHANGE IN FORMER ALASKA LAW: Prior Alaska law provided no statutorily approved procedure for the redemption of shares. ACC sec. 385 is derived from GCL Section 509 with the deletion of language in subsection (c) which would have, nonsensically, required a corporation to send a notice to itself if it did not have the shareholder's address.

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."

Official Comment to ACC Section 10.06.390.

CAPITALIZATION OF RETAINED EARNINGS.

SCOPE: This section permits the board of directors to pass a resolution which transfers amounts properly allocated to the retained earnings account into the paid-in account. The effect of such a transfer would be to limit the ability of the board in the future to make distributions under secs. 358-365.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 390 continues the policy of prior law which permitted directors to increase either the stated capital (former AS 10.05.108) or the capital surplus (former AS 10.05.366) accounts by charging the earned surplus account. There is no corresponding statute in the GCL financials.

It is here noted that the accounting provisions of former law required that an amount equal to the total par value of shares distributed as dividends be transferred to the stated capital account from a surplus account (AS 10.05.204(4)(A)). No such accounting treatment is required under the ACC since the use of par value has been eliminated. Thus, the capitalization of earnings traditionally represented by the issuance of a share dividend is never required by the new law. Sec. 390 permits the continued use of this tradition.

<u>Official Comment to ACC Section 10.06.405.</u>

MEETINGS OF SHAREHOLDERS.

<u>SCOPE</u>: ACC sec. 405 installs a requirement that the shareholders of any corporation organized under or subject to this Chapter must meet at least once annually. If management defaults in calling this meeting sec. 405 provides summary measures by which any shareholder may apply to the superior court for an order convening the annual meeting. The statute also determines standing to call special meetings of the shareholders.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 405 is predicated upon Section 28 of the Model Act and Section 600(d) of the GCL. It replaces former AS 10.05.138. For the first time in Alaska law a shareholder is provided with standing to seek a summary court order to convene an annual meeting if such a meeting has not been held within the prior thirteen month period. The former declaration in AS 10.05.138 that the failure to hold the annual meeting did not work a forfeiture or dissolution of the corporation has been omitted in sec. 405.

ACC sec. 405(c) differs from the Model Act in conferring the power to summon special meetings of the shareholders upon the chairman of the board and the president of the corporation. Former AS 10.05.138 conferred such power upon the president but did not reach the chairman of the board.

<u>Official Comment to ACC Section 10.06.408.</u>

CLOSING OF TRANSFER BOOKS AND FIXING RECORD DATE.

<u>SCOPE</u>: One of the essential attributes of corporate status is the free transferrability of share interests. Such ongoing transactions threaten havoc when it is necessary to determine the identity of shareholders who may be entitled to vote in an annual or special meeting or to participate in a distribution.

Sec. 408 provides three alternatives for effecting a determination as to share membership for these purposes. Under the first alternative the board may simply close the stock transfer books. Such a closure inhibits trading in the shares and hence the statutory limitation on the period of time during which the transfer books may be closed (70 days). A second alternative is for the board to simply declare a "record date" for such determination. Shares traded after that date may be effectively transferred, but the corporation is under no obligation to recognize the transferee for the purpose for which the record date has been declared. Here, too, sec. 408(b) imposes a maximum of 60 days before the action requiring determination of shareholders upon the power of the board to close the stock transfer books.

Finally, if the board had neither closed the transfer books nor declared a record date, the default mode for determining the shareholders is to adopt the date on which the notice of the meeting is called or the resolution of the board declaring the distribution is adopted. Shareholders of record on those dates only would be recognized.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 408 is predicated upon Section 7.05 of the Revised Model Business Corporation Act with one modification. In both subsections (a) and (b) the Model Act's ten day minimum period before the action is taken has been extended to twenty (20) days in sec. 408. Former AS 10.05.144 had utilized the Model Act's ten day period. The change in ACC sec. 408 was adopted in order to further the general use of twenty day notice periods which

are deemed a more realistic accommodation to physical and climactic barriers to communication in Alaska. Seventy and sixty day limitations have replaced the fifty day formula in former Alaska law respecting the closing of transfer books or fixing of a record date. This change brings Alaska law into compliance with the terms of the Revised Model Business Corporation Act, Section 7.05.

Finally, the ACC follows the Revised Model Act in making a shareholder list compiled from the closed transfer books or by virtue of the record date effective as to any adjournment of the meeting. The phrase in former AS 10.05.144 which modified this concept in the event of closure of the stock transfer books has been eliminated.

Official Comment to ACC Section 10.06.410.

NOTICE OF SHAREHOLDERS' MEETINGS.

SCOPE: ACC sec. 410 establishes the minimum content and the minimum and maximum time restraints on written or printed notice for annual or special meetings. Such notice must be "delivered" not less than twenty (20) nor more than sixty (60) days before the date of either an annual or a special meeting. In every instance the notice must state the place, day and hour of the meeting. With respect to special meetings only, the notice must also declare the purpose(s) for which the shareholders are being convened. Note that the general provisions of sec. 410 are subject to specific notice requirements of other sections of this Chapter.

Assuming that there has been compliance with the terms of this section, the risk of delay or nondelivery of the notice by the postal authorities is borne by the addressee. An affidavit which complies with this section is prima facie evidence that such steps have been taken and notice thereby effected. Such a prima facie showing may be overcome by contrary evidence adduced to the satisfaction of the trial court.

CHANGE IN FORMER ALASKA LAW: ACC sec. 410 is predicated upon Section 7.05 of the Revised Model Business Corporation Act, Section 605 of the New York Business Corporation Law, and former AS 10.05.141. Unlike the recommended content of the RMBCA, sec. 410 sets a twenty (20) day minimum for the delivery of notice as opposed to the previously stated ten (10) day minimum. The sixty (60) day maximum was adopted from the RMBCA. The provision detailing the address to be used in communicating with shareholders and the prima facie evidence of compliance achieved by the officer's affidavit are taken from the BCL.

Official Comment to ACC Section 10.06.413.

VOTING LIST; LIABILITY.

SCOPE: ACC sec. 413 counters a potential disposition on the part of incumbent management to keep to itself the shareholder list showing the names, addresses and number of shares held by each shareholders. The historical inclination of management not to favor access to this information is rooted in recognition that it is the precise data which a shareholder intent upon challenging incumbents would desire to obtain in order to calculate strategy.

Sec. 413 mandates that at least twenty days prior to each meeting (annual or special) of the shareholders the officer or agent having charge of the stock transfer books shall make a list of all shareholders entitled to vote (sec. 408), and that this list shall be kept open and subject to inspection by a shareholder at any time during usual business hours for a period of twenty days prior to the meeting. The right of inspection prior to the meeting may be exercised by an agent or attorney of the shareholder. Once the meeting is convened, the shareholder list shall be kept open for inspection by shareholders.

Sec. 413(c) imposes a civil penalty of $5,000 upon an officer or agent having charge of the stock transfer books who refuses to prepare, preexhibit and exhibit such a list as provided in sec. 413(a). The penalty shall be paid to the shareholder or divided between or among the shareholders making written request for performance of the duties imposed by this section. Note that a written request is not necessary to invoke the powers of inspection conferred by this section but is required as a predicate for gaining the remedy imposed by sec. 413(c).

CHANGE IN FORMER ALASKA LAW: ACC sec. 413 is predicated upon former AS 10.05.147 which was based on the pre-1962 version of Section 31 of the Model Act. The legislature has elected to retain the explicit requirement of an exposition of the shareholder list for a period prior to the meeting.

The ten day minimum period of former AS 10.05.147 has been supplanted by a twenty (20) day minimum period in ACC sec. 413.

ACC sec. 413(c) is based upon Model Act Section 31 and former AS 10.05.150. There are two changes. One reflects the enlargement of the preexhibition period from ten (10) to twenty (20) days. The second change inheres in the provision of a $5,000 penalty as a civil liability for failure to observe the duties prescribed by this section in the face of a written request that this be done.

In enacting this section it is the intention of the legislature to grant shareholders an absolute right of inspection during the stipulated periods. Such right is not subject to the "proper purpose" line of common law authorities.

Official Comment to ACC Section 10.06.415.

QUORUM OF SHAREHOLDERS.

SCOPE: ACC sec. 415 confronts two problem areas: the minimum attendance necessary to convene a meeting of shareholders and the power of a minority of that number to destroy the ability of the majority to transact business by simply "walking out," thus reducing the number remaining to less than a quorum. Sec. 415(a) is highly permissive of provisions in the articles or bylaws which establish greater than majority quorum requirements. The articles, but not the bylaws, are competent to reduce the quorum requirement from the presumption of an absolute majority to as little as one-third of the voting shares but no further. Sec. 415(a) establishes the norm that the vote of a majority of a quorum constitutes the act of the shareholders.

Sec. 415(b) addresses the "walk out." Once a quorum has been established it is not possible for a disgruntled minority to defeat the capacity of the majority to transact business by simply walking out of the meeting so long as the vote of those remaining would be sufficient to constitute a majority of a quorum. Under these terms the walk out of a sizeable block of shareholders which left those remaining divided on an issue could see the majority fail to muster the needed affirmative vote.

CHANGE IN FORMER ALASKA LAW: ACC sec. 415(a) is predicated upon Model Act Section [illegible] and former AS 10.05.153. Sec. 415(b) is predicated upon Section 602(b) of the GCL. Sec. 415(a) reflects no change in prior Alaska law; Sec. 415(b) is new and unprecedented.

Official Comment to ACC Section 10.06.418.

PROXIES.

SCOPE: ACC sec. 418 permits a shareholder to create a legal power in a nominee to vote his or her shares. The life of a revocable proxy is limited by the statute to eleven months, a provision deliberately designed to preclude its being cast at two successive annual meetings. Sec. 418 follows the common law and earlier statutory development in treating a revocable proxy as destructible at the will of the proxy giver. The statute now regulates the circumstances or acts which will "revoke" the proxy, thus disabling management from recognizing the power of the nominee to cast the votes represented by the shares.

For the first time Alaska law contains explicit provisions defining the circumstances under which a proxy may be made irrevocable. These provisions are intended to be exclusive and to bar the application of any common law precedent which in circumstances other than those defined in sec. 418(e) would recognize a proxy as being coupled with an interest.

Finally, sec. 418(f) opts for the rights of an innocent transferee who has acquired the shares without knowledge or, as a reasonable person, has no reason to know that such transfer is in violation of an "irrevocable proxy." The proxy holder can gain protection from this rule by causing the fact of the proxy and its irrevocability to be physically noted on the certificate(s) representing such shares.

CHANGE IN FORMER ALASKA LAW: ACC sec. 418 is taken from GCL Section 705 with a modification to eliminate Section 705(e)(3) (on the rights of creditors). Sec. 418 replaces former AS 10.05.159 and .168 which had been based on Section 33 of the Model Act. In framing the ACC the provisions of the California code were preferred because of the explicit treatment of the question of "revocation" and the circumstances under which a proxy might be made "irrevocable" by agreement of the shareholder and specified proxy holders. These provisions are unprecedented in former Alaska law which limited the life of a proxy to eleven months and, subsequent to a 1972 amendment, appears to have made the concept of an irrevocable proxy impossible. This prohibition was felt to be at variance with legitimate commercial needs. The dangers which are inherent in the unrestricted recognition of irrevocable proxies (divorcing voting rights from the other beneficial incidents of share ownership) have been avoided by subjecting the practice to exclusive statutory regulation.

Official Comment to ACC Section 10.06.420.

VOTING OF SHARES.

SCOPE: ACC sec. 420 establishes a cumulative voting scheme designed to enhance the opportunity for minority share interests to obtain board representation as the presumptive norm. Such a cumulative voting scheme may be eliminated in the articles of incorporation but, as a safeguard to minority interests, such a provision of the articles may not be introduced by an amendment if the number of votes cast against the amendment would have been sufficient to elect one director if voted cumulatively at an election of the entire board. Sec. 420 establishes the right of a shareholder to vote in person or by proxy (the validity of proxies being governed by sec. 418).

Sec. 420(b) mandates that shares held by the corporation or by a subsidiary corporation in which a majority of the shares enfranchised to elect directors is controlled by the corporation may not be voted in or counted toward the outstanding shares entitled to vote. Further provisions of sec. 420 govern the voting of shares held by administrators, executors, guardians, conservators, trustees, or receivers. Until shares have been transferred into the name of a pledgee, the shareholder who has pledged the stock shall have the voting rights. Finally, redeemable shares are disenfranchised by an effective notice of and adequate financial provision for a redemption.

CHANGE ON FORMER ALASKA LAW: ACC sec. 420 is predicated upon Model Act Section 33, with the exception of subsections (d) and (i). Sec. 420(d) is predicated upon GCL Section 708(a). Replaced are former AS 10.05.156-168. While former Alaska law also made cumulative voting optional, it permitted it to be eliminated by amendment to the bylaws. ACC sec. 420(d) makes cumulative voting optional and presumptive unless eliminated by a provision of the articles. It goes beyond the Model Act to provide that if elimination of cumulative voting is sought via an amendment to the articles such an amendment shall not be effective if a sufficient number of voted are cast against it as would elect a single director if voted cumulatively in an election for the entire board.

Sec. 420(i) respecting the disenfranchising of redeemable shares is new and unprecedented in former Alaska law.

Official Comment to ACC Section 10.06.423.

ACTIONS TAKEN WITHOUT MEETING; WRITTEN CONSENT; REVOCATION OF CONSENT.

SCOPE: Unless extinguished by provisions of the articles or bylaws, ACC sec. 423 is tolerant of informal action by shareholders. Note that the tradeoff for the absence of a formal meeting is the requirement that the action be taken by the unanimous written consent of the shares. Sec. 423(b) governs the circumstances under which a written consent, once given, may be revoked.

CHANGE IN FORMER ALASKA LAW: ACC sec. 423(a) is predicated upon Section 145 of the Model Act and former AS 10.05.807. Language has been added to make it clear that the written consents are invalid unless of identical content as to all shareholders. Sec. 423(b) is adapted from GCL Section 603(c) and is unprecedented in former Alaska law.

In revising the ACC the legislature considered and rejected the California and Delaware positions which would tolerate informal action by less than unanimous consent of the shares. It was felt that the requirement of unanimous consent was a valid tradeoff for the abolition of the formal meeting where the voices of doubt and dissent might have influenced for the formation of opinion.

Official Comment to ACC Section 10.06.425.

VOTING TRUSTS AND AGREEMENTS AMONG SHAREHOLDERS.

SCOPE: The voting trust enjoys a long and troubled history both at common law and under statutory regulation. See

Abercrombie v. Davis, 36 Del.Ch. 371, 130 A.2d 338 (1956). The essence of a voting trust may be found in any agreement wherein the voting rights are separated from the other incidents of stock ownership. Tankersley v. Albright, 514 F.2d 956, 969 (7th Cir. 1975). This is objectionable from a fundamental premise: the theory of corporate law is that the shareholders will exert residual control over the entity. To do this they exercise the voting rights implicit in the common shares. If these rights can be vested in some party who does not enjoy the other attributes of share ownership, there is danger that the decisions reached by this "stranger" will be motivated by goals and aspirations other than those implicit in the assumed conduct of shareholder.

There is a further danger in that these devices are frequently employed to consolidate voting strength within the family of shareholders so as to "lock in" a particular majority. If the shareholders can enter binding agreements wherein their shares are precommitted to an individual or faction, there is again a transgression of the basic assumption that in voting the shareholders will use their honest judgment to determine on an issue-by-issue, term-by-term basis what they think best for the corporation and their own self-interest. If one adds to this picture the element of secrecy, the dangers are compounded and take on the sinister prospect that innocent parties may purchase stock in a corporation ignorant of a hidden agreement which precludes any "democracy" in the governance of the entity.

Standing in opposition to these classical objections are the asserted needs of the business community whereby a desire for continuity is said to demand the fusion of share interests. Litigation such as Abercrombie, supra, illustrates patterns of investment which have been extended upon the assumption that society would respect a binding voting agreement.

Sec. 425 of the ACC attempts to accommodate these competing goals by accepting the voting trust and then regulating its duration and mandating disclosure of its terms and members. Aside from these statutory requirements, parties to a voting trust may regulate both the substance and mechanics by contract.

Clarke Memorial College v. Monoghan Land Co., 257 A.2d 234, 235 (Del.Ch. 1969). While sec. 425(a) requires that shares committed to a voting trust be surrendered to the trustee in exchange for trust certificates, all incidents of share ownership other than voting rights remain with the shareholder/participants. Winitz v. Kline, 288 A.2d 456, 459 (Del.Ch. 1971).

Sec. 425(b) leaves to common law development the development of limitations upon agreements between or among shareholders which fall short of a voting trust. Pooling agreements (State ex rel. Everett Trust & Savings Bank v. Pacific Waxed Paper Co., 22 Wash.2d 344, 157 P.2d 707 (1945); and Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 29 Del.Ch. 610, 53 A.2d 441 (1947)); and share classification (Lehrman v. Cohen, 222 A.2d 800 (1966)) are illustrative of arrangements which are unobjectionable and meant to be tolerated under the umbrella of sec. 425(b).

CHANGE IN FORMER ALASKA LAW: ACC sec 425(a) is taken from Model Act Section 34 and former AS 10.05.171. Unlike former Alaska law, sec. 425(a) has adopted the Model Act language designed to require disclosure by the trustee of both the terms of the trust and the identity of the shares and shareholders committed. The Model Act language on the extension of voting trusts has not been adopted in the belief that at the end of the ten year maximum life the parties are capable of forming a new trust. Sec. 425(b) is taken from GCL Section 706(d) and is unprecedented in Alaska law.

Official Comment to ACC Section 10.06.428.

SHAREHOLDERS' PREEMPTIVE RIGHTS.

SCOPE: Few issues divide the desires of shareholders from those of incumbent management more than whether existing shareholders shall have an enforceable right to first refusal upon the further issuance of shares of stock in the corporation. These are termed "preemptive rights." The recognition of preemptive rights protects from dilution two distinct interests of shareholders in the corporation: their proportionate equity (rights to distributions during the life of the corporation and a residual claim on corporate assets in the event of dissolution); and their proportionate voting strength. The classical objections of management are that preemptive rights frustrate a market for security offerings and hamper the ability to use shares of stock to fund various deferred compensation schemes.

ACC sec. 428 attempts to balance these interests. The statute establishes preemptive rights in certain shareholders to acquire under fair and reasonable terms unissued shares or securities convertible into such shares or carrying a right to subscribe to or acquire such shares. As a further statutory norm, preemptive rights do not exist in holders of any class of preferred shares, nor do the holders of common stock have preemptive rights with respect to the issuance of nonconvertible preferred shares. No preemptive rights exist as to shares issued for a consideration other than cash. If a majority of the shares approve or authorize the board, preemptive rights do not exist as to shares issued to directors, officers or employees. This provision is intended to facilitate the implementation of qualified deferred compensation schemes under the Internal Revenue Code. By its express terms, sec. 428 recognizes that the articles of incorporation are competent to enlarge or diminish the scope of preemptive rights.

In adopting sec. 428 the legislature intends to occupy the field with respect to circumstances under which preemptive rights are to be recognized. It does not, however, intend to hamper the persuasive reasoning or result articulated in Katzowitz v. Sidler, 24 N.Y.2d 512, 301 N.Y.S.2d 470, 249 N.E.2d 359 (1969). In Katzowitz the New York Court of Appeals recognized that while statutes may give protection against the dilution of voting strength (by establishing a right to acquire a proportionate number of the shares of the new issue), the exercise of this right is frequently a burden upon the shoulders of the existing shareholders. They must expend further sums to retain the status quo with respect to their equity interest. For this reason the court announced a common law scrutiny of share offerings to the end that management be prohibited from confronting shareholders with a new issue unless a valid business purpose can be established.

In other words, Katzowitz recognized that absent a valid business purpose an existing shareholder has an enforceable right not to be faced with the expenditure involved in purchasing further shares to maintain his or her proportionate interest. The terms of the new offering are also subject to judicial scrutiny with respect to the price to the end that the new shares not be offered at a price substantially below their true market value. Such an offering would further weaken the position of existing shareholders who were financially unable to exercise their preemptive rights without gaining a legitimate advantage to the corporation. The lessons of Katzowitz would apply to offerings by the board of shares of a different class; for while they would not impact upon the general voting strength of holders of shares of another class, they do threaten the dilution of the equity interest.

CHANGE IN FORMER ALASKA LAW: ACC sec. 428 is predicated upon Model Act 26A and replaces former AS 10.05.129. Modified are the provisions of the former statute which excluded preemptive rights for shares sold to officer and employees (but omitting any reference to "directors") of the corporation or of its subsidiary if the terms and conditions of the sale had been approved by a vote of two-thirds of the voting shares or by the board pursuant to approval of the shares. Former Alaska law contained no provisions comparable to sec. 428's presumptions as to shares or offerings to which preemptive rights are not extended.

Official Comment to ACC Section 10.06.430.

BOOKS AND RECORDS.

SCOPE: ACC sec. 430 addresses the problematic question of access by shareholders and some others to the books and records of the corporation. The questions presented include: who shall have a "right" of access; under what circumstances may this right be asserted (time, place, and frequency); and to which books and records (shareholder lists, minutes of board, board committee and shareholder meetings, financials, etc.) does it extend. Subsidiary issues surround the consequences of a "wrongful" denial of access and the availability of judicial process to enforce the "rights" created or recognized.

The friction between the demands by shareholders and the attitude of incumbent management has led to considerable litigation. Indeed, the question of inspection now governed by sec. 430 was first addressed at common law. The classical problems involve the shareholder who desires to learn the identity of other shareholders so that he might launch a "take over bid" or a move to oust incumbent management. Less frequently encountered is the shareholder who desires to gain a list of clients to whom he can peddle insurance, etc. Looking beyond the shareholder list to books and records the tension is between the right of a shareholder to gain access to proof of mismanagement or other wrongdoing and the possibility that a shareholder could use this right to vex or harass incumbent management in the hope that he would be "bought off." Another problem surrounds the corporate fear that the information gained through an exercise of a right of inspection will be used to harm or compete with the corporation. The real presence of these dangers accounts for the "proper purpose" limitation found in ACC sec. 430(b) and reflected in the defense by an officer or agent who has refused the right of inspection to the liability created by ACC sec. 430(c).

Sec. 430(a) creates the basic obligation of any corporation organized under this Chapter to keep specified books and records of account, minutes of proceedings, and a record of its shareholders, containing the names and addresses of all shareholders and the number and class of the shares held by each. A provision has now been made to facilitate the data collecting and keeping via electronic processing so long as such data can be reduced to writing. Sec. 430(b) creates the right of inspection as to the data described in sec. 430(a) and vests that right in the Department of Commerce and Economic Development and any shareholder. The shareholder inspection shall be upon a written demand which must state the purpose or purposes for which inspection is demanded. The inspection, which may be carried on in person, by agent, or attorney must be made at a reasonable time and for a proper purpose. By way of further limitation, the scope of the enforceable demand shall extend only to such sec. 430(a) data as is relevant to the stated purpose(s). Copies of any data to which the right of inspection attaches may be made.

In adopting Section 430(b) the legislature intends to approve the several distinctions and interpretations of the "proper purpose" doctrine as enunciated in the following cases. With respect to the shareholder list: a statement that the shareholder list is desired for the purpose of communicating with shareholders on matters of mutual interest to shareholders and for the purpose of soliciting proxies is sufficient to gain the right of inspection. Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul Inc., 290 A.2d 691 (Sup. Ct. Del. 1972). A willingness of the corporation to mail the shareholder's material is not a valid reason to deny the right to inspect and copy the shareholder list. Kerkorian v. Western Airlines, Inc., 253

A.2d 221 (Del. Ch. 1969). The fact that a shareholder is frankly hostile to management or desires to gain control of the corporation does not constitute an improper purpose. State ex rel. Pillsbury v. Honeywell, Inc., 291 Minn. 322, 191 N.W.2d 406 (1971).

With respect to all other 430(a) data (books and records): a shareholder has every right to inspect books and records to protect his interest as a shareholder so long as he has an honest motive and is not proceeding for vexatious or speculative reasons. Briskin v. Briskin Mfg. Co., 6 Ill.App.3d 740, 286 N.E.2d 571, 574 (1972); Southern Acceptance Corp. v. Nally, 222 Ga. 534, 150 S.E.2d 653 (1966); Keeneland Ass'n. v. Pessin, 484 S.W.2d 849 (Sup. Ct. Ky. 1972); and Campbell v. Ford Industries, Inc., 274 Or. 243, 546 P.2d 141 (1976). Prior to acceding to the demand, the corporation has a right to demand and receive assurances that the information disclosed is not used for the purpose of injuring corporate business or building up a rival concern. State ex rel. Armour and Co. v. Gulf Sulphur Corp., 233 A.2d 457 (Sup. Ct. Del. 1967). If the shareholder proposes to conduct the inspection or extracting other than in person the corporation is entitled to receive adequate proof of the agent's authority. Henshaw v. American Cement Corp., 252 A.2d 125 (Del. Ch 1969).

Sec. 430(c) creates personal liability in any officer or agent who denies a right of inspection which the shareholder can establish was properly demanded under sec. 430(b). It is an affirmative defense to this liability that the demanding shareholder has within the previous two years offered the shareholder list for sale, aided or abetted another in such an offer, or made improper use of information secured through prior examination of the books and records of account, or minutes, or record of shareholders of the corporation or any other corporation, or was not acting in good faith or for a proper purpose in making his demand. Although there would appear to be no direct common law precedent, it is the intention of the legislature in framing sec. 430(c) that a history of negligent or deliberate dissemination of confidential materials by the demanding shareholder would constitute "improper use of information" justifying a refusal of the demand and immunizing the corporate officer so refusing from liability.

Sec 430(c) makes it clear that nothing in this section shall preclude or inhibit the power of a competent court to enforce a right of inspection which the shareholder can establish as properly demanded under sec. 430 (b).

Sec. 430(e) goes beyond any other requirements to give a shareholder a right to receive, upon written request, a copy of the corporation's most recent financial statement.

CHANGE IN FORMER ALASKA LAW: ACC sec 430 is based upon Section 52 of the Model Act and former AS 10.05.237-249. Sec. 430(a) continues the former content of AS 10.05.237 with added provisions for the minutes of meeting of board committees and the permission that the data may be recorded in a written form or in any other form capable of being converted into written form within a reasonable time.

Sec. 430(b) continues the policy of recognizing a right of inspection in the Department of Commerce and Economic Development (as in former AS 10.05.237(b)) but has eliminated durational and numerical qualifications which obtained in former AS 10.05.240. Language has been added which restricts the right of inspection to data relevant to the proper purpose.

Sec. 430(c) continues the policies of former AS 10.05.243 respecting the liabilities of and defenses available to an officer or agent who refused a demand for inspection properly under sec. 430(b). The only change is to impose a minimum liability of $5,000 to the shareholder aggrieved by the refusal.

Sec. 430(d) had modified former .246 in view of the standing requirements eliminated under sec. 430(b). Sec. 430(e) adopts without change the content of former .249 on the right of a shareholder to demand a copy of the most recent corporate financial statements.

Official Comment to ACC Section 10.06.433.

ANNUAL REPORT TO SHAREHOLDERS: CONTENT, FINANCIAL STATEMENT ON REQUEST.

SCOPE: Recognizing that the residual powers of the shareholders cannot be exercised in an intelligent manner in the absence of a reliable stream of basic information, ACC sec. 433 has followed an innovation made by the State of California which requires that the board shall cause an annual report to be sent to all shareholders irrespective of their voting rights. The nature and degree of disclosure will vary according to the number of shareholders of record. and whether or not the corporation is subject to the reporting provisions of the federal Securities and Exchange Act of 1934 or the Alaska Native Claims Settlement Act.

Sec. 433(a) establishes the basic obligation of the board to cause an annual report to be sent to shareholders not later than 180 days after the close of the fiscal year or, the date on which the notice of the annual meeting in the next fiscal year is given, whichever date is first. (See AS 10.06.430) If the corporation has fewer than 100 holders of record of all its shares (as determined by the machinery established in ACC sec. 408), its articles of incorporation are competent to waive the requirements of sec. 433. For all others the information required is mandatory. A provision in the articles, the bylaws or extrinsic contract which attempt to limit or surrender the provisions of sec. 433 would be contrary to the public policy enshrined in this section and a nullity.

The irreducible content of the annual report shall be a balance sheet as of the end of the just concluded fiscal year accompanied by an income statement and statement of changes in the fiscal position of the corporation during that fiscal year. If the corporation has 100 or more shareholders of record (as determined under ACC sec. 408), sec. 433(b) substantially expands the content of the annual report. In general, transactions involving the corporation and interested directors or officers of the entity, its parent or subsidiary, must be described in detail unless submitted for approval by the shareholders (ACC sec. 990(6)) pursuant to sec. 478. Any indemnification or advances aggregating more than $10,000 paid during the fiscal year to any officer or director of the corporation pursuant to ACC sec. 488, and not approved by the shareholders under (d) of that section, must also be described with particularity. There are two exemptions to the sec. 433(b) reporting requirements each justified on the theory that substantially similar information is being elicited by federally imposed requirements. The exemptions are extended in favor of corporations reporting under Section 12 of the Federal Securities Exchange Act and for those reporting under Sec.

7(c), 8(c), and 28 of the Alaska Native Claims Settlement Act.

Sec. 433(c) permits a shareholder or shareholders holding at least 5% of the outstanding shares of any class to make written requests for periodic income statements and obliges the corporation to furnish such information.

In every instance in which a financial or income statement is to be prepared and either sent or made available upon the request of a shareholder, such statement must be accompanied either with the report thereon of independent accountants, or a certificate on the part of an authorized officer of the corporation that such statement were prepared without audit from the books and records of the corporation.

Sec. 433(f) establishes the penal consequences of any neglect, failure or refusal to cause to be prepared or disseminate the reports and statement required by this section. In addition to this penalty, which shall be paid to the shareholder or shareholders making the request, the courts are directed to enforce the duties of sec. 433 with specificity.

Finally, sec. 433(g) directs that this section applies to all domestic corporations and also to any foreign corporations having their principal executive office in Alaska or customarily holding meetings of its board in Alaska.

CHANGE IN FORMER ALASKA LAW: ACC sec. 433 is new and without precedent in Alaska law. It is adapted from Section 1501 and 2000 of the GCL. GCL Section 1501(g) on attorney fees and costs, was omitted from sec. 433.

Official Comment to ACC Section 10.06.435.

SHAREHOLDER'S DERIVATIVE ACTION.

SCOPE: With the enactment of ACC sec. 435 Alaska, for the first time, subjects shareholders' derivative action to statutory regulation. Sec. 435 regulates the standing of shareholders, the exhaustion of intracorporate remedies, security for expenses of the corporation or real defendants abandonment, discontinuance, or settlement of any such action and the circumstances in which a prevailing plaintiff may recover expenses (including attorney fees) in addition to the damages which are to be paid to the corporation.

Sec. 435(b) establishes a limited departure from what is otherwise a contemporaneous share ownership standing requirement. If a non-contemporaneous shareholder can establish the satisfaction of the superior court that the criteria enumerated in sec. 435(b)(1)-(5) are satisfied, the statute empowers the court to grant standing to such a plaintiff. Subsection (b)(3) should prove sufficient to insure that this relaxation does not work to the advantage of an individual who desires to "buy a lawsuit."

Sec. (c)-(g) address questions of exhaustion of intracorporate remedies. The ACC envisions a demand upon the board of directors unless the litigating shareholder can meet the statutory criteria for excuse. Further, even when demand is excused, directors who are untainted by direct or indirect involvement with the alleged wrong are given standing to move for dismissal of the action on the ground that in their independent, informed, and good faith business judgment the corporate interests would not be served by litigation. The burdens of allegation and proof with respect to the matter of an initial excuse and the subsequent motion for dismissal are detailed in the statute along with the obligation of the reviewing court.

It will be noted that sec. 435 does not require that the litigation shareholder make a demand upon the outstanding shares under any circumstances. While the failure to make such a demand is not ground for dismissal, the fact that a majority of the outstanding shares has been voted by those who are neither directly nor indirectly implicated in the alleged wrong in an effort to ratify it may be considered by the court in fashioning an appropriate remedy.

One of the most difficult policy questions respecting derivative actions is to balance the initiative which ought to be left with a disgruntled shareholder against respect for the norm that corporate governance decisions are normally committed to the board of directors. The accommodation worked out in ACC sec. 435(c)(f) evolved from the Legislature's approval of two recent decisions: Zapata Corp. v. Maldonado, 430 A.2d 779 (S.Ct. Del. 1981); and, Barr v. Wackman, 36 N.Y.2d 71, 329 N.E.2d 180 (1976).

The initial role of the board of directors: Sec. 435(c) begins with the premise that it is a precondition to instituting the cause of action created by sec. 435(a) that a shareholder with standing under 435(b) has made a formal demand upon the board to secure such action as plaintiff desires. However, unlike those jurisdictions which impose this precondition without qualification, the ACC follows the view that if such an effort would involve a futile act the demand should be excused and the shareholder permitted to inaugurate the action. Sec. 435(c) provides an inclusive definition of "futility." Excuse is established upon proof that a majority of the directors are implicated in, or under the direct or indirect control of those who are implicated in, the injury to the corporation.

Sec. 435(d) establishes procedures to ensure compliance with the substantive provisions of sec. 435(c). The complaint must state with particularity the facts establishing the statutory grounds for excuse. If the complaint is well pled the defendants may controvert the factual allegations in a motion to dismiss for failure to make a demand upon the board. Sec. 435(d) places the burden of establishing facts sufficient to meet the 435(c) criteria for excuse upon the plaintiff-shareholder.

The trial court should be wary that at this early stage it is examining the relationship of the incumbent directors to the injury alleged in the complaint to determine whether the decision to litigate ought to lie with the majority of the board. It should not use this initial question as the occasion to try the shareholder's derivative complaint on its merits. A fairly obvious instance of excuse under the terms of sec. 435(c) and sec. 435(d) would involve particularly allegations and proof that a majority of incumbent directors were the alleged culprits in breaching their duty of care or loyalty to the corporation.

<u>Barr. v. Wackman</u>. confronted the question of excuse in a more subtle setting. The complaint admitted that plaintiff had not made a demand upon the board but claimed excuse on the theory that , while the majority of directors had no financial interest in the questioned transaction, they were guilty of a breach of their duty of care by actively acquiescing in those transactions. The New York Court of Appeals declared:

> The basic question is whether from the particular circumstances of the liability charged it may be inferred that the making of such a demand would indeed by futile. Thus, it is well established that a demand will be excused where the alleged wrongdoers control or comprise a majority of the directors. . . . and, while justification for failure to give directors notice prior to the institution of derivative action is not automatically to be found in bare allegations which merely set forth prima facie personal liability of directors without spelling out some detail, such justification may be found when the claim of liability is based on formal action of the board in which the individual directors were participants.
>
> It is not sufficient, however, merely to name a majority of the directors as parties defendant with conclusory allegations of wrongdoing or control by wrongdoers. This pleading would only beg the question of actual futility and ignore the particularity requirement of the statute. The complaint here does more than simply name the individual board members as defendants. . . . Acting officially, the board, qua board, is claimed to have participated or acquiesced in assertedly wrongful transactions. . . .
>
> [A] derivative shareholder's complaint may, in a particular case, withstand a motion to dismiss for failure to make a demand upon the board, even though a majority of the board are not individually charged with fraud or self-dealing. Particular allegations of formal board participation in and approval of active wrongdoing may, as here, suffice to defeat a motion to dismiss.

Yet another instance of recognized futility appears to be a board evenly divided between implicated and nonimplicated Yet another istance of recognized futility appears to be a board evenly divided between implicated and nonimplicated directors so that a quorum of disinterested directors could not be formed to act for the board.

If demand is not excused: Sec. 435(e) establishes that in any case in which a demand upon the board is required by sec. 435(c) a decision by the board consonant with the individual director's duties of care and loyalty to the corporation that, in their business judgment, such litigation would not be in the best interest of the corporation terminates the right created by sec. 435(a). In Zapata v. Maldonado, the Supreme Court of Delaware recognized that if demand was made upon the board, and the nonimplicated majority concluded that the best interests of the corporation were not served by the litigation, their decision was to be respected by the court. "A stockholder cannot be permitted to invade the discretionary field committed to the judgment of the directors and sue in the corporation's behalf when the managing body refuses." 430 A.2d at 783. Note the major qualification that the directors' decision not to litigate must be consistent with observance of their duties of loyalty and care.

In exercising their judgment directors are permitted to take a "business view," a phrase intended to preclude any notion that they are restricted to evaluating the legal merit of the shareholder's claim. It is proper for the directors to take into account such matters as the potential harm to the corporation, the morale of its nonimplicated management, its public image, the cost in time and treasure, and any jeopardy to its trade secrets or other confidential data which might be compromised in the course of litigation. These factors are to be weighed against the benefit to the corporation of a successful prosecution of the action. The burden would be upon the shareholder to demonstrate that the board's decision was "wrongful."

It should be noted that a shareholder who made a demand upon the board is not thereafter precluded from offering evidence that any or all of the directors who have decided that litigation not go forward are implicated, directly or indirectly, in the wrong of which complaint is made. The fact that demand upon the board was made is not to be taken as an admission that the majority of the directors or any of them are not implicated in or under the direct or indirect control of those who are implicated in the injury to the corporation. Further evidence that the decision was taken under circumstances incompatible with the duties of care and loyalty owed to the corporation by individual directors may be offered to demonstrate that their decision was tainted and should be ignored and the action allowed to proceed. Reasonable discovery should be permitted in order to establish the presence or absence of such facts.

Subsequent efforts by board members to dismiss the action: If the initial demand upon the board has been excused, or the shareholder is able to prove that the recommendation by a board upon which demand has been made should be ignored as tainted, sec. 435(f) addresses the subsequent intervention by allegedly disinterested directors asserting that, in their good faith, independent and informed business judgment, the action should be dismissed as inimical to the best interests of the corporation. Again, this provision comports with the decision of the Supreme Court of Delaware in Zapata. Contrary to cases such as Maldonado v. Flynn, 485 F.Supp. 274 (S.D. N.Y. 1980), such an expression of opinion in a motion to dismiss is not fatal to the derivative action. Sec. 435(f) places the burden of establishing good faith, independence and informed business judgment upon the petitioners. Assuming that this burden is met, the statute directs the trial court to make an independent assessment.

In the course of exercising its own judgment the court is authorized to consider not only the economic, psychological and competitive interests of the corporation and its personnel but also the public policy issues implicated in the alleged wrongful conduct. Seen in this broader perspective, it would be proper for the trial court to deny the motion to dismiss upon grounds that, while it did not consider the expression of business judgment to be in error or incomplete, it was outweighed by public policy considerations.

Sec. 435(g) aligns Alaska with New York and California in omitting the requirement that a shareholder make demand upon the outstanding shares as part of an exhaustion effort. Notwithstanding, sec. 435(g) does not ignore the fact that a disinterested majority of the outstanding shares may have attempted to forgive the wrong of which complaint is made via ratification. The trial court is authorized to take such a fact into account in framing any order for relief to which it deems the corporation is entitled.

Sec. 435(h) covers the matter of security for expenses of the corporation and/or the actual defendants. If the plaintiff shareholder(s) hold five percent or more of any class of outstanding shares of the corporation or voting trust certificate representing such shares, there shall be no security for expenses requirement. If not, either the corporation or the actual defendants are permitted to move the court at any time before final judgment to require the plaintiff(s) to give security for the reasonable expenses, including the fees of their attorneys, that may be incurred by the petitioners. The amount of such security shall be determined by the court which may, thereafter, raise or lower it upon a showing that it had become inadequate or excessive. Whether the petitioners shall have recourse to such security shall depend upon the judgment of the court.

Note that if several plaintiffs aggregate their shares in order to meet the five percent requirement, it is a sufficient compliance with sec. 435(b) if any one of them meets the requirement of contemporaneous share ownership. Further, if a shareholder increases his net holdings in order to meet the five percent requirement, there is no offense to sec. 435(b) if any of his shares were held so as to meet the requirement of contemporaneous ownership.

Sec. 435(i) forbids any form of "out-of-court settlement" of a derivative action commenced under this chapter. Such actions shall not be discontinued, abandoned, compromised, or settled without court approval. When presented with such a proposal, it shall be within the discretion of the court to require that notice be given to all affected shareholders inviting them to assume the prosecution of the action.

Sec. 435(j) governs the fate of any recovery. Since the action was prosecuted upon the theory that it was the corporation, and not the plaintiff shareholder(s) which was injured, any recovery should be accounted for to the corporation. However, the court is competent to award the prevailing plaintiff(s) reasonable expenses, including attorney fees, designed to make them whole for their out of pocket expenses.

<u>CHANGE IN FORMER ALASKA LAW</u>: Sec. 435 is new and without statutory precedent in Alaska. Prior to its adoption the subject was regulated by the Supreme Court's adoption of Rule 23.1 of the Federal Rules of Civil Procedure. Subsection (a) is taken in modified form from Section 626(a) of the NYBCL. Subsection (b) is taken from Section 800(b)(1) of the GCL. Subsections (c)(f) represent original work by the Alaska Code Revision Commission. Note that subsection (g) changes former Alaska practice by eliminating the necessity of a demand upon shareholders under all circumstances. Subsection (h), relating to security for expenses, is taken from Section 49 of the MBCA. Subsections (i) and (j) are predicated upon Section 626(d) and (e) of the NYBCL.

Official Comment to ACC Section 10.06.438.

LIABILITY OF SHAREHOLDERS AND SUBSCRIBERS.

SCOPE: Sec. 438 establishes the basic proposition of the limited liability of shareholders. Exceptions to the liability to pay the full consideration for the shares are created for designated classes of successors in interest.

CHANGE IN FORMER ALASKA LAW: ACC sec. 438 is predicated upon Model Act Section 25 and former AS 10.05.125. Subsection (a) has been modified with the insertion of the words "as such" so as to make it clear that if an individual becomes liable in the capacity as officer or director for debts incurred in the corporate name the exemption conferred by sec. 438 is not applicable. In such case the individual is not liable as a shareholder but under the officer or director status as provided in ACC sec. 488.

The standard of "knowledge" employed by sec. 438(b) is intended to encompass both the subjective knowledge of the individual defendant and the imputed knowledge which a reasonable person standing in the circumstances of the defendant would have known or noticed. Further, such information as might with reasonable effort have been gained by following the indicia of notice that the full consideration had not been paid is deemed within the knowledge of the defendant.

Official Comment to ACC Section 10.06.450.

BOARD OF DIRECTORS; DUTY OF CARE; RIGHT OF INSPECTION; FAILURE TO DISSENT.

SCOPE: This section replaces former AS 10.05.171 (Board of Directors), .222 (Presumption of Consent of Director and Filing of Dissent), and .219 (Effect of Good Faith Reliance on Financial Statements). These Alaska provisions were drawn from the pre-1969 version of Model Act Sections 35 and 48. Sec. 450 gathers into one place basic provisions on four major questions: (1) the exercise and potential delegation of board functions; (2) the articulation of a standard for the discharge of the duty of care which must be observed by directors and their right to rely upon certain information, opinions, reports or statements from officers, experts, or committees of the board on which they do not serve; (3) the grant of an absolute right of inspection to every director as to all corporate books, records and documents of every kind together with the right to use an agent or attorney and the right to make copies or extracts of such information; and (4) the consequences of a director's failure to dissent as to any action taken by the board at a meeting at which such director is present.

Note that under subsection (a), the articles are competent to delegate the powers and duties imposed by this chapter on directors. If the delegation is by the board to a committee consisting of some, but not all of the directors, it is governed by sec. 468. If the delegation is pursuant to the terms of the articles under sec. 450(a), such provisions may also extend to the delegates the privileges and liabilities conferred and exacted in this chapter. However, the mere fact of delegation does not relieve the directors of ultimate responsibility for the faithful discharge of their statutory responsibilities or the duties of care and loyalty owed to the corporation.

In the event that a delegate acts or fails to act in a manner which would, in the absence of delegation, constitute an actionable cause against the director or directors, such delegate is liable to the corporation as an intended third party beneficiary of the delegated duty. The delegating directors are liable to the same extent as if they had remained primarily responsible for the act or omission. Recovery by the corporation of full damages against the delegate would exonerate the delegating directors. If recovery is sought directly against the delegating directors, they would have a right to implead the breaching delegate(s) and, upon satisfaction of any judgment to the corporation, be subrogated to its cause of action.

This chapter does not permit the substitution of persons other than directors as the individuals ultimately liable for the exercise of corporate powers or in the direction of corporate affairs. Because they remain ultimately liable, directors who have delegated their authority pursuant to provisions in the articles retain the full rights of inspection provided in subsection (d), nor are they deprived of their right to rely upon the sources specified in subsection (b).

<u>CHANGE IN FORMER ALASKA LAW</u>: Subsection (a) is premised upon the [illegible] revision of Section 35 of the Model Act.

Unlike the content of former AS 10.05.174, which required that the business and affairs of a corporation be managed by the board, sec. 450 permits board functions to be delegated to committees consisting of some but not all of the directors (see, sec. 468) or to nondirectors so long as such delegation is provided in this Chapter.

Like former Alaska law, sec. 450 is not intended to permit substitution of individuals for directors as persons bearing ultimate responsibility and liability for the control and management of the corporation. Sec. 450 does represent a compromise between the traditional insistence upon governance by the board of directors and the recent position assumed by states following Delaware which would make it competent for a corporation to function without any board at all by substituting in designees the powers and responsibilities of directors. Under sec. 450 there must be a board of directors. There is virtually no substantive limitation upon the extent of the power of delegation contained in sec. 450. Note that the rights, privileges, and duties which the chapter fixes upon directors devolve upon the delegates.

Subsection (b) is also premised upon the revised content of Model Act Section 35. Prior to this statute there was no law in the State of Alaska defining the duty of care to be observed by a corporate director. The standard adopted is "objective" in the sense that it goes beyond subjective good faith behavior to require that the performance accord with the judgment of an "ordinarily prudent person in a like position" seeking the best interests of the corporation.

Deviating from the text of MBCA Section 35, ACC sec. 450(b) borrows from ACC Section 309(a) to make clear that this duty of care includes a duty of reasonable inquiry. See National Auto & Cas. Ins. Co. v. Payne, 261 Cal. App. 2d 403, 409, 67 Cal. Rptr. 784 (1968), for elaboration of this concept. Another important change in Alaska law is sec. 450(b)'s substantial expansion of the right of reliance upon statements, records, and other information furnished to a director from officers, employees, or other directors. Former AS 10.05.219 contained a limited right to rely upon financial statements for the purpose of avoiding liability for the declaration and payment of an illicit dividend or other distribution of assets under former AS 10.05.216.

Taken in full these provisions would permit an Alaska court to distinguish between a "resident" and "outside" director in fashioning the dimension of their respective duties of care. The content of that duty would remain constant but the "circumstances" of the outside director (an individual known by the corporation to be devoting substantial time to other pursuits and a nonexpert in the affairs of the corporation on the board of which he is elected to serve) could be properly weighed. See Barnes v. Andrews, 298 F. 614 (S.D. N.Y. 1924). But there is no automatic exoneration. See ACC sec. 468(b).

Official Comment to ACC Section 10.06.453.

NUMBER AND ELECTION OF DIRECTORS.

SCOPE: This section specifies the minimum number of directors required, directs where to place rules regarding the number of directors, permits increasing or decreasing the number of directorships originally specified, directs that there shall be an election of directors at each annual meeting except in the case of a classified board (sec. 455), and defines the tenure in office of incumbent directors. It replaces former AS 10.05.177 (on number of directors), AS 10.05.180 (Membership and Term of Office of First Board of Directors), and AS 10.05.183 (Election of Directors).

CHANGE IN FORMER ALASKA LAW: Sec. 453(a) and (b) are premised on a modification of BCL Section 702(a) and (b) and were adopted in lieu of comparable provisions of Section 36 of the Model Act. This decision was made to preserve the policy of former AS 10. 5.177 which set a minimum number of directors at three save for a corporation with fewer than three shareholders. The Model Act language which would permit a corporation to function with a board of one regardless of the number of shareholders was rejected. An important change in .177 concerns the machinery for fixing the number. In former Alaska law that was done by the bylaws which were adopted by the board without shareholder participation.

As modified from the BCL, sec. 453(a) makes it impossible for the board to act in this important particular without participation of the shares unless it is operating under a provision of the articles or bylaws adopted by approval of the outstanding shares. Subsection (b) would also require shareholder participation in the increase or decrease of the board size or in adopting the article or bylaw which empowers the board to effect this change. See also sec. 228 and the comment thereto.

Subsection (c) is taken from Section 36 of the Model Act and intended to recognize the competence of the articles to give special voting rights to classes or series of shares to elect certain board positions.

Subsection (d) is taken from Section 36 of the Model Act and works no substantive change over former AS 10.05.130 except that it substitutes the permissive "may" for the mandatory "shall" of the former statute.

Subsection (e) is adapted from Model Act Section 36 with language changes intended to make it clear that a director (including a director elected to fill a vacancy) serves until the expiration of the term for which he was elected and until a successor has been elected and qualified. This language is intended to approve those common law decisions which have held that in the event deadlock or disagreement at the shareholder level prevents or unduly delays the process of selecting replacements, the incumbent directors remain in office bound by their duties of care and loyalty to the corporation no matter how disagreeable their situation may have become. See Dillon v. Scotten, Dillon Co., 335 F.Supp. 566 (D. Del. 1971).

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.

Official Comment to ACC Section 10.06.458

VACANCIES ON THE BOARD.

SCOPE: This section is intended to clarify one circumstance in which the board has authority to declare vacant the office of a director.

CHANGE IN FORMER ALASKA LAW: Sec. 458 is adapted from GCL Section 302. It has no direct parallel in former Alaska law and is intended to clarify a circumstance in which the machinery for the filling of vacancies (sec. 465) would become operative.

Official Comment to ACC Section 10.06.460.

REMOVAL OF DIRECTORS WITHOUT CAUSE.

SCOPE: Sec. 460 provides an important shareholder check upon the incumbent directors innovated in California and now found in the New York (optional), Delaware (optional), and Model Acts. Subject to specific provisions on notice, incumbent directors may be removed at any time without any reason by a vote of the outstanding shares. If removal is sought at a special meeting then notice must be given under AS 10.06.410, which notice includes the purpose for which the meeting is called. Sec. 460(a)(1) creates a special exception to the general rule under the ACC that no notice of the agenda or purpose need be given in a notice for a nonspecial meeting. In the case of corporations the voting shares are which are held of record by 300 or more shareholders only, notice of an intention to seek removal of any or all directors must be sent to the shareholders entitled to vote on the question. Sec. 460(a)(1) provides that in the instance of an annual meeting the shareholder may submit this notice to the president or secretary of the corporation for inclusion, without cost to the shareholder, on the notice sent pursuant to AS 10.06.410. In order to gain the advantage of this no-cost machinery the shareholder must deliver notice of his intention and request for inclusion to the president or secretary no later than 75 days before the date fixed for the annual meeting.

A shareholder who does not make a timely submission of this notice may, at that shareholder's expense, comply with the requirement of sec. 460(a)(1) by delivering the notice personally or by mail at least 20 days before the date fixed for the meeting. In the case of a corporation the voting shares of which are held of record by fewer than 500 shareholders there need be no notice of intention to seek removal if the attempt is to be made at a nonspecial meeting.

Sec. 460 is intended to eliminate the concept of "for cause" removal by action of the shareholders (Matter of Auer v. Dressel, 306 N.Y. 427, 118 N.E.2d 590 (1954) leaving such efforts, in default of shareholder action under this section, to the judgment of a superior court (sec. 463). Note the provisions protecting the representatives of a minority of the shares or the directors elected by a class or series of shares.

CHANGE IN FORMER ALASKA LAW: Sec. 460 has no parallel in prior Alaska law. It is premised on Section 303 of the GCL and is mandatory. The California statute was preferred to the Model Act provision with respect to protecting directors elected by minority share interests under cumulative voting. Under the California provision and sec. 460 the total votes to which the cumulative voting formula is applied is that number of shares cast on the removal question. Under Section 39 of the Model Act, it would be the total number of shares entitled to vote. Given the potential of inertia to inhibit some shares from taking part in the vote, a smaller number of shares voting "no" on the question will prevent the attempted removal under ACC sec. 460.

The special provisions on notice are original having no parallel in statutory precedent. They are intended to apply only to corporations the voting shares of which are held of record by five hundred or more shareholders.

Official Comment to ACC Section 10.06.463.

REMOVAL OF DIRECTOR BY SUPERIOR COURT.

SCOPE: The primary recourse for shareholders dissatisfied with the performance of a director is to seek removal under sec. 460. However, if there are insufficient votes, sec. 463 specifies the serious grounds under which holders of at least ten percent of the shares of any class or a majority of the board of directors have standing to seek removal in the superior court.

CHANGE IN FORMER ALASKA LAW: Sec. 463 is taken from GCL Section 304 and is without parallel in prior Alaska law. Sec. 463 goes beyond the California Code in adding "gross neglect of duties" as a ground for judicial removal and in granting standing to the board as well as the requisite percentage of the shares.

Official Comment to ACC Section 10.06.465.

VACANCIES AND RESIGNATION; SPECIAL MEETING OF SHAREHOLDERS.

SCOPE: Secs. 458 and 465 define when a "vacancy" exists upon the board and how such vacancies shall be filled if they should arise at a time when the shareholders are not meeting. Absent contrary provisions in the articles or bylaws and unless the vacancy has occurred by removal by shareholders (sec. 460), the vacation position(s) may be filled by the director(s) remaining in office even though there is less than a quorum of the entire board.

Sec. 465 also contains provisions designed to deal with the danger that the directors then in office may be the representatives of a minority faction of the shares. The procedure for resignation by a director and his status until the election and qualification of a successor is also defined.

CHANGE IN FORMER ALASKA LAW: Sec. 465 is modeled upon GCL Section 305 with noted modifications. It replaces former AS

10.05.189 which had been premised upon Section 38 of the Model Act.

Sec. 465(a) continues the policy of former AS 10.05.189 in vesting broad authority to fill vacancies with the remaining member(s) of the board. Unlike the former Alaska statute, sec. 465(a) clearly states that the presumptions fixed in the statute may be modified by provision of the articles or bylaws. While not explicitly mentioned, "vacancies" occasioned by expansion (sec. 453(b)) fall within sec. 465(a). The 1976 amendment to former AS 10.05.189, which required that expansion vacancies be filled by shareholders at either an annual or special meeting, has been dropped given the expanded by the commissioner under sec. 630(a)(5) of this Chapter.

Sec. 465(c) is a substantial modification of GCL Section 305(c) with the omission of Section 305(c)(2) of the California Code. This modification eliminates the role for a superior court in ordering an election of the entire board when it appears that there is a significant danger that it is nonrepresentative of the majority of the shares. ACC Sec. 465(c) addresses this danger by granting to the holders of ten percent or more of all shares entitled to elect directors then outstanding (as opposed to other ACC provisions which merely require a percentage of any class of shares) to call a meeting to elect the entire board. If such an election is called, the action of the shares there taken terminates the terms of all incumbent directors upon the qualifications of their successors.

Sec. 465(d) is a modified version of GCL Section 305(d) designed to coordinate with ACC sec. 453(d) making it clear that notwithstanding an effective "resignation" the privileges and duties of the director's office remain with that individual until the election and qualification of a successor. Such a provision would override common law authorities such as _Parsons Mobile Products, Inc. v. Remmert_, 216 Kan. 256, 531 P.2d 428, 432 (1975). Such a policy will minimize circumstances under which a corporation could become a candidate for involuntary dissolution under ACC sec. 630(a)(5).

_Official Comment to ACC Section 10.06.468._

EXECUTIVE AND OTHER BOARD COMMITTEES.

<u>SCOPE</u>: Sec. 468 permits inclusion in the articles or bylaws of provisions empowering the board to set up executive and other committees and to delegate, with noted exceptions, to such committee(s) the powers otherwise vested in the board. The duty of care of directors who are not members of such committees is particularized in sec. 468(b).

Note that sec. 468(a) incorporates the suggestion of the revised Model Business Corporation Act respecting a minimum composition of board committees. It works an accommodation between the desire to streamline board functions via delegation and the necessity of protecting a meaningful role for representatives of minority interests. Under sec. 468, protection for the minority is found in two provisions: first, the elimination of "one director" committees in any corporation which is required to have a board of three members; and second, reservation of enumerated, critical board decisions which may not be delegated.

Under the terms of the coordinated coverage of sec. 453, if the corporation is required to have a board of at least three directors, then any committee created by the articles or bylaws must have a minimum membership of two. If the number of shareholders is two, then under sec. 453, the number of directors need not exceed the number of shareholders.

Under sec. 468(a), a corporation with a two person board could provide in its articles or bylaws for one or more one-director committees. The interests of the non-member director are protected since the committee could not be created nor could its jurisdiction be defined without the active consent of both members of a two-person board. On such a board one of the directors could never constitute the "majority."

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 468 is a modified version of Section 8.25 of the Revised Model Business Corporation Act. It clarifies Alaska law, as set out in former AS 10.05.195, in several particulars. Sec. 468(a) departs from AS 10.05.195 by a clear indication that there may be such other committees of the board, in addition to an executive committee, as may be provided in the articles or bylaws of the corporation. Coordination with sec. 453 precludes one-director committees in any corporation required to have a board of at least three members. Sec. 468(a) continues to reflect the policy of old .195 in the

requirement that the resolution setting up a committee permitted under the articles or bylaws be adopted by an absolute majority of the board and not merely of the directors then in office.

The most significant change worked by sec. 468(a) over former .195 is in the enumerated subjects which may not be delegated by the full board to any committee. This list accords with the suggested content of Section 8.25(e) of the Revised Model Business Corporation Act. The only modification is with respect to ACC sec. 468(a)(5) on the capitalization of retained earnings and sec. 468(a)(9) on transaction with interested directors.

Sec. 468(b) expands upon the former provision of .195 with regard to a declaration that the directors who do not serve on board committees are not, by virtue of nonservice, relieved of their duties of care and loyalty with respect to the work of such committees, and that this includes the express recognition of a duty of reasonable inquiry which the ACC has engrafted onto the formulation of the classical and Revised Model Act. See Heit v. Bixby, 276 F.Supp. 217, 231 (E.D. Mo. 1967).

Official Comment to ACC Section 10.06.470.

MEETINGS: CALL, PLACE, NOTICE, AND WAIVER.

SCOPE: Sec. 470 defines the corporate officers or directors who have authority to call regular or special meetings of the board or any board committee, the notice requirements which must be observed, and the waiver of such requirements by unnoticed directors.

CHANGE IN FORMER ALASKA LAW: ACC sec. 470 is a modified version of GCL Section 307 which replaces former AS 10.05.198 (Section 43 of the Model Act).

Sec. 470(a) is unprecedented in Alaska law and for the first time defines the corporate officers or directors who have authority to call regular or special meetings of the board or of any board committee. In the case of a board committee this section does not intend to require that the directors calling the meeting have to be members of that committee.

Sec. 470(b) follows the no notice policy of the former Alaska act with respect to regular meetings. With respect to special meetings there is a standardization of a twenty day requirement on written notice and a broad authority to use the instrumentalities of electronic telecommunications, in which case the time provision is the 72 hours requirement observed for person to person communication or notice by personal messenger. ACC sec. 470(b) goes beyond either the GCL or the Model Act in requiring that notice of a special meeting of the board or a committee disclose the purpose and business to be transacted.

Sec. 470(c) defines in greater detail than former AS 10.-05.198 the circumstances under which an unnoticed director can or will be taken to have waived the requirements of this section.

Official Comment to ACC Section 10.06.473.

QUORUM OF DIRECTORS.

SCOPE: This section fixes a quorum of the board or any committee thereof at an absolute majority of the positions of such body. The articles or bylaws are competent to set a higher quorum requirement but may not go below the majority requirement.

CHANGE IN FORMER ALASKA LAW: ACC sec. 473 continues the policy and language of former AS 10.05.192 and Model Act Section 40. Subsection (b) is a technical clarification.

Official Comment to ACC Section 10.06.475.

INFORMAL ACTION BY DIRECTORS.

SCOPE: ACC sec. 475 covers two related but distinct departures from the norm that board business is conducted at formal meetings: meetings conducted via communications equipment allowing simultaneous contact of all participants and business transacted without any form of meeting via the use of written consents of all members.

CHANGE IN FORMER ALASKA LAW: ACC sec. 475 is based upon former AS 10.05.199 and Model Act Sections 43 and 44. Sec. 475(a) is a straight enactment of the last paragraph of

Model Act Section 43. Section 475(b) is a modified version of Model Act Section 44 and former AS 10.05.199 making it clear, for the first time, that the written consents obtained from all directors must be identical in content. The permission for the transaction of board business without a meeting is extended by sec. 475(b) to board committees.

Official Comment to ACC Section 10.06.478.

DIRECTOR CONFLICTS OF INTEREST.

SCOPE: ACC sec. 478 addresses director conflict of interests in two distinct and classical instances: where the contract or other transaction is between the corporation and one or more of its directors; or where the contract or transaction is between two corporations sharing a common director or directors. Different rules are developed for each fact pattern with the former receiving the more intense scrutiny.

CHANGE IN FORMER ALASKA LAW: Prior to the enactment of ACC sec. 478 Alaska had no statutory law on conflicts of interest at the director level. Sec. 478 is modeled upon GCL Section 310 with modifications designed to produce an even more stringent standard for fact patterns featuring the threat of a direct conflict of interest.

Sec. 478(a) addresses the direct conflict of interest where the transaction is between the corporation and the director or a business entity in which a director has a material financial interest. Such transactions are not void per se, but must be approved under either of two procedures.

Sec. 478(a)(1) provides for validation via the informed approval of the shareholders with the shares of the interested director(s) being disenfranchised on the question. Note that under sec. 905 these disqualified shares are not computed in reckoning a quorum of the shares or in determining the presence of a majority on the question of approval or disapproval.

Sec. 478(a)(2) is an alternative whereby a disinterested and fully informed majority of a quorum of the full board approves the transaction. Whether or not the presence of the interested director(s) is counted for the purposes of ascertaining a quorum (sec. 478(d)), the majority working approval must meet the absolute majority requirement of sec. 478(a)(2). Section 310 of the GCL would permit this validation decision to be made by a committee of the board, an alternative deliberately eliminated from ACC sec. 478(a). Also eliminated is California's third alternative for validation which would be accomplished by the proponent of the contract or transactions upon proof that the transaction was just and reasonable to the corporation. Instead of being an independent vehicle for validation as in GCL Section 310(a), such a requirement is imposed as an <u>additional</u> ground for validation under ACC sec. 478(a)(2).

Sec. 478(b) follows GCL Section 310(a) by providing that neither a mere common directorship nor participation in board action setting the compensation of other directors constitute a "material financial interest" within the meaning of sec. 478(a).

Sec. 478(c) confronts the threat to the efficient operation of the duty of loyalty occasioned by the presence on the boards of each of the corporate parties to a contract or transaction of (a) "common director(s)." Under this section there is no objection to the presence of or participation in board deliberations by such a "common director" so long as the other directors are fully apprised of all facts, including the common directorship, and approve of the transaction by an absolute majority of a quorum of the full board. Unlike GCL Section 310(b)(1), this decision cannot be delegated to a committee of the board; and unlike GCL Section 310(b)(2), proof of the "just and reasonable" nature of the transaction to the corporation is not an alternative vehicle for validation under ACC sec. 478(c).

Sec. 478(e) makes it clear that nothing in this section is intended to influence Alaska antitrust laws.

Finally, it should be noted that a director's duty of loyalty to the corporation as defined by common law agency concepts covers subject matters not embraced by ACC sec. 478. In adopting the content of sec. 478, the legislature does not intend to cast doubt upon the "corporate" or "business" opportunity and related doctrines which have been traditionally left to common law development. <u>See Alvest, Inc. v. Superior Oil Corporation</u>, 398 P.2d 213 (Alaska 1965), for a vigorous expression of the corporate opportunity doctrine, which is expressly approved.

Official Comment to ACC Section 10.06.480.

LIABILITY OF DIRECTORS.

SCOPE: ACC sec. 480 imposes joint and several liability upon directors who vote for or assent to three types of illicit transactions: distributions to shareholders contrary to the provisions of Article 4 of this Chapter; distributions to shareholders which are prejudicial to the rights of creditors during the liquidation of the corporation; and loans or extensions of corporate credit to any officer or employee contrary to the restrictions of sec. 485 of this Chapter and any provisions of the articles of incorporation. A defense to liability asserted under sec. 480 is proof by the defendant(s) of an observance of the duty of care articulated in sec. 450(b).

CHANGE IN FORMER ALASKA LAW: ACC sec. 480 is an augmented version of the New Model Act Section 48 and replaces former AS 10.05.216 and 225. AS 10.05.219 and 222 have been replaced by provisions of ACC sec. 450.

Sec. 480(a) continues the former policy of .216 imposing joint and several liability upon director(s) who vote for or assent to illicit distributions to shareholders with wording changes designed to harmonize with the new Model Act Section 48. Sec. 480(a)(3) continues an imposition of liability for illicit loans to officers or employees contained in .216(d) which is not to be found in Model Act Section 48. Former Alaska law is changed in that the liability of defendant director(s) under ACC sec. 480(a) may be avoided upon satisfactory proof by defendant(s) of an observance of the standard of care defined in ACC sec. 450(b). No such defense was explicitly recognized in former AS 10.05.216. Proof of such compliance is a matter of affirmative defense to a liability established upon plaintiff's proof of a transaction illicit within sec. 480(a).

Sec. 480(b) establishes a right of contribution for a director held liable under sec. 480(a). With respect to distributions to shareholders the right of contribution is dependent upon the knowing receipt of distributions made in violation of the ACC and is proportionate to the amounts received. With respect to a director held liable under sec. 480(a)(3) the right of contribution extends to the person receiving the loan irrespective of that individual's knowledge of the illicit nature of the transaction.

Sec. 480(c) continues to policy of former AS 10.05.225(b).

Official Comment to Section 10.06.483.

OFFICERS: TENURE, RESIGNATION, AGENCY, DUTY OF CARE.

SCOPE: Five major topics are addressed by this section:

(1) the minimum number of offices which a corporation formed under the ACC must have; (2) the manner of selection and right of resignation of officers; (3) the source of real authority of corporate officers; (4) a strategy by which a third party can preclude a corporate principal's denial of the authority of an officer as agent; and (5) a definition of the standard of care according to which officers are to discharge their responsibilities to the corporation.

CHANGE IN FORMER ALASKA LAW: This section replaces former AS 10.05.231 and 228 which were based upon Section 50 of the Model Act. Subsection (a) is adapted from GCL Section 312(a), former GCL Section 821 and BCL Section 715(e). Unlike former AS 10.05.228, which required four offices held by at least two individuals, sec. 483(a) eliminates the necessity of a vice president. Further, if the corporation has only one shareholder, the new act permits that individual to hold all of the corporate offices.

Subsection (b) is taken from GCL Section 312(b) and differs from former AS 10.05.228 in the manner of selection of officers. Henceforth, they must be selected by the board. The new statute makes it clear that no officer can serve beyond the pleasure of the board. This does not preclude the board from entering into contracts for a term with an individual; and, if the board discharges the officer without justification prior to the expiration of that term, the corporation is liable on that contract. Subsection (b) also makes clear for the first time that an officer may resign at any time subject to any contract rights which may accrue to the corporation.

Subsection (c) is taken from BCL Section 715(g). It replaces former AS 10.05.231 and reflects no substantive change in defining the source of the real authority of corporate officers.

Subsection (d) is taken from CCL Section 313 which, in turn, is adapted from Pennsylvania Business Corporation Law Section 305 and is designed to aid third parties dealing with "authority" questions in transactions with a corporation. This topic is fully elaborated in the official comment to sec. 020 of this Chapter. Note that the two officer requirements of subsection (a) sets the stage for the signatures of two officers required as the talisman in subsection (d) for all Alaska corporations except those in which all offices are held by a single shareholder. In that circumstance, the two signature rule is unneeded since a signature by the only officer, director and shareholder would, unquestionably, bind the corporate principal.

Subsection (e) is premised upon BCL Section 715(h) without inclusion of the explicit "right of reliance" provision of the New York Act. Former Alaska law did not define a duty of care for officers. This matter has now been remedied. Unlike BCL Section 715, ACC sec. 483(e) makes it clear that the duty of care includes a duty of reasonable inquiry. Further, it is not the white heart and empty head standard articulated in some common law decisions, but rather a duty of care which would be exhibited by an ordinarily prudent person in similar circumstances. National Auto & Cas. Ins. Co. v. Payne, 261 Cal.App.2d 403, 409, 67 Cal. Rptr. 784 (1968), is an excellent application of the standard, including the duty to act upon inquiry notice, which this section seeks to impose upon officers. The lesser duty of mere good faith enunciated in Kardish v. Phx.-Scotts Sports Co., 11 Ariz. App. 175, 466 P.2d 794, 797 (1970), is disapproved.

Subsection (e) is silent on whether a breach of the duty of care would be actionable in litigation which was not brought directly or derivatively by the corporation in whose service the defendant had served as an officer. There may be circumstances in which it would be proper to allow shareholders to prosecute a direct action where there had been a change in the beneficial ownership of the corporation between the time of the alleged injury and its discovery. C.f., Young v. Columbia Oil Co., 110 W. Va. 364, 158 S.E. 678 (1931). It is the intention of the legislature to leave this question to judicial development.

CROSS-REFERENCE: See ACC sec. 020 and comment for further discussion of these agency questions.

Official Comment to ACC Section 10.06.485.

LOANS TO DIRECTORS, OFFICERS, AND EMPLOYEES.

SCOPE: In an economy in which an individual's credit rating may be a most significant asset, the liability of a corporate director, officer, or employee to find in the corporation an understanding or passive and generous lender is a danger. The conflict of interest is greatest for directors, for they exercise the power to make the corporate decision to loan funds or to commit the corporation as a guarantor of a loan repayment obligation to an "outside lender." When the classical common law and early statutes took a firm position prohibiting such financial transactions with directors, they were invaded by the expedient of having the borrower assume the dual role of "employee/director" or "officer/director" and the transaction extended in the "nondirector" setting. When statutes expanded to meet this challenge another evasion was devised: have the financial transaction take place between a parent corporation and the officers, employees, and directors of a "subsidiary" as lend or guarantor and the officers, employees, and directors of the parent.

Standing in opposition to those who would inhibit these transactions are the arguments that in some circumstances they may be to the advantage of the corporation. Visions of a "grateful servant as a better servant" and "relief of financial worries which would otherwise hamper job performance" are frequently advanced as the source of the "benefit". ACC sec. 485 is designed to provide firm guidance as to all variations of these transactions.

CHANGE IN FORMER ALASKA LAW: ACC sec. 485 is unique, borrowing from Model Act 47 and GCL Section 315, but reflecting policies which are more protective of the corporate fisc than either of those provisions. It replaces former AS 10.05.213 which contained a flat prohibition against loans to corporate directors or officers or to any borrower if the security was to be the corporation's own shares.

Sec. 485(a) repudiates the flat prohibition on loans to officers or directors. Loans to directors may not be extended without the approval of two-thirds of the voting shares. The board is competent to extend loans to officers or employees, consistent with the duty of care defined in sec. 485(f). If a vote of the shares is required, a shareholder who is also a director may vote his shares notwithstanding his interests. If an officer or employee is also a director, then shareholder approval is required for an extension of any loan.

Sec. 485(b) imposes the additional restraint that no loan may be extended unless it is permissible as a distribution under secs. 990(17) and 358.

Sec. 485(c) contains a broad definition of a "loan" going beyond extensions of cash to include securities or real or personal property.

Sec. 485(d) equates any use of a corporation as a guarantor with the extension of a loan and incorporates the restraints imposed by sec. 485(a).

Sec. 485(e) equates the officers, employees, and directors of all affiliate corporations (sec. 990(2)) (parent, subsidiary, or sibling) with those of the corporation restrained under sec. 485(a).

Official Comment to ACC Section 10.06.488.

SECONDARY LIABILITY OF DIRECTORS AND OFFICERS.

SCOPE: This section is new and without precedent in corporate law. The social problem targeted for redress is the abuse of unsecured creditors, including employees, who are precluded by the relatively small dimension of their demands, contrasted with the high costs of litigation, from asserting the more traditional common law efforts to pierce the corporate veil.

As early as 1948 the State of New York addressed the interests of employees and others who had provided personal services for a corporate entity which subsequently did not have assets sufficient to cover their claims. The solution was to impose liability upon the ten largest shareholders in any corporation the equity shares of which were not publicly traded. While it would appear that this New York precedent has not been followed in other jurisdictions, it is equally clear that the gears of commerce did not grind to a halt because of the policy decision to impose greater liability upon enterprisers who sought the privilege of a corporate vehicle for the conduct of their affairs.

The initial proposal considered by the Alaska Code Revision Commission followed this New York precedent while expanding it to include liability for claims of creditors for materials, supplies, inventory and services extended on open account. Such extenders of credit are traditionally unsecured in the marketplace. Frequently, such indebtedness is not reflected in formal, written contracts. Upon reflection, this approach was abandoned because it was felt that shareholders who might drift into and out of the "top ten" may have had little pragmatic opportunity to discipline those in control of the corporation. That control lies with the directors and officers and for this reason it is they who are the targets of ACC sec. 488. The impact of this novel solution is to give those in daily control of the business affairs of the corporate entity a personal incentive to conduct them in a manner responsible to small creditors.

Under sec. 488(a) officer liability is imposed upon the president, secretary and treasurer of an Alaska or foreign corporation or upon individuals performing the functions of those offices in a foreign corporation. The reason for restricting the last reference to foreign corporations is because the ACC requires corporations to have these offices although a person may occupy any two offices except those of president and secretary. See sec. 483(a).

In some jurisdictions corporate offices are optional in which case it would be possible to form a corporation without a president, secretary or treasurer. If such a formation decision has been made, the liability imposed by sec. 488 would be fixed upon such person or persons who had performed functions which, were it an Alaska corporation, would have been appropriate to those offices.

If, in disregard of their duty to call an organization meeting and elect initial directors (ACC sec. 225), incorporators were to transact business on behalf of an entity for which there had been issued a certificate of incorporation, they, too, would incur the potential personal liability created by sec. 488(a). As provided in sec. 488(b), for the purpose of such liability their period of service would conclude with the designation or election of initial directors.

Traditional concepts of "limited liability" are venerated in the explicit provision that sec. 488 creates a "secondary liability" on the part of the designated directors, incorporators, and officers. Funds invested by shareholders as well as accumulated earnings remain the first line of recourse for the contract indebtedness of the corporate entity. Exhaustion of that source, as discussed in Arenwald v. Douglas Machinery Co., 183 Misc. 627, 50 N.Y.S.2d 39 (1944), is a condition precedent to the assertion of the liability created by sec. 488.

Further vindication of traditional limited liability is reflected in the imposition of $2,500 (excluding all costs of collection) as a ceiling upon this secondary liability. This limitation reflects two policy judgments: (1) for sums greater than this amount, the third party should bear the risk of negotiating for liability greater than that of corporate assets; and (2) for sums in excess of $2,500, the costs of litigation do not pragmatically preclude the assertion of "thin capitalization" or other abuses of the corporate norm which would, if proven, establish liability upon certain or all of the shareholders. The intention has been to preserve these common law remedies in addition to the liability created in sec. 488. In this connection see Mohawk Oil Co. v. McKibben, 667 P.2d 1223 (Alaska 1983); Eagle Air v. Corroon & Black/Dawson & Co., 648 P.2d 1000 (Alaska 1982).

It will be noted that the terms of any written contract are competent to modify or eliminate the liability created by this section.

The legislature recognizes the desirability of treating all corporations doing business within this state as equal in terms of both privilege and responsibility. To this end the liability created by sec. 488 is extended to directors, incorporators, and officers (or their substitutes) of every foreign corporation doing business within this state to the extent that materials, supplies, inventory or services were furnished within Alaska. Armstrong v. Dyer, 268 N.Y. 671, 198 N.E. 551 (1935) and Arenwald v. Douglas Machinery Co., 183 Misc. 627, 50 N.Y.S.2d 39 (1944), are disapproved and declared contrary to the intention of the Legislature in enacting sec. 488. There is not intention to create liability in Alaska between a foreign corporation and a claimant who did not extend the consideration within this state.

Observance of the standard of "due care" created by ACC sec. 490(b) and made a matter of affirmative defense to liability created within the corporate entity under ACC sec. 490 has no application to the secondary liability to third party claimants created by sec. 488.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 488 is new and without precedent in former Alaska statutory law. Two recent decisions of the Supreme Court of Alaska have surveyed common law theories for disregarding or "piercing" the corporate veil. In neither was such a step ultimately taken. <u>Jackson v. General Electric Company</u>, 514 P.2d 1170, 1172-73 (1973), cites with approval and then finds inapplicable both fraud and instrumentality theories for disregarding the formal distinction between parent and subsidiary corporations

A question of shareholder liability to corporate creditors was presented in <u>Shepard v. Bering Sea Originals</u>. 578 P.2d 587, 589-90 (1978). The court cited both non-Alaska case law and text writer exposition of the "thin capitalization", "alter ego" and "instrumentality" theories but then found them inapplicable on the facts. In enacting ACC sec. 488 the legislature does not intend to occupy the field or to preclude the development of these and other doctrines which subject the privilege of limited liability to concepts of equity, social responsibility and sound business practice.

<u>Official Comment to ACC Section 10.06.490</u>.

INDEMNIFICATION OF OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS: INSURANCE.

<u>SCOPE</u>: Corporate directors, officers, and employees are vulnerable to attack in their personal capacity for acts done in their corporate roles. There is an understandable demand for financial protection from potentially ruinous costs and liabilities. Standing in opposition to this demand are social policies implicit in the condemnation of activity or behavior as criminal, violative of administrative regulations, or harmful to the interests of the corporation. If the consequences of such conduct are shifted from the individuals who were guilty of its pursuit to the corporation with which they were affiliated, critics argue that the disincentives are substantially weakened.

ACC sec. 490 attempts to strike a balance between these contending positions.

CHANGE IN FORMER ALASKA LAW: ACC sec. 490 is premised upon Section 5 of the Model Act and works few changes on the provisions of former AS 10.05.010. The basic approach of sec. 490 is to distinguish those circumstances in which claim for indemnification may be made as of "right" from those in which it is addressed to the discretion of the corporation. As a further limitation upon discretionary indemnification sec. 490(a) and (b) specify standards which must have been obtained as to both the conduct and state of mind of the defendant. Finally, the corporation is empowered to purchase and maintain insurance which would recompense a defendant for any costs or liabilities incurred irrespective of the power of the corporation to have effected indemnification from its own recourses.

Indemnification as a matter of right under sec. 490(c) can be asserted by a defendant who has been exonerated on the merits. The statute contains a further "or otherwise" phrase which has been engrafted on to the Model Act from the Delaware Corporations Code. It has not proven free from difficulty. In enacting it as a part of sec. 490(c) the legislature intends to approve the construction asserted in Gold v. Berg, 359 F. Supp. 698 (D. Del. 1973) (which denied indemnification as a matter of right when the case had been dismissed without prejudice); and Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del. Sup. 1974) (which required indemnification in criminal cases which did not result in a conviction).

Discretionary indemnification is provided in two circumstances. Sec. 490(a) deals with a defendant in direct civil, administrative or criminal proceedings. Note that while the decision is left to the judgment of the corporation (sec. 490(d)) it is conditioned upon a finding that the defendant ". . . acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to a criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful . . . ." These standards are a limitation upon the power of the corporation conferred in sec. 490(a) and exercises under sec. 490(d). The final sentence of sec. 490(a) stipulates that the mere fact that the direct action terminated ". . . by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, does not, of itself, create a presumption that (the defendant did not act with the requisite state of mind)." With respect to criminal convictions (and arguably a plea of nolo) see, Steidel v. State, 460 P.2d 77, 78 (Alaska 1969); State v. Guest, 583 P.2d 836, 839 (Alaska 1978); and Hentzner v. State, 613 P.2d 821 (Alaska 1980), which would seem to preclude the ability of a defendant to establish the absence of a specific mens rea This would place it beyond the power of the corporation to act under sec. 490(d) to authorize discretionary indemnification.

Sec. 490(b) deals with the even more troubling situation of discretionary indemnification where the defendant has been assailed in a derivative proceeding. If the defendant has been adjudged guilty of violating either the duty of care or loyalty, the power of the corporation to indemnify against the very harm which it has suffered, or the costs incurred in resisting that liability, can only be had pursuant to a specific finding by and order of the court in which the action had been tried.

Sec. 490(d) deals with the procedure under which the decision to effect discretionary indemnification may be taken. The three alternative methods continue the content of former AS 10.05.010(d).

Sec. 490(e) governs the circumstances and specifies the steps which must be observed before a corporation may advance expenses to a director, officer, employee, or agent who is a defendant in a civil or criminal action or proceeding. The provisions are adapted from Sec. 8.53 of the Revised Model Business Corporation Act.

Under sec. 490(e), a three step procedure must be observed in requesting and granting an advance of corporate assets. First, assuming that a determination has been arrived at under sec. 490(d), the director or officer must furnish the corporation with a written affirmation of good faith belief that the applicable standard of care has been met. In the instance of a director that standard is set forth in sec. 450(b). The standard of care for corporate officers is set forth in sec. 483(e). In addition to the affirmation of belief in the observance of the applicable standard of conduct, the party seeking a disbursement of corporate assets must furnish a written unlimited general undertaking to repay the advance if it is ultimately determined that an acceptable standard of conduct has not been met.

Finally, those charged with making the determination to comply with such a request must find that the facts then known would not preclude indemnification.

Official Comment to ACC Section 10.06.502

AUTHORIZATION: PERMITTED AND PROHIBITED AMENDMENTS.

SCOPE: ACC sec. 502 permits a corporation to amend its articles in "any and as many respects as may be desired." Sec. 502(a) states the legislature's intent to exercise its reserve power over corporations to authorize any amendment to the articles regardless of whether any such amendment was permissible under prior law. Such power was reserved under AS 10.05.822 for corporations formed under the Alaska Business Corporation's Act of 1957. As to corporations formed prior to 1957 under Territorial Law, the case of Starkey v. American Airlines Inc., 68 Wash.2d 3?3, 419 P.2d 352 (1966) is approved with respect to its interpretation of the intent of the Alaska Legislature in adopting sec. 502.

Sec. 502(b) lists permissible amendments which might otherwise be questioned in litigation. This list is not meant in any way to limit the general power of amendment granted in sec. 502(a). Rather, the enumeration of licit amendments is intended to limit the common law "vested rights" doctrine as exemplified in Morris v. American Public Utilities Co., 21 Del.Ch. 391, 190 A. 115 (1923).

Sec. 502(c) limits the general power to amend with respect to statements in the original articles listing the names and addresses of the initial directors and the initial agent.

CHANGE IN FORMER ALASKA LAW: Sec. 502(a) is taken from GCL Section 900. It repeats the substance of former AS 10.05.270, which it replaces, and adds language which makes clear the legislative intent in providing for the amendment of articles.

Sec. 502(b) is largely a reenactment of former AS 10.05.273. Several minor deletions were occasioned by the elimination of the concept of par value. More importantly, the language in sec. 502(b)(2) is new. The language reflects a major change in former Alaska law.

Presumably, an amendment under sec. 502(b)(2) could either shorten or lengthen the duration of a corporation established by either an omission or a specification of duration in the original articles. However, shortening the duration of a corporation could function to violate the procedure for voluntary dissolution established in Article 9. Sec. 605 requires a minimum 2/3 affirmative vote to elect to voluntarily dissolve. This statutory requirement could easily be circumvented under the new law by simply passing an amendment shortening the corporation's life; such an amendment would only require a majority vote under sec. 504. In view of this possibility, the wording of sec. 502(b)(2) was carefully chose to unequivocally authorize only changes which extend limitations imposed upon a corporation's duration.

As is discussed in State ex rel. Swanson, et al. v. Perham, 80 Wash.2d 372, 494 P.2d 1365 (1972), the articles are a contract of a fourfold nature: (1) between the state and the corporation; (2) between the state and the stockholders; (3) between the corporation and the stockholders; and (4) between the stockholders themselves. The statutory authorization to amend the articles is a part of the contract. It is a broad authorization with no express statutory limitations. However, traditional contract law principles of equity do exist as limitations on the power to amend. See Honigman v. Green Giant Co., 208 F.Supp. 754, aff'd 309 F.2d 667 (8th Cir. 1962) which held that amendments working a drastic change in the manner in which the corporation was held and controlled were permissible "in the absence of fraud and the violation of any fiduciary relationship."

Thus, legislative authorization to freely amend the articles is not a carte blanche to oppress minority interests. Limitations imposed by the fiduciary duties of majority shareholders as discussed in the comment to sec. 542 of the ACC and limitations imposed by equitable principles of contract law may be used to challenge fundamental and unfair or oppressive changes sought through amendment of the articles.

Well-conceived draftmanship can protect minority interests against tumultuous recapitalizations or a diluting issuance of new stock. Sec. 210 expressly permits the articles to require supermajority votes; such votes could be employed for the approval of amendments to the articles if the majority vote provided by sec. 504 was considered to be insufficiently protective of minority interests. Sec. 508 would protect such a supermajority provision. Miscellaneous provisions in Article 12 give existing corporations a choice of remaining under the 2/3 voting requirement of prior law or of being governed by the majority voting requirement of sec. 504.

Finally, it is noted that ACC sec. 502 follows MBCA Section 58 in secs. 502(b)(5) and (b)(6) in modifying the term "shares" with the phrase "all or any part". This language change reflects a desire to conform Alaska law to the language of the model statute; it is not intended to authorize discriminatory treatment of shares of the same class or series.

Official Comment to ACC Section 10.06.504.

PROCEDURE TO AMEND ARTICLES OF INCORPORATION.

SCOPE: ACC sec. 504 sets forth the mandatory procedures which must be followed to amend the articles of incorporation. Under sec. 504(a)(1) if no shares have been issued the power of amendment resides in the board. This power of amendment may be subject to contract limitations if it is attempted at a point in time at which share subscriptions have been entered but which is prior to issuance of the shares.

Once shares are outstanding sec. 504(a)(2) vests concurrent power in the board and the voting shares to initiate amendments to the existing articles. To become effective an amendment initiated by the shareholders does not become effective until approval by the board. Sec. 504(a)(2) requires that board consideration be given at the next regular or special meeting held following shareholder approval. In passing upon a shareholder initiated amendment it is important that directors understand that they are to exercise an independent business judgment and not serve as a mere rubber stamp. A board initiated amendment does not become effective until it has been approved by the outstanding shares.

Under the ACC scheme, approval by the outstanding shares normally means approval by an absolute majority of the outstanding shares entitled to vote. In order to determine the shares entitled to vote recourse must be had to the content of the corporate articles. Class voting may be required under two circumstances. If the existing articles grant certain outstanding shares the right to vote as a class or series, an amendment to the articles is not effective until, in addition to receiving approval by a majority of the outstanding shares, it is approved by a majority of that class or series voting as a class. See ACC sec. 990(5). Even if the existing articles do not confer voting rights upon an outstanding class or series, ACC sec. 506 enfranchises such shares if the amendment would alter the relative rights, preferences, or restrictions of those shares.

As noted, approval of the outstanding shares normally means a simple, absolute majority of the shares entitled to vote (including, when required, a simple, absolute majority of each class or series with separate voting rights). However, if the existing articles require a greater majority or even the unanimous vote of the outstanding shares, class or series and amendment is not approved until it has attained that requisite vote. See ACC sec. 508.

ACC sec. 504(a)(3) adopts an idea suggested by the Revised Model Business Corporation Act. Unless the articles provide otherwise, the board is given authority to effect three types of amendments without the necessity of shareholder approval. The first two categories involve deletion of the names and addresses of the initial directors and registered agent. The third permits the board to change each issued and unissued authorized share of an outstanding class into a greater number of whole shares if the corporation has only shares of that class outstanding.

ACC sec. 504(c) requires that written notice setting forth the proposed amendment or amendments or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote in accordance with the general ACC provisions on time and manner for the giving of notice of shareholder meetings. If such notice is not given or fails to fairly apprise the shareholders of the content of the amendment or amendments, the vote taken on the question of approval shall be a nullity. In this connection the legislature intends to approve the holding in _Berger v. Amana Society_, 253 Iowa 378, 111 N.W.2d 753 (1962).

CHANGE IN FORMER ALASKA LAW: ACC sec. 504's subsections (a)(1), (b) and (c) are taken from former AS 10.05.276 and Section of the Model Act. Sec. 504(a)(2) is adapted from Section 902(a) of the GCL and changes former Alaska law by explicitly giving shareholders the power to initiate amendments to the articles. Former Alaska law required two-third's majority of the shareholders to approve amendments to the articles. ACC sec. 504(a)(2) opts for a majority of the outstanding shares entitled to vote (see, ACC sec. 990(5)), but makes the articles competent to establish supermajority voting requirements which cannot be altered by amendment save by the affirmative consent of the supermajority. See ACC sec. 508.

Sec. 504(a)(3) is taken from RMBCA Section 10.02 with the following modifications: the first, fifth, and sixth categories of board amendments are eliminated. The first was unnecessary in Alaska since no prior law limited the life of corporations; the fifth (dealing with name changes) was not carried forward because of a perception that name changes ought to be approved by the shareholders; and the sixth was superfluous since the ACC does not vest the board with any other circumstances in which it is a sufficient power to amend the articles. The concept is new to Alaska law.

Official Comment to ACC Section 10.06.506

CLASS VOTING ON AMENDMENTS.

SCOPE: If the articles have established more than one class of outstanding shares, amendments which would change the relative rights, preferences, or restrictions pose special problems. On the one hand if the amendment would create a class or series with rights superior to those of an outstanding class, there is prejudice to that class even though there is technically no alteration in the indenture. If the "senior shares" are nonvoting, the holders are at the mercy of the common shareholders who may attempt to use the amendment machinery to diminish the preferences or rights of the senior securities. ACC sec. 506 confronts both of these problems with the concept of "class voting."

First, the section strong-arms voting rights for any class of shares adversely affected within the specific provisions of the statute. These voting rights obtain irrespective of any provisions of the articles and may not be impaired or denied by any internal rule within the corporate structure.

Second, as to any amendment on which there is a right to vote by class, there is no "approval by the shareholders" unless the amendment receives the affirmative vote of a majority of the affected class as well as a majority of the other shares entitled to vote.

CHANGE IN FORMER ALASKA LAW: ACC sec. 506 is largely a reenactment of former AS 10.05.282. References to par value have been eliminated in keeping with the ACC financials. Sec. 506(6) amends prior law to conform with Section 60 of the MBCA. Prior Alaska law did not include an increase in the authorized number of shares of a superior class as an amendment giving a right to class voting.

Sec. 506(7) amends prior Alaska law to conform to Section 60(h) of the Model Act by providing for class voting on proposed amendments which would authorize the board to divide senior classes into series and fix and determine the designation of series and the relative rights and preferences between series. The provisions of former AS 10.05.279 have been deleted from the ACC as being substantially duplicative of former .282 and reflected in the coverage of ACC sec. 506.

Official Comment to ACC Section 10.06.508.

GREATER VOTING REQUIREMENTS.

SCOPE: ACC sec. 210 permits the articles to set up supermajority or even unanimous voting requirements; sec. 508 protects such requirements by specifying that an amendment affecting such an article must be approved by the same supermajority vote.

CHANGE IN FORMER ALASKA LAW: Sec. 508 is new to Alaska law, stemming from UCL Section 902(e).

Official Comment to ACC Sections:

Sec. 10.06.510. ARTICLES OF AMENDMENT.

Sec. 10.06.512. FILINGS ARTICLES OF AMENDMENT.

SCOPE: In order for an amendment to the articles of incorporation to become effective as provided in sec. 514, it is necessary to make a filing with the commissioner and receive a certificate of amendment. Sec. 510 specifies what the articles of amendment are to include; sec. 512 specifies the proper filing procedure.

CHANGE IN FORMER ALASKA LAW: ACC sec. 510 is a reenactment of former AS 10.05.285 with the deletion of a subsection referring to "stated capital" which is unnecessary under the ACC financials.

ACC sec. 512 is a reenactment of former AS 10.05.288 with technical rewording to accommodate the consolidation of provisions specifying the treatment of documents in the commissioner's office in ACC sec. 910.

Official Comment to ACC Section 10.06.514.

EFFECT OF CERTIFICATE OF AMENDMENT.

SCOPE: An amendment to the articles is not effective until such time as the commissioner has reviewed the amendment to ascertain its conformity with law (sec. 910) and issued a certificate of amendment. The amendment may provide by its terms an effectiveness date not more than thirty (30) days subsequent to the filing with the commissioner.

ACC sec. 514(b) specifies that an amendment does not have a retroactive effect so as to compromise any pending litigation; nor does an amendment changing the corporate name abate a suit brought against the corporation in its former name.

CHANGE IN FORMER ALASKA LAW: ACC sec. 514 is essentially a reenactment of former AS 10.05.291. Language is added from MBCA Section 63 permitting up to a 30-day delay in effectiveness.

Official Comment to ACC Section 10.06.516.

RESTATED ARTICLES OF INCORPORATION.

SCOPE: This housekeeping provision merely authorizes a corporation from time to time to restate the content of its articles as they may have been amended by resolution of the board. The question is one of form; the substantive provisions of the articles are not to be altered. In fact, sec. 516 requires that a statement be filed with the restated articles which avers that the restated articles of incorporation correctly set out without change the corresponding provisions of the articles of incorporation. A corporation desiring to both restate its articles and amend them concurrently must follow the requirements for amending the articles. ACC sec. 504(b) provides for this combined procedure.

CHANGE IN FORMER ALASKA LAW: ACC sec. 516 is a reenactment of former AS 10.05.294.

Official Comment to ACC Sections:

10.06.518. FILING OF RESTATED ARTICLES OF INCORPORATION;

10.06.520. EFFECT OF ISSUANCE OF RESTATED CERTIFICATE OF INCORPORATION.

SCOPE: ACC sec. 518 specifies the procedure to be followed by the corporation and the commissioner (sec. 910) in the filing and administrative handling of the restated articles. ACC sec. 520 provides that the restated articles become effective and supersede the original articles and all amendments to them upon the issuance of the restated certificate of incorporation.

CHANGE IN FORMER ALASKA LAW: ACC sec. 518 is a reenactment of former AS 10.05.303 with technical rewriting to accommodate the consolidation of matters specifying document processing in the commissioner's office in sec. 910. ACC sec. 520 is a verbatim reenactment of former AS 10.05.306.

Official Comment to ACC Section 10.06.522.

AMENDMENT OF ARTICLES OF INCORPORATION IN REORGANIZATION PROCEEDINGS.

SCOPE: ACC sec. 522 is designed to coordinate local law with the Federal Bankruptcy Act. A plan of reorganization under that act may alter or eliminate shareholder interests in a manner which would never obtain an affirmative vote of the shares. If local law does not permit amendment without such a vote, an involuntary dissolution and reincorporation would be necessary to achieve the desired result of the bankruptcy reorganization. This process may, among other things, increase liability for federal income taxes. ACC sec. 522 prevents this problem by permitting amendment of the articles as part of the reorganization proceedings.

CHANGE IN FORMER ALASKA LAW: ACC sec. 522 is new to Alaska law; it is taken from MBCA Section 65.

Official Comment to ACC Sections:

10.06.524. FILING OF AMENDMENT OF ARTICLES IN REORGANIZATION PROCEEDINGS;

10.06.526. EFFECT OF ISSUANCE OF CERTIFICATE OF AMENDMENT IN REORGANIZATION PROCEEDINGS.

SCOPE: ACC sec. 524 specifies the filing procedure for any amendments to the articles accomplished according to ACC sec. 522. ACC sec. 526 provides for effectiveness of the amendments and issuance of a certificate of amendment by the commissioner. The language of sec. 526 makes clear that no action by either the board or the shareholders is required for the amendments to become effective.

CHANGE IN FORMER ALASKA LAW: ACC secs. 524 and 526 are new to Alaska law, being added in the wake of sec. 522. They are in conformity with other "filing" and "effectiveness" provisions in the ACC. They derive from MBCA Section 65. Sec. 524 varies in its reliance on sec. 910. Sec. 526 varies substantively in that the MBCA provision permitting the effectiveness to be delayed for up to thirty (30) days has been deleted. Other variations in the text of sec. 526 and MBCA Section 65 do not work any substantive changes.

Official Comment to ACC Sections 10.06.530-540.

MERGER, CONSOLIDATION, SHARE EXCHANGE.

SCOPE: These sections define and set up uniform procedures for the proposal of three classic forms of organic change. In the event of either a merger or consolidation, one or both of the participating corporations formally ceases to exist. In the event of a share exchange, there is no formal supression of a constituent corporation but it becomes a wholly owned subsidiary of the acquiring corporation. In each instance the scheme of the ACC is to place the responsibility for the framing of a proposal within the discretion of the boards of the constituent or participating corporations. The approval of the shareholders is then obtained under secs. 544 and 546.

CHANGE IN FORMER ALASKA LAW: Sec. 530 and 532 (pertaining to the definition of and procedure for merger) are taken from Model Act Section 71 and reflect without change former AS 10.05.375 and 378. Secs. 534 and 536 (pertaining to the definition of and procedure for consolidation are taken from Model Act Section 72 and reflect without change former AS 10.05.381 and 384. Secs. 538 and 540 (pertaining to the definition of and procedure for a share exchange) are taken from Model Act Section 72A and are without precedent in former Alaska law.

Official Comment to ACC Section 10.06.542.

DISPARATE TREATMENT OF SHARES OF THE SAME CLASS OR SERIES PROHIBITED: EXCEPTIONS.

SCOPE: The object of ACC sec. 542 is to establish a legal presumption against the disparate treatment of shares of the same class or series in any plan for any specie of "organic change" (merger (sec. 530), consolidation (sec. 534), share exchange (sec. 538), or merger of subsidiary (sec. 554)). The fiduciary duties of majority or controlling shareholder(s) which have recently been recognized in Singer v. Magnavox Co., 830 A.2d 969 (Del. Sup. 1977), are given legislative approval through formulation of sec. 542(a).

Sec. 542(b) accommodates the arguments that the shareholders in any given corporation must accept as a possibility that a majority with which they disagree may exercise their voting strength to work an organic change for purposes or results which do not appeal to or advantage the minority. The legitimacy of a desire by the majority to achieve or protect a Subchapter S election is recognized in sec. 542(b)(1).

As to other business reasons or purposes which may actuate the majority, sec. 542(b)(2) places the burden of proof (in the event of litigation challenge by any shareholder) upon the proponents to establish the disparate treatment as consistent with fiduciary duties owed to all shareholders. In this manner the ACC recognizes that majority shareholder(s) also have "rights." See Tanzer v. International General Industries, Inc., 379 A.2d 1121 (Del. 1977).

CHANGE IN FORMER ALASKA LAW: ACC sec. 542 is predicated upon but not adapted from GCL Section 1101. Sec. 542 is unprecedented in former Alaska law.

Official Comment to ACC Section 10.06.544.

NOTICE TO AND APPROVAL BY SHAREHOLDERS.

SCOPE: ACC sec. 544 mandates the steps which must be taken to seek the approval of shareholders of the constituent corporations to any merger, consolidation, or share exchange. Approval of the merger of a subsidiary corporation (sec. 554) is not within the scope of sec. 544. Written notice must be given to each shareholder irrespective of voting rights not less than 20 days before the meeting. This notice must state that the purpose or one of the purposes of the meeting is to consider the proposed organic change. A copy of the plan for the proposed change together with the text of the ACC provisions on the rights of dissenting shareholders must accompany the notice.

CHANGE IN FORMER ALASKA LAW: Sec. 544 is a modified version of new section 73 of the Model Act and has been extended to treat the share exchange in a manner identical to the merger or consolidation. Former AS 10.05.387 did not include the share exchange because such an organic change was previously not governed by Alaska law. A further change is reflected in sec. 544's command that the notice to shareholders include either a copy or incorporate the text of ACC secs. 574 and 576 respecting the rights of a dissenting shareholder.

Official Comment to ACC Section 10.06.546.

MANNER OF APPROVAL BY SHAREHOLDERS.

SCOPE: ACC sec. 546 enfranchises all shares of every class or series of each constituent corporation to an organic change notice under sec. 544. The plan prepared by the board and noticed to the shareholders is "approved" upon receiving the affirmative vote of an absolute two-thirds majority of all outstanding shares. If the articles of any constituent corporation confer upon any class or series of shares the right to vote as a "class" on the approval of any organic change, then approval is not obtained unless, in addition to receiving the affirmative vote of at least two-thirds of all outstanding shares, the plan receives the affirmative vote of at least two-thirds of that class.

In the absence of provisions in the articles granting the right to vote by class, sec. 546 mandates class voting if any provision of the plan for the organic change would, if it had been proposed as an amendment to the articles of incorporation of that constituent corporation, have required recognition of a right of such shares to vote as a class. If the organic change is a share exchange, sec. 546's "strong arm" provision on class voting obtains only if the affected class is included in the exchange.

CHANGE IN FORMER ALASKA LAW: ACC sec. 546 is premised upon new Section 73 of the Model Act with a modification to retain the two-thirds voting requirements found in former AS 10.05.390. The only changes worked by sec. 546 pertain to the inclusion of share exchanges.

Official Comment to ACC Section 10.06.548.

ABANDONMENT OF PLAN OF MERGER, CONSOLIDATION, OR EXCHANGE.

SCOPE: ACC sec. 548 provides that notwithstanding approval by the shareholder (sec. 546) the plan may fail without further action if any condition precedent or concurrent is not satisfied or if any condition subsequent is triggered.

CHANGE IN FORMER ALASKA LAW: ACC sec. 548 is taken from Section 73 of the Model Act and mirrors without change the content of former AS 10.05.393 save for inclusion of the share exchange.

Official Comment to ACC Section 10.06.550

ARTICLES OF MERGER, CONSOLIDATION, OR EXCHANGE.

SCOPE: ACC sec. 550 establishes the formal requisites and administrative paperwork necessary to reflect the combination. Each constituent corporation is required to execute a set of recombination articles. The articles must state all the pertinent facts of the combination, including the mechanics of the shareholder vote.

CHANGE IN FORMER ALASKA LAW: ACC sec. 550 is predicated upon new Section 74 of the Model Act. It reflects a change in the wording of subsections (1) and (2) to substitute "were" for "are" used in former AS 10.05.396. Also included for the first time is the share exchange.

Official Comment to ACC Section 10.06.552.

FILING OF ARTICLES OF MERGER, CONSOLIDATION, OR EXCHANGE.

SCOPE: ACC sec. 552 directs that a duplication of the recombination articles (sec. 550) is to be delivered to the commissioner for processing according to the uniform procedures established in ACC sec. 910.

CHANGE IN FORMER ALASKA LAW: ACC sec. 552 is premised upon new Section 74 of the Model Act and former AS 10.05.402 technically restated to reflect the uniform processing procedures established under sec. 910.

Official Comment to ACC section 10.06.554.

MERGER OF SUBSIDIARY CORPORATION.

SCOPE: ACC sec. 554 authorizes a "short form" merger between a parent and a subsidiary whenever at least 90 percent of all outstanding shares of each and every class are owned by the parent corporation.

CHANGE IN FORMER ALASKA LAW: ACC sec. 554 is taken from Section 75 of the Model Act. It has no precedent in Alaska law.

Official Comment to ACC Section 10.06.556.

PROCEDURE FOR MERGER OF SUBSIDIARY CORPORATION.

SCOPE: ACC sec. 556 places the power to propose and implement the plan for the merger of the subsidiary into the qualified parent corporation within the board of the acquiring parent. No shareholder approval is required. Disparate treatment of shares of the same class or series must pass muster under sec. 542.

CHANGE IN FORMER ALASKA LAW: ACC sec. 556 is taken from Section 75 of the Model Act with a modification to subject the process to the ACC provision (sec. 542) creating a presumption against the disparate treatment of shares of the same class or series. This modification reflects a legislative desire to restrain the use of this vehicle for "going private" to freeze out minority share interests without the advancement of some business purpose for the disparity. See Singer v. Magnavox, 380 A.2d 969 (Del. Sup. 1977).

Official comment to ACC Section 10.06.558.

FILING OF ARTICLES OF MERGER OF SUBSIDIARY CORPORATION.

SCOPE: ACC sec. 558 continues the uniform procedures for filing with the commissioner established under sec. 910.

CHANGE IN FORMER ALASKA LAW: ACC sec. 558 is taken from Model Act Section 75 as technically rewritten to accommodate the uniform filing procedures of the ACC.

Official Comment to ACC Section 10.06.560.

EFFECT OF MERGER, CONSOLIDATION, OR EXCHANGE.

SCOPE: ACC sec. 560 provides that the combination becomes effective upon the issuance of the certificate by the commissioner. The section also provides for a subsequent effective date, not later than thirty days after the filing of the plan, if the plan contains such a provision. Sec. 560 is a sufficient authority for the succession by the surviving or resulting corporation to all of the rights and liabilities of the constituent corporations. To the extent that the recombination articles purport to amend the articles of incorporation, such change is given effect.

Finally, sec. 560 determines the fate of all shares of the constituent corporations which are to be converted or exchanged. The ownership claims and interests of shareholders in the constituent corporations are defined subject to any rights which may be asserted by a dissenting shareholder under sec. 574.

CHANGE IN FORMER ALASKA LAW: ACC sec. 560 is predicated upon new Section 76 of the Model Act. The provision for an optional delayed effective date, the inclusion of share exchanges and the elimination of former subsection (7) regarding net surplus of the merging or consolidating corporations reflect the changes wrought by sec. 560 over former AS 10.05.405.

Official Comment to ACC Section 10.06.562.

MERGER, CONSOLIDATION, OR EXCHANGE OF SHARES BETWEEN DOMESTIC AND FOREIGN CORPORATIONS.

SCOPE: When corporations of different states combine, the conflicts between the laws respecting organic change present vexing problems. ACC sec. 562 removes these potential conflicts. Under the terms of the ACC all domestic corporations shall comply with this chapter. If the surviving or resulting corporation is foreign, it must as a condition of merging with a domestic corporation agree to in-state service of process, appoint the commissioner as agent for process, and formally agree to promptly pay all dissenting shareholders.

CHANGE IN FORMER ALASKA LAW: ACC sec. 562 is predicated upon new Section 77 of the Model Act and replaces former AS 10.05.408, 411 and 414. The inclusion of the share exchange is unprecedented in former Alaska law. Former .414 (Effect of Merger or Consolidation of Foreign and Domestic Corporation) is eliminated as surplusage.

Official Comment to ACC Section 10.06.564.

REORGANIZATION: DISCLOSURE OF ALIEN AFFILIATES.

SCOPE: ACC sec. 564 mandates the disclosure of alien affiliates and the percentage of their outstanding shares in any corporation organized under this Chapter.

CHANGE IN FORMER ALASKA LAW: ACC sec. 564 reflects the content of former AS 10.05.250 as amended in 1980 by SB 112.

Official Comment to ACC Section 10.06.566.

SALE OF ASSETS IN REGULAR COURSE OF BUSINESS; MORTGAGE OR PLEDGE OF ASSETS.

SCOPE: The ACC distinguishes between a sale of assets in the normal course of business (such as the sale of all inventory) and a sale of assets not in the regular course of business. Shareholder approval is necessary for the latter, but not the former. Sec. 566 allows the release of beneficial control of a corporation's assets for consideration so long as such release is in the usual and regular course of business. The mortgage or pledge of a corporation's assets is allowed regardless of the purpose.

CHANGE IN FORMER ALASKA LAW: ACC sec. 566 is predicated on the 1962 version of Section 78 of the Model Act. Unlike former AS 10.05.435, sec. 566 makes a mortgage or pledge of any or all assets a decision within the sole discretion of the board. Former Alaska law required that there be shareholder approval if such mortgage or pledge was other than in the normal course of business.

Official Comment to ACC Section 10.06.568.

SALE OF ASSETS NOT IN REGULAR COURSE OF BUSINESS.

SCOPE: ACC sec. 568 treats the sale, lease, exchange or other disposition of all, or substantially all, of the property and assets of a corporation as the equivalent of an organic change if not made in the usual and regular course of business. The power to frame the terms and command such a transaction is lodged with the board. Thereafter, written notice must be sent to all shareholders regardless of the voting rights of their shares under terms of the articles or the share indenture. This written notice must be given a minimum of twenty days before a meeting called to place the recommendation of the board before the shares.

Sec. 568 mandates that this notice shall, in addition to stating the specific purpose of the meeting, include a copy of ACC secs. 574 and 576 respecting the rights of a dissenting shareholder.

CHANGE IN FORMER ALASKA LAW: ACC sec. 568 is predicated upon Section 79 of the Model Act. Former AS 10.05.438 is modified to eliminate a mortgage or pledge of all or substantially all assets. This topic is now covered by ACC sec. 566 (placing the decision within the discretion of the board). Sec. 568(b) differs from the content of the Model Act in that it requires the notice of the meeting of shareholders to consider the board recommendation to also include a copy of the ACC sections on the rights of a dissenting shareholder.

Official Comment to ACC Section 10.06.570.

APPROVAL OF TRANSACTION BY SHAREHOLDERS.

SCOPE: ACC sec. 570 continues the pattern of treating the sale of all or substantially all of the corporate assets when not in the regular course of business as the functional equivalent of and organic change. The proposal advanced by the board is adopted upon the affirmative vote of at least two-thirds of all outstanding shares. All share are franchised by the statute regardless of restrictions or limitations in the articles or share indentures. Class voting is recognized, but unlike sec. 544, only if the articles (sec. 208(5)(c)) so provide.

If the buyer in the sale is in control of or under common control with the seller, sec. 570(b) erects an extraordinary requirement of approval via at least 90 percent of the outstanding shares regardless of restrictions or limitations in the articles or share indenture.

CHANGE IN FORMER ALASKA LAW: ACC sec. 570(a) is predicated on Section 79(c) of the Model Act preserving the two-thirds voting requirement of former AS 10.05.441.

Sec. 570(b) is new and addresses a subject matter unprecedented in Alaska law. The problem is with a de facto "cash out" of minority share interests implicit in the sale of all or substantially all of the corporation's assets other than in the regular course of business. Sec. 542 is unavailing as a source of protection to minority shareholders because there is no "distribution." The corporate entity remains although with its assets (and consequent living in the market place) perhaps fundamentally changed. The opportunities implicit in the former asset holdings may now have passed to another corporation controlled by the majority of the shares, thus excluding the minority. The requirement of the extraordinary absolute ninety percent approval by the outstanding shares (with all shares franchised) is designed to minimize this danger.

In adopting this provision the legislature also intends to endorse the fiduciary duties owed by majority to minority share interests as articulated in Singer v. Magnavox Co., 380 A.2d 969 (Del. Sup. 1977), and refined more specifically in Jones v. H.F. Ahmanson and Company, 1 Cal.3d 93 460 P.2d 460 (1969).

Official Comment to ACC Section 10.06.572.

ABANDONMENT OF TRANSACTION BY BOARD.

SCOPE: ACC sec. 572 permits the board, in its discretion, to abandon a sec. 568 transaction notwithstanding its approval by shareholders. Such an action or course of conduct is subject to any rights which may have arisen in third parties.

CHANGE IN FORMER ALASKA LAW: ACC sec. 572 is predicated upon Section 79(d) of the Model Act and reflects without substantive change the content of former AS 10.05.444. Note the contrast with abandonment under sec. 458. If the transaction is a merger, consolidation, or exchange it may be abandoned by the board only to the extent that abandonment machinery was place within the plan.

Official Comment to ACC Section 10.06.574.

RIGHT OF SHAREHOLDERS TO DISSENT.

SCOPE: The ACC recognizes that an organic change (a merger, consolidation, share exchange, or sale of all or substantially all corporate assets other than in the usual course of business) so fundamentally alters the vehicle in which the shareholder has invested that it would be harsh to require a minority who did not approve the board's plan to become the involuntary shareholders of the resulting entity.

Protection of the minority share interests is partially extended by the concept of "dissenter's rights." The scheme is conceptually simple: the corporation which survives or is the creature of the organic change has an affirmative obligation to purchase at a fair valuation the shares of those shareholders who have perfected their status as dissenters under the code. The statute is drafted so as to clearly identify shareholders who have achieved the right to this purchase and, in the event of a dispute as to fair valuation, steps are mandated which are designed to achieve an expeditious settlement or, in the event of recourse to litigation, a result which declares and enforces the rights of all in a uniform manner.

The ACC approaches this area in two stages: sec. 574 develops the right to dissent in the event of four organic changes (merger, consolidation, share exchange, and sale or exchange of all or substantially all property and assets of the corporation not made in the usual of regular course of business). Sec. 576 sets forth the rights of such dissenting shareholders, the procedure to enforce payment of their shares, and the circumstances in which a demand for such purchase may be withdrawn.

Sec. 578 obligates the resulting or surviving corporation to make an offer to those shareholders who have perfected the status of dissenters under sec. 576 and to accompany that offer by a tender of what the corporation deems the fair value of the shares. Sec. 576 also establishes the circumstances in which, given the ACC's prohibitions upon distributions which would prejudice the rights of corporate creditors, the corporation is forbidden to make such payments to dissenting shareholders. Sec. 580 fixes the rights and obligations of the corporation and shareholders in the event of disagreement over the issue of fair valuation of the dissenters' shares.

Aside from the right to litigate the regularity of any organic change and to challenge any disparate treatment of shares of the same class or series in a plan for such change (sec. 542), the right to claim the status of a dissenter under secs. 574 to 580 is intended to be the exclusive remedy available to shareholders in corporations governed by this Chapter.

CHANGE IN FORMER ALASKA LAW. ACC sec. 574 is predicated upon section 80 of the Model Act with alterations to allow dissenter's rights to shareholders in all corporations which are party to a share exchange. In company with secs. 576 to 582, sec. 574 consolidates provisions found in two areas of the former corporations code. Dissenter's rights attaching in the case of a merger or consolidation were found in former AS 10.05.417-432, while those arising in the event of a "sale or exchange of all or substantially all of the property and assets of the corporation" were located in former AS 10.05.447-462.

Only one difference appears to have been cleaved on this distinction. It was only with respect to sale or exchange of assets that the former act contemplated "abandonment or revocation" of the organic change. See AS 10.05.459. This distinction has now been abandoned. As previously noted, former Alaska law did not recognize the share exchange which is now covered in the ACC and to which dissenter's rights are extended.

Sec. 574(b) changes former Alaska law by recognizing that a shareholder need not assert the right to dissent with respect to all of his shares. This provision is an accommodation for, but not limited to, a broker or other institutional holder who may be under different instructions from the beneficial owners.

Sec. 574(c) contains a further change by the denial of dissenter's rights in the case of a short form merger (sec. 556). There is additional change in the presumptive denial of dissenter's rights to holders of a class or series of shares traded on a national securities exchange on the record date fixed for ascertaining the shares entitled to approve the organic change. The concept is that such shareholders are adequately protected by the liquidity of their investment.

<u>Official Comment to ACC Section 10.06.576.</u>

RIGHTS OF DISSENTING SHAREHOLDERS: PROCEDURE TO ENFORCE SHAREHOLDER'S RIGHT TO RECEIVE PAYMENT FOR SHARES; WITHDRAWAL OF DEMAND.

<u>SCOPE</u>: ACC sec. 576 creates the machinery for perfecting the rights of a dissenting shareholder as well as the circumstances in which that status may be terminated or withdrawn.

A plan to engage in an organic change must originate with the board of directors who are obligated to furnish the shareholders with written notice both of the fact and terms of the plan prior to a meeting at which the shareholder vote to authorize the board's plan is taken. Under ACC sec. 576 (a) a shareholder electing to exercise a right to dissent is obligated, prior to or at that meeting of shareholders, to file with the corporation a written objection to the proposed action. This written objection shall include a notice of election to dissent, the shareholder's name and address, the number and classes of shares to which the shareholder dissents, and a demand for payment of the fair value of such shares if the proposed action is taken. If the corporation failed to give the shareholder notice of the meeting to consider the proposed organic change, such a shareholder is exempted from the obligation created by sec. 576(a).

If the proposed organic change is approved, sec. 576(b) requires that the corporation act within 10 days of the date on which the authorizing vote was obtained to give written notice of the approval to all shareholders who filed written objections under sec. 576(a) or from whom written objection was not required under that provision. A shareholder who voted in favor of the proposed action is not entitled to this notice or the exercise of dissenter's rights, irrespective of a notice of objection under sec. 576(a).

Sec. 576(c) deals with those shareholders who had not been notified of the meeting where the vote to approve the organic change was taken. Such individuals, having received notice of approval under sec. 576(b), are now given 20 days to elect the status of a dissenter under this chapter. Failure to file such written notice of election to dissent bars any further claim to the status of a dissenter.

Under the ACC, the obligation of the resulting or surviving corporation to tender what it deems to be the fair value of dissenters' shares matures upon consummation of the organic change. Accordingly, sec. 576(d) fixes the effective date determined in accordance with sec. 560 as consummating a merger, consolidation or share exchange. A transaction involving assets under sec. 568 is deemed consummated when the corporation has received the consideration specified in the board resolution submitted to the shareholders in accordance with that section.

Senator Bettye Fahrenkamp
Page 143
May 7, 1987

Sec. 576(e) declares that upon consummation of the corporate action, shareholders who have perfected their status as dissenters cease to have any rights except to be paid the fair value of their shares. This subsection also governs the circumstances in which a dissenter who has perfected the status of a dissenter may withdraw the election and be restored to full status as a shareholder including a right to any intervening preemptive rights, dividends, or distributions. The election may be withdrawn as a matter of right at any time prior to acceptance under sec. 578(f) or until the expiration of 60 days from the date of consummation of the corporate action.

If the corporation has failed to make the offer required by sec. 578, the time for withdrawing the election to dissent is extended until 60 days after such a offer is made. Upon the expiration of the period in which the election may be withdrawn as a matter of right, it may still be withdrawn if the corporation is willing to consent to the withdrawal in writing.

Sec. 576(f) requires that a dissenter submit the certificates representing the shares for which payment is claimed to the corporation or its transfer agent so that they may be impressed with a legend to the effect that they are subject to corporate purchase. A shareholder who fails to submit shares within the times set forth in this subsection creates an option in the corporation to defeat the dissenter's rights otherwise conferred by this chapter. In order to exercise this option the corporation must provide the delinquent shareholder with written notice. If it fails to make a timely exercise of this notice requirement the rights of the dissenting shareholder are not lost. Sec. 576(f) also permits a court, for good cause shown, to relieve a delinquent shareholder from the forfeiture of the status of a dissenter.

Under sec. 576(g) the shares of a dissenter may be transferred, but once they have been impressed with a legend pursuant to sec. 576(f), a transferee acquires no rights as against the original, surviving or resulting corporation other than the right to be paid the fair value of the shares.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 575 is predicated upon section 623(a), (b), (c), (e), and (f) of the NYBCL as amended in 1982. It significantly expands coverage of the

circumstances in which the status of a dissenter may be perfected, the obligations of such an individual to the corporation, and the status of any transferee of the shares.

Official Comment to ACC Section 10.06.578.

OFFER AND PAYMENT TO DISSENTING SHAREHOLDERS; CIRCUMSTANCES WHERE PROHIBITED.

SCOPE: Sec. 578(a) defines the basic obligation of the surviving or resulting corporation to those shareholders who have perfected and maintained the status of a dissenter under sec. 575. The corporation is obligated to make a written offer to pay each dissenter what the corporation estimates to be the fair value of such shares. In order that the shareholder may have an opportunity to gauge the fairness of this offer, sec. 578(b) requires that the corporate offer be accompanied by financial disclosure of profit and loss as well as the current balance sheet. In addition, the offer must be accompanied by a copy of this section and sec. 580 which define the rights and obligations of such dissenting shareholders.

Sec. 578(c) adopts the position of the RMBCA and requires that, if the corporate action has been consummated, the offer to purchase the shares of dissenting shareholders be accompanied by an advance payment of the offered sum to each shareholder who has submitted share certificates to the corporation as provided in sec. 576(e). Those shareholders who have not submitted their share certificates for affixation of the legend restricting the rights of a transferee are to be given written notice that promptly upon such submission the corporation will tender an advance payment of the offered sum.

The tender of an advance payment or statement that such payment would be tendered is, under sec. 578(e), to be accompanied by advice to the shareholders that in accepting such payment they do not waive their rights to later contest whether the value fixed by the corporation is, in fact, the fair value of the dissenter's shares. However, a shareholder who fails to make a written objection within 30 days after the corporation's certified mailing tendering either the advance payment or advice that such payment will be made is conclusively deemed to have agreed that the corporate valuation of the shares represents their fair value. In the event that litigation by objecting shareholders fixes a different value, those shareholders who failed to make timely objections under sec. 578(f) are barred from further claim against the corporation.

Sec. 578(g) addresses the obligations of a resulting or surviving corporation which is unable to purchase the shares of dissenting shareholder without violating the restraints upon distributions found in sec. 358, 360, 363, 365, or 375. The scheme is clearly designed to subordinate the rights of dissenting shareholders to those of corporate creditors. Before it may engage in any payment, the corporation must first ascertain the total dimension of its obligation to all dissenters and then determine if that obligation can be met without violating the ACC restraints upon distributions. If it cannot, the corporation is forbidden to make any payment for this would violate the cardinal rule that all dissenting shareholders are to be treated in an identical fashion.

The first obligation of a corporation which deems itself unable to comply with what would otherwise be its obligations to dissenters is to advise the dissenting shareholders of this fact along with an explanation of the alleged inability. This statement shall be accompanied with advice that dissenting shareholders have an option to either withdraw their election to dissent and be restored to full status as shareholders of the resulting or surviving corporation, or affirm the election. In the event of affirmance of the election to dissent, the shareholder remains under the disabilities imposed by sec. 576(e) and is relegated to the status of a creditor of the resulting or surviving entity. As a creditor the dissenting shareholder's claim upon corporate assets is subordinated to all other creditor claims but is superior to the equitable claims of corporate shareholders. Further, at the point in time in which payment of the fair value of the dissenters' shares can be made without offense to the restraints upon distribution, such shareholders have a right to payment.

It should be noted that it is possible that the number of dissenters who expressly opt to withdraw their election under sec. 578(g)(1)(A) would be sufficient to permit the corporation to make payment to those dissenters who elect to affirm their status. Finally, if a dissenter fails to make an express election between withdrawal or affirmance within 60 days after receiving the corporate notice, that dissenter is deemed to have withdrawn.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 578 is drawn from Section 623(g) of the NYBCL and Section 13.25 of the RMBCA. Under the New York formulation the corporation's initial obligation was to tender only 80% of what it deemed the fair valuation of the shares. The Revised Model Act requires a tender of 100% of that amount. ACC sec. 578 follows the suggested content of the Revised Model Act and thus creates an obligation in the resulting or surviving corporation to tender the amount it deems to represent the fair valuation of the shares. Such a requirement is new to Alaska law.

The goal of the legislature in adopting this suggestion is to ensure that dissenting shareholders will have an informed basis to assess the adequacy of the corporate offer for their shares and assets with which to finance a judicial challenge under sec. 580 should they become convinced that the corporate offer did not represent a fair valuation. Prior Alaska law was silent on the obligation of a corporation which could not make payments to dissenting shareholders without so debilitating its assets as to become irresponsible to its creditors.

Sec. 578(g) follows the New York Act in clearly subordinating the rights of dissenting shareholders to such creditors thus providing a clear answer to this vexing question.

<u>Official Comment to ACC Section 10.06.580</u>.

ACTION TO DETERMINE VALUE OF SHARES UPON FAILURE TO ACCEPT CORPORATE OFFER.

<u>SCOPE</u>: If the corporation fails to make the offer required by sec. 578(a), or the shareholder rejects it within the 30 day period specified in (f) of that section, sec. 580(a) sets the stage for a single judicial proceeding in which the fair value of the shares will be ascertained and all remaining dissenting shareholders bound. The initial obligation to commence this judicial proceeding is that of the surviving or resulting corporation. See sec. 580(a)(1).

In the event that the corporation refuses or fails to inaugurate such a proceeding, sec. 580(a)(2) confers standing upon any dissenting shareholder to proceed in the name of the corporation. If such a proceeding is not commenced within the time fixed by that section the rights of all remaining dissenters shall be lost and those shareholders shall be regarded as having withdrawn their election to dissent. The superior court may, for good cause shown, limit the scope of relief against the incidence of this loss of dissenter's status.

The object of sec. 580 is to make the judicial proceeding commenced under subsection (a) the plenary and exclusive forum for determining the rights of all remaining dissenting shareholders. To that end, subsection (b) directs that all shareholders who have rejected the corporate offer, wherever residing, are to be made parties to the proceeding as an action against their shares quasi in rem. Service of process is to be made in accordance with the provisions of the Alaska Rules of Civil Procedure or as otherwise permitted by law.

The task of the court entertaining the sec. 580(a) proceeding is defined by sec. 580(c). In the event that the corporation contests the dissenting status of any shareholder that court is to determine the issue of entitlement to payment for shares. As to all shareholders for whom entitlement is determined or is not contested the court is then to fix a value found to be the fair value of the shares as of the close of the business day before the date on which the vote was taken approving the proposed corporate action. Guidelines are set forth to assist the court in fixing this value as well as an explicit authorization to appoint appraisers to assist in fixing that figure.

Under sec. 580(d) the judgment of the court shall include an allowance for interest at the rate determined to be fair and equitable. The interest is to be calculated from the date on which the vote was taken authorizing the proposed corporate action to the date of payment for the shares. In the event that the court determines that the refusal of any or all of the shareholders to accept the corporate offer was arbitrary, vexatious, or otherwise not in good faith, no interest shall be allowed.

Sec. 580(e) requires that each party to the proceeding shall bear its own costs and expenses, including counsel fees and the costs of any experts. Under prescribed guidelines, the court is empowered to apportion and assess any or all of these costs, expenses and fees against any or all of the shareholders of the corporation.

Unless payment should violate the restraints upon distribution made applicable by sec. 578(g), sec. 580(g) directs that within 60 days after the final determination the corporation shall pay to each dissenting shareholder who is a party to the proceeding the amount determined by the court under sec. 580(e). Such payment obligation is contingent upon the surrender of the certificates representing the dissenter's shares. Upon that surrender and payment the shareholder ceases to have any interest in the shares of the corporation.

CHANGE IN FORMER ALASKA LAW: ACC. sec. 580 is drawn from Section 623 of the NYBCL as amended and replaces former AS 10.05.426 and 456. These former provisions of Alaska law did not contain the provisions designed to consolidate all dissenters and the corporation into one forum with single litigation concerning "fair value". Former AS 10.05.456 placed the burden of inaugurating litigation in the event of failure to agree upon the dissenting shareholder. ACC sec. 580(a)(1) shifts the burden to the resulting or surviving corporation. Former .456 also contained no provision on costs and expenses nor did it deal with the issue of assessment covered in ACC sec. 580(e).

Official Comment to ACC Section 10.06.582.

STATUS OF SHARES ACQUIRED FROM DISSENTING SHAREHOLDERS.

SCOPE: ACC sec. 582 provides that shares purchased from dissenters may be used by the surviving or resulting corporation as reacquired shares except that, in the case of a merger or consolidation, they may be held and disposed of as the plan may otherwise provide.

CHANGE IN FORMER ALASKA LAW: ACC sec. 582 is predicated upon Model Act Section 81 and consolidates former AS 10.05.429 and 462 with the substituted references to "reacquired" for "treasury" shares.

Official Comment to Article 9 of the ACC.

DISSOLUTION.

INTRODUCTION: Dissolution is to a corporate entity what death is to a natural person. As with the provisions respecting the articles and bylaws, amendments and organic change, the protection of the interests of shareholders and creditors and the imposition of duties of care and loyalty upon directors and officers are addressed in the ACC provisions governing dissolution. Unlike the statutory provisions establishing and managing the corporate form, Article 9 assumes that the corporation is, or shortly shall be, dead and gone.

Article 9 carefully distinguishes between two fact patterns which are united only in the conclusion that the corporation ceases to exist. The distinction is predicated upon whether the decision to dissolve is that of a majority of the shareholders, or whether that result is inflicted upon the corporation by judicial decree because of the valid contention of a minority of the shareholders or the commissioner that the continued existence of the corporate person is intolerable. If majority consent is the key, the dissolution is said to be "voluntary." If the life of the corporation is to be taken as a consequence of gross abuse of the minority or persistent and serious flaunting of the state's regulation, then corporate death is "involuntary."

The ACC provisions on voluntary dissolution reflect substantial modification of prior Alaska law and follow the format and content of the new CGCL. However, the California model proved unacceptable as a basis for most of the provisions respecting involuntary dissolution where the decision was made to pattern the new act after the Model Business Corporations Act and prior Alaska law. Notwithstanding, certain innovations from the GCL have been engrafted onto the involuntary provisions and are noted in the official comments to the specific sections.

<u>Official Comment to ACC Section 10.06.605</u>.

VOLUNTARY DISSOLUTION BY VOTE, WRITTEN CONSENT OF SHARES, OR ELECTION OF THE BOARD.

<u>SCOPE</u>: ACC sec. 605 places the decision to voluntarily dissolve a functioning corporate entity with the shareholders. A two-thirds affirmative vote of the shares entitled to vote is required to approve a plan of voluntary dissolution. Under the ACC the board of directors is given no role in either proposing or passing upon the decision to voluntarily dissolve. The proposal will thus be initiated by a shareholder or shareholders under sec. [illegible]). As an

alternative to a noticed meeting and formal vote, shareholder approval under sec. 605(a)(2) may be obtained by unanimous written consent of the franchised shares.

Sec. 605(b) creates an exception to the norm of shareholder action for corporations (1) adjudicated bankrupt, (2) without assets and with a history of having transacted no business for the preceding five years, or (3) which are stillborn, having issued no shares. In these circumstances, the power to elect voluntary dissolution resides with the board.

CHANGE IN FORMER ALASKA LAW: ACC sec. 605 differs from prior Alaska law only insofar as it curtails the role of the board in initiating and approving a plan of voluntary dissolution. However, the statute has undergone major changes in form by the consolidation of former AS 10.05.465, 474, and 477 into a single section. ACC 605 is an adapted version of GCL Section 1900. Provisions regarding procedure for notifying the commissioner are consolidated into ACC sec. 608.

Official Comment to ACC Section 10.06.608.

CERTIFICATE OF ELECTION: CONTENTS, SIGNING, VERIFICATION AND FILING.

SCOPE: ACC sec. 608 imposes upon a corporation the requirement that it file with the commissioner a certificate of election to dissolve. Subsection (b) sets forth the signing and verification requirements and specifies what shall be set forth by the certificate; subsection (c) directs the corporation to file an original and an exact copy with the commissioner to be processed by him according to sec. 910.

CHANGE IN FORMER ALASKA LAW: The changes wrought in prior Alaska law are minor. Formerly, the terminology "statement of intent to dissolve" was used as opposed to "certificate of election." Under prior law, execution of the statement of intent to dissolve was to be done "by its president or vice president and by the secretary or an assistant secretary, and verified by one of the officers signing the statement." ACC sec. 608 requires the use of an officer's certificate (sec. 990(24)).

The content of the certificate has been altered by the ACC in only one respect: under prior law, the number of shares outstanding, and if the shares of a class were entitled to vote as a class, the designation and number of outstanding shares of each such class were to be revealed. If class voting was required, the statement of intent to dissolve was to include a class-by-class tally of votes for and against. Sec. 608 only requires that the certificate state the number of shares voting and that the election was made by shareholders representing at least two-thirds of the voting power.

Since election to dissolve by the board is the exception under ACC sec. 605, sec. 608(b)(4) requires that the certificate set forth the circumstances permitting board action.

Subsection (c) is a substantial reenactment of prior law which participates in the consolidation made possible by sec. 910.

Note that under prior law, a corporation being dissolved by incorporators did not need to engage in the filing of both a statement of intent to dissolve and articles of dissolution. Both are required under the ACC, but there is no reason that both cannot be filed at the same time.

ACC sec. 608 derives from GCL Section 1901 and consolidates the provisions of former AS 10.05.468, 474, 480, and 483 and MBCA Section 82(b), 83(b), 84(b), and 85.

Official Comment to ACC Section 10.06.610.

CERTIFICATE OF REVOCATION OF ELECTION: CONTENTS, SIGNING, VERIFICATION, AND FILING.

SCOPE: ACC sec. 610 permits a corporation to revoke an election to wind up and dissolve prior to the distribution of any assets and upon approval by the same power (i.e., either shareholders or the board, as the case may be) as made the initial decision to voluntarily dissolve. A certificate of revocation of election is to be signed, verified, and filed in the manner prescribed in sec. 608. The contents of the certificate are specified.

CHANGE IN FORMER ALASKA LAW: See comment to ACC sec. 608 with regards to the changes in signing, verifying, and filing requirements. As to the content of the certificate of revocation, ACC sec. 610 omits the requirements of prior law that the name of the corporation and the names and addresses of officers and directors be included in the certificate; these matters were required under sec. 608, so there is no need for their repetition. Unlike prior law, a copy of the resolution passed by shareholders is not required; however, a copy of the written consent is required if the revocation was accomplished in that manner. Added is a requirement that the certificate state that the action was taken by the board if such occurred.

The most important change brought to Alaska law by ACC sec. 610 is the requirement that no assets be distributed prior to a revocation of an election to dissolve. This limitation on the right revoke and the corresponding requirement that the certificate of revocation state that no assets have been distributed is crucial to preserving the statutory scheme for protecting the interests of creditors and senior shares as provided in ACC secs. 358-365. Under ACC sec. 383, a corporation is exempt from secs. 358-365 if it is engaged in a dissolution. This exception assumes that the dissolution will be completed and the protection for creditors and senior shareholders provided in Article 9 will functionally replace secs. 358-365. If a corporation were permitted to revoke an election to dissolve, after the distribution of assets, the protections provided by the statutory scheme would be perforated by a loophole.

In requiring that a revocation be taken by the same power and in the same manner as the initial election, a two-thirds vote of the outstanding shares is intended for elections approved by means of a shareholder vote; however, a revocation by unanimous consent may also be employed to revoke an election taken by shareholder vote.

Sec. 610 is an adapted version of GCL Section 1902 which consolidates with the above-referenced changes the provisions of MBCA Sections 88, 89, and 90 and former AS 10.05.492-504.

Official Comment to ACC Section 10.06.613.

EFFECT OF CERTIFICATE OF REVOCATION OF ELECTION.

SCOPE: A certificate of election to wind up and dissolve is deemed revoked upon compliance with sec. 610. Sec. 610 incorporated by reference the filing requirements of sec. 608, which in turn refer to the commissioner's duties under sec. 910. Thus, effectiveness of the certificate of revocation is contingent upon inspection by the commissioner's office, filing by that office, and the return of the original to the corporation. Until the time of the effectiveness of the certificate to revoke, the corporation is deemed to be in the process of dissolution.

CHANGE IN FORMER ALASKA LAW: Sec. 613 is substantively a reenactment of prior Alaska law, AS 10.05.507, based upon MBCA Section 91. The section has been technically rewritten to conform with the changes rendered in other sections.

Official Comment to Section 10.06.615.

COMMENCEMENT AND CONDUCT OF VOLUNTARY PROCEEDINGS FOR WINDING UP, CESSATION OF BUSINESS, NOTICE.

SCOPE: Under ACC sec. 615, proceedings to dissolve are to commence upon electing to dissolve; there is no waiting period for effectiveness during the processing of the certificate of election in the commissioner's office. The board's power upon commencement of dissolution is limited to winding up activities; the corporation is to cease to carry on its business. However, an exception to the general requirement of cessation of normal activities is made for those activities which are necessary to preserve th goodwill or going-concern value of the business pending a sale of the business or assets. The board is required to cause written notice of the commencement of winding up proceedings to be given creditors and shareholders, excepting those who voted in favor of the dissolution.

CHANGE IN FORMER ALASKA LAW: ACC sec. 615 replaces former AS 10.05.468 and .639(1) (based upon MBCA Section 86 and 87); it is an adapted version of GCL Section 1903. Sec. 615 changes Alaska law by giving explicit recognition of the propriety of continuing normal business activities to the extent necessary to preserve either the goodwill or going-concern value of the business if a sale of the business or its assets is contemplated. The express mention of board powers during a period of winding up is also new to Alaska law; ACC sec. 660 is also relevant to this topic.

Finally, the requirement of giving notice to shareholders, excepting those who voted for the dissolution, is new.

Official Comment to ACC Section 10.06.618.

JUDICIAL SUPERVISION OF WINDING UP; PETITION AND NOTICE; ORDER PROTECTION SHAREHOLDERS AND CREDITORS.

SCOPE: ACC sec. 618 creates standing in the corporation, a five percent shareholder(s) or three or more creditors to petition the superior court to assume jurisdiction over the winding up of a corporation which has elected voluntary dissolution. The assumption of this jurisdiction is discretionary with the court which is granted broad equity powers with respect to ". . . any and all matters concerning the winding up of the affairs of the corporation and for the protection of its shareholders and creditors . . ."

CHANGE IN FORMER ALASKA LAW: Under former AS 10.05.489(3), the corporation was permitted to petition a court for supervision of the liquidation of a corporation. ACC sec. 618 continues this precedent and substantially broadens the standing to include shareholders and creditors. While former Alaska law was predicated upon Section 87 of the Model Act, ACC sec. 618 is an adapted version of GCL Section 1904.

At the time of its adoption it was noted to the legislature that the Supreme Court of California had interpreted a predecessor provision of GCL Section 1904 as permitting a trial court to forbid a dissolution and to require a return to normal business activity. See In re Security Finance Co., 49 Cal.2d 370, 317 P.2d 1 (1957). It is the intention of the legislature that the precedent set in that case be expressly disapproved. An election to voluntarily dissolve under the ACC may be revoked only by the same power and in the same manner as the original choice.

Official Comment to ACC Section 10.06.620.

ARTICLES OF DISSOLUTION: CONTENTS.

SCOPE: Upon completion of the winding up proceedings, a corporation is to file articles of dissolution signed and verified by a majority of the directors then in office. The articles are to recite that the corporation is completely wound up, that the debts and liabilities of the corporation have been paid or otherwise adequately provided for (see ACC sec. 668) and that the remaining assets have been distributed to shareholders.

CHANGE IN FORMER ALASKA LAW: ACC sec. 620 is taken from GCL Section 1905 and replaces former AS 10.05.510, modeled after MBCA Section 92. Under prior law, execution of the articles of dissolution was done by two officers; execution by a majority of the directors is required by the new provision. The requirement regarding the contents of the articles has been altered to eliminate information already in the commissioner's files, such as the name of the corporation and a reference to the statement of intent to dissolve and the date of its filing.

Also deleted is a requirement that the articles recite that no suits are pending against the corporation or that adequate provision has been made for satisfaction of a judgment against the corporation in a pending suit; this provision was believed unnecessary as a pending suit is comprehended within the phrase "known debts and liabilities" in subsection (2). In addition, sec. 678 provides for a fictional continued existence of a corporation for the purpose of suits.

A valuable addition of the new law is the definition of "adequately provided for" in ACC sec. 668. This definition draws a clear line as to what is an "adequate provision."

Official Comment to ACC Sections:

10.06.623. FILING OF ARTICLES OF DISSOLUTION;
10.06.625. EFFECT OF CERTIFICATE OF DISSOLUTION.

SCOPE: These sections establish a procedure whereby the articles are filed, processed by the commissioner and a certificate of dissolution is issued. The issuance of the certificate terminates the existence of the corporation except for certain purposes.

CHANGE IN FORMER ALASKA LAW: ACC secs. 623 and 625 are reenactments of former AS 10.05.513 and 516, based upon MBCA Section 93. Sec. 625 is technically rewritten given the consolidation rendered by ACC sec. 910.

Official Comment to ACC Section 10.06.628.

INVOLUNTARY DISSOLUTION BY VERIFIED COMPLAINT; FILING; INTERVENTION BY SHAREHOLDER OR CREDITOR.

SCOPE: ACC sec. 628 envisions involuntary dissolution as essentially an adversarial process conducted before a trial court. Thus, sec. 628(a) speaks of a "verified complaint" which may be filed in the superior court by one-half or more of the directors then in office (not the total number of directorships), a shareholder or shareholders who hold shares representing not less than one-third of the common shares (excluding the shares of any defendants accused of gross oppression of the minority or other serious conduct under sec. 628(b)(4)), any shareholder if the ground for dissolution is expiration of the period of time for which the corporation was formed, or any person expressly authorized to do so in the articles.

The grounds for involuntary dissolution are specified in sec. 628(b). The use of involuntary dissolution to resolve deadlocks at either the director or shareholder level is evident in sec. 628(b)(2) and (3). However, note that in addition to deadlock there must be a serious threat to the business or property of the corporate entity and, with respect to shareholder deadlock, a history of futile effort to resolve the impasse. Sec. 628(b)(4) sets a specific standard for involuntary dissolution predicated upon the conduct of those in control of the entity. In essence their pattern of behavior must have risen to such a damaging level as to make their continued exercise of the prerogatives of corporate existence obnoxious to both the minority and the state. If the corporation is held beneficially by 35 or fewer persons of record, sec. 628(b)(5) sets a further ground for involuntary dissolution.

Finally, under sec. 628(d), the definition of shareholder has been expanded to include those who hold beneficial interests in shares committed to a voting trust under sec. 425.

CHANGE IN FORMER ALASKA LAW: ACC sec. 628 is predicated upon CCC Section 1800 with the delegation of 1900(d). It replaces former AS 10.05.540-543, which had been premised upon Section 97 of MBCA. Key changes include elimination of the former provision whereunder a single shareholder could initiate an involuntary dissolution proceeding. The grounds for fraud, mismanagement, unfairness, or other violations of the rights of certain or all other shareholders are spelled out with greater specificity in sec. 626. Former AS 10.05.543 permitted a creditor to bring an action to liquidate the corporation. No such provision is included in ACC sec. 628. Note that under ACC sec. 488 creditors are permitted to proceed directly against directors and officers of the corporation if normal collection proceedings against the corporate debtor prove unsuccessful.

With respect to the grounds for involuntary dissolution, ACC sec. 628(b)(1), (2), (3), and (4) reenact comparable provisions of former AS 10.05.540(1), (2) and (3). ACC sec. 628 (b)(5) is new and is designed to provide relief in what are, fundamentally, incorporated partnerships. Sec. 628(b)(6) is also new and in combination with subsection (a)(3), permits any shareholder to dissolve a corporation whose time has expired.

ACC sec. 628(c) replaces former AS 10.05.552. Prior law specified that the joinder of shareholders was not necessary; this principle is implicit in subsection (c) which grants to any shareholder a right of intervention.

Official Comment to ACC Section 10.06.630.

AVOIDING DISSOLUTION BY VERIFIED COMPLAINT; PURCHASE OF PLAINTIFF'S SHARES; DETERMINATION OF FAIR VALUE; STAY; APPRAISAL; AWARD; APPEAL.

SCOPE: ACC sec. 628 established involuntary dissolution by verified complaint as a means of resolving deadlock or charges of oppression within the corporation. While society has an interest in resolving such grave disputes, it also faces a potential loss of a corporate employer, competitor, or servant within the marketplace. For this reason, ACC sec. 630 has created machinery under which the plaintiff shareholders may be "bought out" at a fair price which goes beyond mere liquidation value to include the value of the business as going concern. This buy out may be effected by 50 percent or more of the voting power of the corporation or by the corporate entity. If the purchase is by the latter, it amounts to a "distribution" and is subject to the ACC restrictions on distributions designed to protect creditors and holders of senior shares (secs. 358-365).

Sec. 630(b) and (c) deal with disagreement as between the purchasing and moving parties respecting the fair valuation of plaintiffs' shares. Recourse is to arbitrators appointed by the court, which shall stay the dissolution proceeding. An award by the arbitrators or a majority of them is conclusive upon the parties. Note that if the purchasing parties do not make payment for the shares within the time specified by the court, judgment shall be entered against them and the surety or sureties on the bond posted to cover the reasonable expenses (including attorney fees) of the moving parties.

If a timely purchase is made, sec. 630(d) provides that it is within the discretion of the court to apportion the cost of the appraisal as between the moving and purchasing parties and, if all or a portion of the costs are to be charged against the moving parties, to permit the payment for the value of their shares to be adjusted to reflect this fact.

For the purpose of sec. 630 "shareholder" is defined to include the beneficial owner of shares committee to a voting trust or shareholders' agreement under sec. 425.

CHANGE IN FORMER ALASKA LAW: ACC sec. 630 is new to the law of Alaska. It is a highly modified version of GCL Section 2000, having been altered to limit the "buy out" option to involuntary dissolution by verified complaint only.

Official Comment to ACC Section 10.06.633.

INVOLUNTARY DISSOLUTION BY THE COMMISSIONER: GROUNDS, PROCEDURE, REINSTATEMENT.

ACC sec. 633 establishes involuntary dissolution by administrative action, subject to an appeal to the superior court, as a nonexclusive sanction for failure to comply with the multiple reporting obligations created by the new code, for delinquency in the payment of a license filing fee or penalty, for failure to appoint or maintain a registered agent, or, in the event of a nonresident with a controlling interest in a corporation which is subject to the reporting requirement of the ACC, for failure by such nonresident to appoint an agent as required by sec. 155.

Three other grounds established under section 633(a) are worthy of note. Under sec. 630(a)(6) a material misrepresentation of fact in any document submitted to the commissioner would become a ground for administrative dissolution. If there has been an election of voluntary dissolution and the corporation has failed for two years thereafter to complete the statutory process, sec. 630(a)(4) permits the commissioner to dissolve it administratively. Finally, a vacancy on the board of directors which is not filled at the next annual meeting or within six months, whichever occurs first, provides grounds for administrative dissolution.

With respect to all grounds established under sec. 630(a) the commissioner is empowered but not mandated to effect involuntary dissolution. If such a step is taken, sec. 630(b) requires that written notice is sent by certified mail to one of the following: the corporation's registered office, its registered agent, the corporate president or secretary. Such a notice must specify the alleged delinquency, failure or noncompliance which provides grounds for administrative dissolution under sec. 633(a). It is effective 60 days after the certified mailing is made to any of the alternative addressees using the last known address as shown by the commissioner's record.

Nothing in sec. 633(b) precludes the commissioner from sending duplicate written notice or taking any other steps to notify the corporation. However, such steps would be taken as a matter of grace. Notice is effected once it is sent to any of the listed addressees as provided in sec. 633(b). Failure of such certified mailing to reach the recipient, or the failure of such recipient to actually notify the board of directors shall not defeat the power vested in the commissioner to effect administrative dissolution under this section.

Prior to the expiration of 60 days following dispatch of the certified mailing of notice the corporation may stay the commissioner's power by making a written request for an administrative hearing. As an alternative it may correct the neglect, omission, delinquency or noncompliance. If a hearing is sought and the commissioner adheres to the conclusion that grounds for dissolution are present, sec. 633(c) permits the corporation to seek a trial de novo in the superior court.

In the absence of an order by the superior court, a determination of neglect, noncompliance, delinquency, or omission within this section empowers the commissioner to proceed under sec. 633(d) to issue the certificate of dissolution which shall terminate the corporate existence.

Sec. 633(e) establishes a two year period in which a corporation dissolved by the commissioner may be reinstated.

Under sec. 633(g) a corporation dissolved by the commissioner may effect a nongratuitous assignment of contract rights which shall be effective in the hands of the assignee in any action. The statute requires that the fact and nongratuitous quality of the assignment be alleged in the complaint or other process commenced by the assignee and follows the common law by subjecting the claim to any defense which the defendant might have asserted against the assignor/corporation. Any counterclaim may be asserted to diminish or negate liability to the assignee who may not be subjected to an affirmative recovery. Any set-off may be asserted for the purpose of diminishing or negating liability to the assignee provided that it had arisen prior to the effective date of the assignment. No affirmative recovery on any set-off may be had against the assignee.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 633 is a reenactment of former AS 10.05.519 with substantial amendments. It continues the provisions of the former Alaska statute which modified Section 94 of the MBCA to substitute involuntary dissolution by administrative process for judicial proceedings inaugurated by the Attorney General. However, for the first time ACC sec. 633(b) provides for a hearing before the commissioner in which the corporation may contest the noticed neglect, omission, delinquency, or noncompliance. Further, sec. 633(c) creates a right in the corporation to seek a trial de novo in the superior court with the power of the commissioner subjected to the orders of that court. These new provisions reflect the legislature's concern for the due process rights of the corporate entity and are patterned after the rights accorded in ACC sec. 863.

ACC sec. 633(a) continues the content of former AS 10.05.519 in augmenting the grounds under which involuntary dissolution may be had. The phrase "principal officers and directors" in former .519(b) and (c) has been replaced by president, secretary or registered agent in sec. 633 so as to eliminate any potential argument over the status of the recipient of the notice. Former .519(h) has never been severed from ACC sec. 633 and given separate treatment in sec. 635.

<u>Official Comment to ACC Section 10.06.635.</u>

COMMISSIONER'S AUTHORITY TO BRING ACTION FOR INVOLUNTARY DISSOLUTION; GROUNDS; RELIEF.

<u>SCOPE</u>: ACC sec. 635 provides additional grounds upon which the corporation may be involuntarily dissolved by the superior court in an action by the commissioner. Involuntary dissolution is appropriate where it is shown that the corporation procured its certificate of incorporation through fraud; the corporation continued to exceed or abuse its authority; the corporation seriously violated a statute regulating corporations; or the corporation violated a provision of law by an act or default that is ground for forfeiture of corporate existence.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 635(a)(1) and (2) is a reenactment of former AS 10.05.519(h). ACC sec. 635(a)(3), (4), and (b) is taken from GCL Section 1801(a)(1), (3), and (c).

<u>Official Comment to ACC Section 10.06.638.</u>

JURISDICTION AND PROCESS FOR COMMISSIONER'S ACTION.

<u>SCOPE</u>: ACC sec. 638 establishes the jurisdiction and service of process rules governing suits for involuntary dissolution brought under ACC sec. 633.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 638 is generally a reenactment of former AS 10.05.534, which is modeled after MBCA Section 96.

<u>Official Comment to ACC Section 10.06.640.</u>

APPOINTMENT OF PROVISIONAL DIRECTOR: DEADLOCK.

<u>SCOPE</u>: Sec. 640 establishes machinery to deal with the threat to corporate business or property which is inherent

if the grounds for involuntary dissolution by verified complaint are those of sec. 628(b)(2). Appointment under the provisions of ACC sec. 640 seeks to break the director deadlock, but is not an automatic alternative to involuntary dissolution. Whether the provisional director offers a lasting or only temporary solution to the circumstances which would otherwise warrant the superior court in decreeing involuntary dissolution is the factor which should play the most prominent role in determining the fate of a complaint grounded solely on sec. 628(b)(2).

CHANGE IN FORMER ALASKA LAW: ACC sec. 640 is new to the law of Alaska being predicated upon GCL Sections 308 and 1802.

Official Comment to ACC Section 10.06.643.

APPOINTMENT OF RECEIVER: APPLICATION, HEARING AND NOTICE, SECURITY, QUALIFICATIONS, POWERS, COMPENSATION.

SCOPE: ACC sec. 643 grants broad powers to a court which has assumed jurisdiction over a complaint seeking involuntary dissolution to act upon plaintiff's motion for the appointment of a receiver who will act to conserve the business and affairs of the corporation pending the hearing and determination of the complaint. The authority of the receiver and the extent to which the appointment modifies the basic ACC command that the business and affairs of a corporation are to be conducted by or under the supervision of the board should be fixed in the court's order.

CHANGE IN FORMER ALASKA LAW: ACC sec. 643(a) is new and taken from GCL Section 1803. Subsection (b) is taken from Section 99 of the MBCA and reflects the former content of AS 10.05.576 with only minor wording modification. Subsection (c) is taken from Section 98 of the MBCA and former AS 10.05.567, with the modification that the fees of attorneys, which were allowed in the Model Act and former Alaska law, have been omitted.

There is a further major modification implicit in the legislature's approval of GCL Section 1803. The former use of a receiver in involuntary proceedings was that of a "liquidation receiver" (Section 98 of the MBCA and former AS 10.05.555-573). The California act upon which the ACC is now modeled uses a receiver for the purpose of preserving the corporation and its business pending a hearing on the complaint for involuntary dissolution. The subsequent provisions of the ACC follow California law in using the incumbent directors (under the discipline of the court) to handle the affairs which the Model Act vested in the liquidating receiver.

Official Comment to ACC Section 10.06.645.

DECREE FOR WINDING UP AND DISSOLUTION: FURTHER JUDICIAL RELIEF.

SCOPE: ACC sec. 645 empowers the court hearing a suit for involuntary dissolution under either secs. 628 or 633 to decree a winding up and dissolution of the corporation or make such less drastic orders and decrees and issue such injunctions as justice and equity may require.

CHANGE IN FORMER ALASKA LAW: ACC sec. 645 is new to Alaska law. It is based on CGCL Section 1804 and replaces former AS 10.05.537, 546, and 549 which were modeled upon MBCA Section 97. The new provision, in concert with ACC sec. 650, gives the superior court far greater power than prior law to shape a remedy fit for the situation.

Official Comment to ACC Section 10.06.648.

COMMENCEMENT AND CONDUCT OF INVOLUNTARY PROCEEDINGS FOR WINDING UP; CESSATION OF BUSINESS; NOTICE.

SCOPE: Upon entry of a decree to wind up a corporation under ACC sec. 645, winding up is to commence. The sitting board is to conduct the winding up subject to judicial supervision unless the court appoints other persons. Those conducting the winding up are expressly permitted to exercise their powers through the existing corporate officers.

Upon commencement of winding up proceedings, regular business operations are to cease and future actions are to be directed toward the cessation of business activity on advantageous terms. An exception is recognized where the continuation of business activities is necessary to preserve good will or the going-concern value of assets which are to be sold. In the absence of a perfected appeal or stay order, notice of the commencement of winding up is to be given by those acting under sec. 648(a) to all shareholders and all known creditors and claimants.

CHANGE IN FORMER ALASKA LAW: ACC sec. 648 is taken from GCL Section 505 and replaces former AS 10.05.555 and 558 which had been based upon Section 96 of the MBCA. Sec. 648 departs from prior law by relying upon the existing management of the corporation, rather than a liquidating receiver, to accomplish the winding up.

While this arrangement is subject to modification as determined by the superior court, it is a statutory expression of a belief that generally those familiar with the business can most cheaply, thoroughly and wisely perform the winding up of the corporation business. See also, ACC sec. 660, Powers and Duties of Directors in Dissolution Proceeding.

Official Comment to ACC Section 10.06.650.

JURISDICTION OF COURT.

SCOPE: Just as ACC sec. 645 created broad powers in the superior court to fashion appropriate remedies in order to dispose of the verified complaint seeking involuntary dissolution, ACC sec. 650 reflects a further concern for the economy of the judicial process by setting forth an extensive list of the ancillary powers and jurisdiction which may be exercised by that court.

Of particular interest is the power conferred by ACC sec. 650(6) for the court to fill any vacancy on the board which the directors or shareholders prove unable to fill and sec. 650(7)'s grant of extraordinary powers of removal and prohibition from further office holding of any director guilty of dishonesty, misconduct, or neglect or abuse of trust in conducting the winding up of the corporation.

CHANGE IN FORMER ALASKA LAW: ACC sec. 650 is adapted from GCL Section 1806. It replaces former AS 10.05.573, 579, 582, and 585 which reflected the content of Sections 98, 100, 101, and 102 of the MBCA. The changes wrought by the election to follow GCL Section 1806 merely make explicit powers which were probably within the inherent equitable jurisdiction of the superior court.

<u>Official Comment to ACC Section 10.06.653.</u>

CLAIMS AGAINST CORPORATION; COURT AND NON-COURT DIRECTED WINDING UP; PRESENTATION; NOTICE; PAYMENT; SECURED CLAIMS; REJECTED CLAIMS.

<u>SCOPE</u>: ACC sec. 653 details procedures for settling all claims against the corporation whether the winding up is with or without judicial supervision. The scheme requires that claims be presented within a specified period of time after which they are barred. Notice by both publication and mail is required. The statute contemplates that most claims will be settled by negotiation between the claimants (creditors and disputed shareholders) and those conducting the winding up of the business. Holders of secured claims who fail to present timely claims are barred only as to any deficiency in the amount realized upon their security.

The fate of contingent, unmatured, or disputed claims is determined according to the presence or absence of judicial direction over the winding up. If there is judicial direction (either because the dissolution was involuntary (sec. 650) or because judicial supervision has been petitioned in a voluntary dissolution under sec. 618), there must be compliance with either subsection (d) or (e).

In the event the assets subject to such claims have been reduced to cash, the Commissioner of Revenue is established as a stakeholder. Thereafter they are to be paid over pursuant to the terms of an agreement as among the disputants or by order of the court. However, sec. 653(e) recognizes that in certain circumstances it may be improvident to reduce assets to cash. In such cases, the assets are to be held in specie pending a resolution of the dispute by agreement between or among the creditors or claims or a court order. Generally, the determination to reduce assets to cash or not is one to be made according to the business judgment of those conducting the winding up. Abuse of this discretion would be subject to corrective orders of the court.

If the winding up is a consequence of voluntary dissolution and there has been no sec. 618 petition, then all disputes are to be resolved according to sec. 653(f). It will be noted, there is no provision for avoiding the conversion of assets into cash and lodging such funds with the Commissioner of Revenue as a stakeholder. Again, the commissioner holds such assets pending agreement among the disputants or order of a court.

In order to ensure that these disputes do not leave the commissioner with custody of assets for an indefinite period, sec. 653(g) requires that claims against the corporation which have been rejected under either (c) or (f) must be made the object of suit within thirty days or be barred.

CHANGE IN FORMER ALASKA LAW: ACC sec. 653 is predicated upon UCL sections 1007 and 1008 and replaces former AS 10.05.579 which had been based upon Section 100 of the MBCA. Sec. 653 repeats the basic substance of prior law which also provided a procedure for settling all claims against the corporation.

Sec. 653 adds several items to the former law: specifications regarding notice, special treatment for secured creditors, a requirement of provision for claims not yet disallowed, a provision allowing a creditor holding an unmatured debt to collect the present value, and a thirty (30) day limit upon the commencement of actions on rejected claims.

Official Comment to ACC Section 10.06.655.

ORDER DECLARING CORPORATION WOUND UP AND DISSOLVED; DECLARATIONS; EFFECT; ADDITIONAL ORDERS; DISCHARGE OF DIRECTORS.

SCOPE: Upon final settlement of accounts under ACC sec. 648 and determination that the corporation's affairs are in a condition for it to be dissolved, ACC sec. 655 directs the court to make an order declaring the corporation duly wound up and dissolved. This order is to state information regarding the provisions made for taxes and penalties owing under Article 11 and other known debts and liabilities. Any distribution of assets to shareholders is to be noted. The order is to declare that those conducting the winding up have settled their accounts and that their duties and liabilities are discharged.

Note that nothing contained in sec. 655 is intended to diminish the liability of officers and directors which may be established by an aggrieved creditor under ACC sec. 433.

Corporate existence ceases upon issuance of the sec. 635 order except to the extent of further winding up and to the extent provided in ACC sec. 678.

CHANGE IN FORMER ALASKA LAW: ACC sec. 655 is derived from GCL Section 1808 and replaces former AS 10.05.555 which had been based upon MBCA Section 102. Former law required that all property be distributed prior to entry of the decree; ACC sec. 655 permits the court to make a decree even though some winding up is yet to be done.

Official Comment to ACC Section 10.06.658.

FILING OF DECREE OF DISSOLUTION.

ACC sec. 658 is a reenactment without change of former AS 10.05.588 which is based upon Section 103 of the MBCA.

Official Comment to ACC Section 10.06.660.

POWERS AND DUTIES OF DIRECTORS IN DISSOLUTION PROCEEDINGS.

SCOPE: ACC sec. 660 is the heart of the reformed framework for utilizing the incumbent directors and officers of the corporation to conduct both voluntary and involuntary dissolution of a corporation. It enumerates powers and duties of the board; the items listed in sec. 660 are illustrative and not intended to limit what the board may do.

The main limitations imposed upon the board are found in secs. 615(c) and 643(c) which direct that the corporation shall cease its normal business and start winding up except to the extent necessary to preserve the good will or going-concern value of the corporate business.

CHANGE IN FORMER ALASKA LAW: ACC sec. 660 is new to Alaska law, being derived from Section 2001 of the GCL. Its coverage replaces that of several sections of prior law, including former AS 10.05.459(2), 564, and 570 based respectively on Sections 87 and 98 of the MBCA. The use of existing management to conduct the voluntary dissolution proceedings is a significant change from prior law which utilized a "liquidating receiver" appointed by the superior court.

The new framework adopts the GCL philosophy that it is best to continue to utilize the existing management of the corporation, subject to the discipline of the court, to conduct the winding up and dissolution. In the event the superior court does not repose confidence in the abilities or fidelity of the incumbent management, it has power under ACC sec. 648 to appoint other persons to conduct the winding up.

Official Comment to ACC Section 10.06.663.

PROCEEDING TO DETERMINE IDENTITY OF DIRECTORS OR TO APPOINT DIRECTORS.

SCOPE: Since the ACC relies upon directors to conduct the winding up and dissolution of a corporation, it is important to be able to establish the identity of such persons and to replace those who are unwilling or unable to perform their duties. ACC sec. 663 creates a procedure for accomplishing these tasks. It is applicable to all dissolutions proceedings.

CHANGE IN FORMER ALASKA LAW: ACC sec. 663 is taken from GCL Section [illegible]. [illegible] is no comparable provision in prior Alaska law or in the MBCA.

Official Comment to ACC Section 10.06.665.

DISTRIBUTION OF CORPORATE ASSETS AMONG SHAREHOLDERS; WHEN TO BE MADE.

SCOPE: Once the interests of creditors and other claimants against the corporation have been settled or made the object of adequate provision, the remaining assets are to be distributed among the shareholders according to their respective rights and preferences. In the context of dissolution proceedings under judicial supervision, no distribution may be made until expiration of the period for presentation of claims under ACC sec. 653.

CHANGE IN FORMER ALASKA LAW: ACC sec. 665 is based upon Section 2004 of the GCL; it replaces former AS 10.05.489 and 561 which were based upon Sections 87 and 93 of the MBCA.

Official Comment to ACC Section 10.06.668.

PROVISION FOR PAYMENT OF DEBT OR LIABILITY.

SCOPE: The concept of "adequate provision" for a debt or liability is used extensively throughout Article 9 as a precondition for distributing assets to shareholders when all claims by creditors have not yet been settled. The definition provided in ACC sec. 668 is intended to clarify the meaning of this important concept.

CHANGE IN FORMER ALASKA LAW: ACC sec. 668 is taken from Section 2005 of the GCL. It is without precedent in Alaska law.

Official Comment to ACC Section 10.06.670.

DISTRIBUTION IN MONEY OR IN KIND; INSTALLMENTS.

SCOPE: ACC sec. 670 gives express sanction to distribution schemes which give shareholders property as opposed to cash. Installment plans are also sanctioned. The statute places a value on making distributions as soon as possible but allows for delays consistent with the beneficial liquidation of the corporation. It is the intent of the legislature to authorize distribution schemes which satisfy some shareholder claims in kind and others in cash if the value of the disparate forms of distribution meets the statutory requirement of proration and if such a plan is fair to all shareholders.

CHANGE IN FORMER ALASKA LAW: ACC sec. 670 is taken from Section 2006 of the GCL. It is without precedent in either prior Alaska law or the MBCA.

Official Comment to ACC Section 10.06.673.

PLAN OF DISTRIBUTION; ADOPTION; BINDING EFFECT; NOTICE; PAYMENT TO DISSENTING SHAREHOLDERS; ABANDONMENT.

SCOPE: Th liquidation preferences of senior shares may prove a hindrance to the execution of a plan of distribution of assets other than money which may be most beneficial to shareholders. ACC sec. 673 permits the liquidation rights of outstanding shares to be altered so as to accommodate such a plan upon approval by the outstanding shares (ACC sec. 990(5)). Class voting is expressly provided. Preferred shares dissenting from the plan may require the corporation to make payment according to their unaltered liquidation preferences. If such dissent and demand prejudices the plan, the board is authorized to abandon it without further recourse to the shareholders.

Liquidation preferences may also be altered by an amendment to the articles under Article 7 if approved by the outstanding shares with full recognition of the rights of the affected shares to vote by class. Under Article 7 there is no right to dissent and then receive treatment according to the terms of the unamended indenture. It is the intention of the legislature that any alteration in the liquidation preferences of senior shares after the filing of an election to wind up and dissolve or after the initiation of involuntary dissolution proceedings is to be governed exclusively by the provisions of ACC sec. 673. Where dissolution is not in process, amendment is governed by the provisions of ACC Article 7.

CHANGE IN FORMER ALASKA LAW: ACC sec. 673 is without prior statutory precedent in Alaska. It is predicated upon Section 2007 of the GCL.

Official Comment to ACC Section 10.06.675.

RECOVERY OF AMOUNTS IMPROPERLY DISTRIBUTED.

SCOPE: Any amount improperly distributed to shareholders may be recovered under ACC sec. 675. Unlike sec. 378, there is no requirement that shareholders have knowledge of the impropriety of any distribution made to them in liquidation. Subsection (d) precludes a corporation contemplating liquidation but not formally engaged in dissolution from exploiting the varying standards between secs. 378 and 673.

Subsection (c) makes clear that any recovery against any shareholders may not function to alter the right of shareholders to share pro rata in the residual assets of the corporation. A right of contribution or a right to compel the corporation or recover from other shareholders may be used to enforce pro rata participation in the assets.

CHANGE IN FORMER ALASKA LAW: ACC sec. 675 is taken from Section 2009 of the GCL. It is new to Alaska law.

Official Comment to ACC Section 10.06.678.

CONTINUED EXISTENCE OF DISSOLVED CORPORATIONS; PURPOSES; ABATEMENT OF ACTIONS; DISTRIBUTION OF OMITTED ASSETS.

SCOPE: ACC sec. 678 provides for a limited continued existence of a corporation which has been dissolved. For an indefinite period of time such a corporation continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, collecting and discharging obligations, disposing of and conveying its property and collecting and dividing its assets. Under the terms of subsection (d), the directors of the corporation on the date of its dissolution or as determined under sec. 663 enjoy the powers to pursue any matter preserved to the corporation under subsection (a).

CHANGE IN FORMER ALASKA LAW: ACC sec. 678(a) is taken from former AS 10.05.594 and is based upon Section 105 of the MBCA. Subsections (b), (c), and (d) are take from SB 112 as passed in the 1980 session of the legislature.

Official Comment to ACC Section 10.06.705.

ADMISSION OF FOREIGN CORPORATION.

SCOPE: ACC sec. 705 conditions entry of a foreign corporation for the purpose of transacting business within the State of Alaska (intrastate business). It is intended to exercise to the fullest extent the police power of the state while respecting the equal protection guarantees made obligatory by the Fourteenth Amendment to the United States Constitution. See Eli Lilly & Co. v. Sav-on-Drugs, Inc., 366 U.S. 276 (1961). Exercise of this power is manifest in sec. 705's requirement that as precondition to the transaction of intrastate business a foreign corporation must obtain a certificate of authority from the commissioner.

While California has recently launched an effort to impose substantial portions of its general corporation law to regulate the internal affairs of what are deemed "pseudo foreign corporations", the ACC has refrained from the imposition of its provisions upon the internal affairs of foreign organized corporations electing to transact business within this state.

Indeed, the commission is expressly forbidden to deny a certificate of authority because the laws of the state or country under which a foreign corporation is organized differ from the laws of Alaska.

CHANGE IN FORMER ALASKA LAW: ACC sec. 705 is a reenactment of former AS 10.05.597, which is based upon Section 106 of the MBCA. The final sentence of former .597, which disclaimed any regulation of the internal affairs of the corporation, was deleted as unnecessary.

Official Comment to ACC Section 10.06.710.

LIABILITY FOR TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY

SCOPE: In order to enforce the requirement that a foreign corporation obtain a certificate of authority prior to transacting business within Alaska, ACC sec. 710 imposes a penalty of up to $10,000 per year or portion thereof during which such intrastate business is transacted without compliance with sec. 705. In addition, such a foreign corporation is made liable for all fees and taxes which would have been paid if there had been full and prompt compliance with this Chapter.

CHANGE IN FORMER ALASKA LAW: ACC sec. 710 is a reenactment of former AS 10.05.696 and is based upon Section 124 of the MBCA. The penalty ceiling has been increased from $5,000 to $10,000. ACC Article 10 has reorganized the sequence of former Alaska law, situating the sections imposing penalties for noncompliance with sec. 705 immediately after the sections requiring application for the certificate of authority.

Official Comment to ACC Section 10.06.713.

TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY AS A BAR TO RIGHT TO SUE.

SCOPE: Among the disciplinary consequences of a foreign corporation's transaction of intrastate business within Alaska without compliance with ACC sec. 705 is sec. 713's denial to such a corporation of the right to maintain any action, suit or proceeding in the courts of this state. In National Bank of Alaska v. J.B.L. & K. of Alaska, Inc., 546 P.2d [illegible], [illegible] ([illegible]), the court indicated a strong disposition to read an identical provision, former AS 10.05.690, as not precluding the assertion of a counterclaim or set-off by such a disabled foreign corporation at least where such counterclaim or set-off would not result in the use of an Alaska court to obtain an affirmative recovery. Such a conclusion would be in accord with a decision of the Supreme Court of Washington. North Star Trading Co. v. Alaska-Yukon-Pacific Exposition, [illegible] Wash. [illegible], [illegible] P. [illegible], [illegible] ([illegible]). This position, while not a holding in National Bank of Alaska, supra, is approved by the legislature in the enactment of ACC sec. 710.

Whether a noncomplying foreign corporation under the disabilities of ACC sec. 713 could use a federal court in a diversity case cannot be controlled by the state legislature. However, the legislature notes with satisfaction Fred Hale Machinery, Inc. v. Laurel Hill Lumber Co., Inc., 483 F.2d 46 ([illegible] Cir. [illegible]), and the authorities there reviewed, holding that a preclusion which would, upon disciplinary grounds, bar a foreign corporation from the use of state courts would also bar use of a federal forum. Accord, Boston Towboat Co. v. John H. Sesnon Co., 199 Fed. 445 (W.D. Wash. [illegible]).

CHANGE IN FORMER ALASKA LAW: ACC sec. 713 is a reenactment without change of former AS 10.05.690 and is based upon Section 124 of the MBCA.

Official Comment to ACC Section 10.06.715.

TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY NOT AFFECTING CONTRACTS AND RIGHT TO DEFEND ACTION.

SCOPE: ACC sec. 715 confines the disciplinary consequences of the transaction by a foreign corporation of intrastate business within Alaska without a certificate of authority to those imposed by this Chapter. It does not generate grounds for a contracting party to assail the validity of a contract or transaction with such a noncomplying foreign corporation.

Finally, although precluded by ACC sec. 713 from initiating any action, suit, or other proceeding, such a noncomplying foreign corporation is not precluded from defending an action, suit, or proceeding commenced by another in an Alaska court.

CHANGE IN FORMER ALASKA LAW: ACC sec. 715 is a reenactment without change of former AS 10.05.693.

Official Comment to ACC Section 10.06.718.

ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS IN THIS STATE.

SCOPE: Under the Interstate Commerce Clause and common law comity principles, a foreign corporation may engage in certain activities within a state without being required to first obtain a certificate of authority. In an effort to reduce litigation on this issue and to draw clear lines through the conflicting lines of decisional authority in other jurisdictions, ACC sec. 718 enumerates activities which a foreign corporation may pursue without the necessity of obtaining a certificate of authority under ACC sec. 705. The language of the section makes it clear that the list is not exclusive.

Note that identical language in former AS 10.05.600 has been held by the Supreme Court of Alaska not to define those activities which may subject a foreign corporation to the jurisdiction of the courts of this state. Northern Supply, Inc. v. Curtiss-Wright Corporation, 397 P.2d 1013, 1015-16 (1965). In reenacting this language as ACC sec. 718, the legislature intends to approve the holding in that case.

CHANGE IN FORMER ALASKA LAW: ACC sec. 718 is a reenactment of former AS 10.05.600, and is based upon Section 106 of the MBCA. The phrase "for the purpose of this chapter" has been added to the introductory paragraph to foreclose the use of sec. 718 in litigation to contest the imposition of taxes, the service of process, and jurisdictional issues which are governed by ACC sec. 765 and disciplined by federal constitutional guarantees to corporations requiring minimum contacts with this state before a state officer may be designated to receive services of process.

Official Comment to ACC Section 10.06.720.

CORPORATE NAME OF FOREIGN CORPORATIONS.

SCOPE: ACC sec. 720 imposes upon foreign corporations seeking a certificate of authority under sec. 705 the same limitations with respect to a corporate name which are imposed upon domestic corporations by ACC sec. 105.

CHANGE IN FORMER ALASKA LAW: ACC sec. 720 represents a modified content of former AS 10.05.606 and is based upon Section 108 of the MBCA. Subsection (3) has been added to the text of the former act in order to subject foreign corporations to the same restrictions imposed upon domestic corporations by ACC sec. 105. For a rationale of these restrictions, see official comment to ACC sec. 105.

Official Comment to ACC Section 10.06.723.

ASSUMED CORPORATE NAME.

SCOPE: In order to accommodate a foreign corporation while at the same time vindicating the policies of Alaska law with respect to the permissible content of a corporate name, ACC sec. 723 permits a corporation disabled by sec. 720 from using its actual name to adopt an assumed name which, if it is permissible under sec. 720, is the name under which it elects to do business in this state.

In order that any interested person may track the true identity of a foreign corporation operating in Alaska under an assumed name, sec. 723(b) requires the commission to maintain records which cross reference the actual and assumed names of all foreign corporations authorized to transact business in this state.

CHANGE IN FORMER ALASKA LAW: ACC sec. 723(a) is based upon former AS [illegible] which was taken from Section 108(c)(1) of the MBCA. Wording changes have been made in order to avoid any confusion in coordinating this section with ACC sec. 720.

Sec. 723(b) is new and replaces the former requirement that a corporation using an assumed name identify its true corporate name in all advertising, contracts, and other legal doctrines with a scheme whereby any interested party may resort to records maintained by the commissioner which are cross referenced as to actual and assumed names of foreign corporations.

Official Comment to ACC Section 10.06.725.

CHANGE OF NAME BY FOREIGN CORPORATION.

SCOPE: ACC sec. 725 furthers the policy with respect to permissible and impermissible content of corporate names by providing that a foreign corporation authorized to transact intrastate business in Alaska will have that right suspended if it were to change its name to one which was violative of any provision of sec. 720.

CHANGE IN FORMER ALASKA LAW: ACC sec. 725 is a reenactment without change of former AS 10.05.609 and is based on Section 109 of the MBCA.

Official Comment to Section 10.06.728.

APPLICATION FOR CERTIFICATE OF AUTHORITY.

ACC sec. 728's content is self-evident. It represents a reenactment without change of former AS 10.05.612. It is based upon Section 110 of the MBCA.

Official Comment to ACC Section 10.06.730.

CONTENTS OF APPLICATION.

SCOPE: ACC sec. 730 specifies the subject matter and information which must be included in an application for a certificate of authority to transact intrastate business in Alaska. Three of the enumerated items may be unfamiliar to foreign counsel.

Sec. 730(5) goes beyond the statement of purpose which the corporation proposes to pursue in Alaska to require a selection from the identification code established under ACC sec. 950 of the code(s) which most closely describes the activities in which the corporation will engage in this state.

Sec. 730(12) requires that the application include the name and address of each alien affiliate (defined in ACC sec. 990(2) and (3)), the percentage of outstanding shares controlled by each alien affiliate, and a specific description of the nature of the relationship between the foreign corporation and its alien affiliate.

Sec. 730(13) requires that the application state the name and address of any person(s) owning at least five percent of the shares, or five percent of any class of shares, and the percentage of the shares of class of shares owned by that person or those persons.

CHANGE IN FORMER ALASKA LAW: ACC sec. 730 is a reenactment without change of former AS 10.05.615 as amended. With the exception of the three items noted above, it is based upon Section 110 of the MBCA. Note that the changes in the ACC financials (Article 4) are not applicable to foreign corporations. Thus, references in prior law to "par value" and "stated capital" have been retained to accommodate foreign corporations which employ traditional financial restraints on the dissipation of assets.

Official Comment to ACC Section 10.06.733.

FILING OF APPLICATION FOR CERTIFICATE OF AUTHORITY.

SCOPE: ACC sec. 733 requires the filing of the original and an exact copy of the application for a certificate of authority using forms prescribed and furnished by the commissioner. The manner of signature and verification requirements are also specified. Processing by the commissioner shall be according to the uniform procedures established under sec. 910.

CHANGE IN FORMER ALASKA LAW: ACC sec. 733 is a reenactment with changes of former AS 10.05.618 and 621 and is based upon Section 111 of the MBCA. Sec. 733 has been technically rewritten to participate in the consolidation of statutory instructions to the commissioner regarding the processing of filed documents (ACC sec. 910).

Official Comment to ACC Section 10.06.735.

EFFECT OF CERTIFICATE OF AUTHORITY.

SCOPE: ACC sec. 735 parallels sec. 218 by establishing a "bright line" event upon which the authority to transact intrastate business is granted by the State of Alaska. In reenacting the content of sec. 735 it is the intention of the legislature to disapprove any doctrine of "de facto" or "colorable" compliance with the provisions of this Chapter as creating any right to transact intrastate business in Alaska.

CHANGE IN FORMER ALASKA LAW: ACC sec. 735 is a reenactment without change of former AS 10.05.624. It is based upon Section 112 of the MBCA.

Official Comment to ACC Section 10.06.738.

AMENDED CERTIFICATE OF AUTHORITY.

SCOPE: ACC sec. 738 obliges a foreign corporation which changes its corporate name or desires to pursue an intrastate purpose in Alaska other than the purpose(s) set forth in its application for a certificate of authority to obtain an amended certificate of authority as a precondition to effecting such change.

CHANGE IN FORMER ALASKA LAW: ACC sec. 738(a) is a reenactment without change of former AS 10.05.657. Sec. 738(b) is new and conforms the entire section to Section 118 of the MBCA. Subsection (b) was added to clarify the filing procedures for amendments to the certificate of authority.

Official Comment to Section 10.06.740.

POWERS OF FOREIGN CORPORATION.

SCOPE: Consonant with the obligation to extend the equal protection of the laws, ACC sec. 740 establishes that an authorized foreign corporation shall have the same powers as would a domestic corporation organized for the purposes stated in the application for or amendment to the certificate of authority. Sec. 740 is not intended to and does not increase the powers of an authorized foreign corporation beyond those permitted under the laws of the state of its incorporation. The statutory proclamation that a foreign corporation ". . . is subject to the duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation . . . ." is not intended to impose the general provisions of the ACC.

CHANGE IN FORMER ALASKA LAW: ACC sec. 740 is a reenactment without change of former AS 10.05.603 and is based upon Section 107 of the MBCA.

Official Comment to ACC Sections:

10.06.743. REVOCATION OF CERTIFICATE OF AUTHORITY;
10.06.745. LIMITATIONS ON REVOCATION OF CERTIFICATE OF AUTHORITY;
10.06.748. ISSUANCE OF CERTIFICATE OF REVOCATION;
10.06.750. EFFECT OF CERTIFICATE OF REVOCATION

SCOPE: ACC secs. 743, 745, 748, and 750 authorize, regulate, and determine the effect of a certificate of revocation issued by the commissioner. The power of revocation under sec. 743 is similar to the commissioner's power to involuntarily dissolve domestic corporations under ACC sec. 630. The sixty (60) day notice and grace period established by sec. 745 is also similar to the procedures limiting the commissioner's power to effect involuntary dissolution. If the certificate of authority is revoked pursuant to sec. 748, sec. 750 declares that the foreign corporation is no longer authorized to transact intrastate business in Alaska. Further transaction of such intrastate business would subject the foreign corporation to the provisions of sec. 710.

CHANGE IN FORMER ALASKA LAW: ACC secs. 743, 745, 748, and 750 are reenactments without change of former AS 10.05.675, 678, 681, and 684. They are based upon Sections 121 and 122 of the MBCA.

Official Comment to ACC Sections:

10.06.753. REGISTERED OFFICE AND REGISTERED AGENT OF FOREIGN CORPORATION;
10.06.758. CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OF FOREIGN CORPORATION;
10.06.760. FILING OF STATEMENT OF CHANGE.

SCOPE: ACC secs. 753, 758, and 760 parallel secs. 150, 165, and 170 respecting domestic corporations. They oblige authorized foreign corporations to designate both a registered office and a registered agent, govern the change of such office or agent, and establish procedures for notification of the commissioner.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC secs. 753, 758, and 760 are reenactments without change of former AS 10.05.627, 633, and 636. They reflect the content of Sections 113 and 114 of the MBCA.

<u>Official Comment to ACC Sections</u>:

10.06.763. SERVICE OF PROCESS ON FOREIGN CORPORATION;
10.06.765. SERVICE ON COMMISSIONER;
10.06.768. RECORDS KEPT BY COMMISSIONER;
10.06.770. PROCEDURE NOT EXCLUSIVE.

<u>SCOPE</u>: ACC secs. 763, 765, 768 and 770 balance the needs of a party desiring to initiate litigation against an authorized foreign corporation in Alaska with the need of that entity to maximize the circumstances in which notice and service of process will be actual as opposed to constructive. ACC sec. 765 is a reenactment of language in former AS 10.05.642 which was interpreted in <u>Northern Supply, Inc. v. Curtiss-Wright Corporation</u>, 397 P.2d 1013, 1015-16 (1965), as not being restricted by the "transacting business within the state" definition and exclusions of ACC sec. 718.

Therefore, while sec. 765 speaks to the fate of both authorized and no longer authorized foreign corporations, it is likely to be interpreted as providing machinery for substitute service upon a foreign corporation which would not, by virtue of sec. 718, have been required to secure a certificate of authority, but which has the requisite minimum contracts with Alaska to warrant an assertion of jurisdiction by an Alaska court. See also ACC sec. 175(b).

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC secs. 763, 765, 768, and 770 are reenactments without substantial change of former AS 10.05.639, 642, 645, and 648. They are based upon Section 115 of the MBCA. The incorporation by reference in sec. 765 of sec. 175(b) is new and alters the law insofar as sec. 175(b) relied upon Section 57.075(3) of the Oregon Revised Statutes.

Official Comment to ACC Section 10.06.775.

ORGANIC CHANGE OF FOREIGN CORPORATION.

SCOPE: Whenever a foreign corporation is involved in an "organic change" (defined in ACC sec. 990(26)), notification of the commissioner is to be made by filing a copy of the articles of merger, consolidation, exchange or reorganization authenticated by the proper authority in the jurisdiction in which it is domesticated. No amendment of the certificate of authority is necessary unless the corporate name or purposes to be pursued in the conduct of intrastate business in Alaska is altered.

CHANGE IN FORMER ALASKA LAW: ACC sec. 775 is a reenactment without substantive change of former AS 10.05.654. It is based upon Section 117 of the MBCA with terminology changes to clarify the scope of the section and conform to the style of the ACC.

Official Comment to ACC Sections:

10.06.778. WITHDRAWAL OF FOREIGN CORPORATION;
10.06.780. CONTENTS OF APPLICATION FOR WITHDRAWAL;
10.06.783. FORM OF APPLICATION FOR WITHDRAWAL;
10.06.785. FILING OF APPLICATION FOR WITHDRAWAL;
10.06.788. EFFECT OF CERTIFICATE OF WITHDRAWAL.

SCOPE: ACC secs. 778, 780, 785, and 788 provide for the orderly and official withdrawal of a foreign corporation from Alaska. If these procedures are not followed, and the bright line events of secs. 785 and 788 observed, the foreign corporation would have a continued liability for taxes and fees.

CHANGE IN FORMER ALASKA LAW: ACC secs. 778, 780, 783, 785, and 788 are reenactments of former AS 10.05.660, 663, 666, 669, and 672. They are based upon Sections 119 and 120 of the MBCA. Sec. 785 has been restated to observe the consolidation of procedures effected by ACC sec. 910.

Official Comment to ACC Sections:

10.06.805. BIENNIAL REPORT OF DOMESTIC AND FOREIGN CORPORATIONS;

10.06.808. CONTENTS OF BIENNIAL REPORT;
10.06.811. FILING OF BIENNIAL REPORT.

SCOPE: ACC secs. 805, 808, and 811 establish on the part of each domestic corporation and each foreign corporation authorized to transact business in this state, an obligation to file a biennial report with the Department of Commerce and Economic Development. Prior to 1980 former Alaska law required that these reports be filed on an annual basis. The 1980 session saw the legislature replace this requirement with a biennial obligation supplemented by sec. 813's obligation to update the report with respect to important, specified particulars.

CHANGE IN FORMER ALASKA LAW: ACC secs. 805, 808, and 811 are predicated upon former AS 10.05.699, 702, and 705 as amended by SB 112 (1980). These provisions of former Alaska law were based upon Sections 125 and 126 of the MSCA. Sec. 811(d) is new and was suggested by the Department of Commerce and Economic Development. Its purpose is to eliminate the possibility that the sec. 808 information would not be available on a newly formed or authorized corporation.

Official Comment to ACC Section 10.06.813.

FILING NOTICE OF CHANGE OF OFFICERS, DIRECTORS, FIVE PERCENT SHAREHOLDERS, AND ALIEN AFFILIATES.

SCOPE: Sec. 813 reflects the intense concern of the state that it be informed as to the identity of officers, directors, five percent shareholders, and alien affiliates as these are defined in the ACC.

CHANGE IN FORMER ALASKA LAW: ACC sec. 813 is predicated upon former AS 10.05.706 as enacted by SB 112 (1980).

Official Comment to ACC Section 10.06.815.

PENALTY FOR FAILURE TO FILE BIENNIAL REPORT.

SCOPE: ACC sec. 815 imposes a sanction applicable to any failure or refusal to file the biennial report required by this Chapter. The scheme imposes a strict liability standard for compliance.

<u>CHANGE IN FORMER ALASKA LAW:</u> ACC sec. 815 is predicated upon former AS 10.05.771 as amended by SB 112 (1980). The general provision is based upon Section 135 of the MBCA.

<u>Official Comment to ACC Section 10.06.818.</u>

INTERROGATORIES BY COMMISSIONER; JUDICIAL PROCEEDINGS TO CONTEST.

<u>SCOPE:</u> ACC sec. 818 is intended to grant broad powers to the commissioner to utilize interrogatories in order to ascertain compliance with or violations of this Chapter. Such interrogatories are limited as to subject matter or extent in that they must be reasonably necessary to enable the commissioner to discharge the functions imposed upon his office by this Chapter.

Subsection (d) is designed to permit either a corporate or individual person faced with interrogatories propounded under subsection (a) to judicially contest either the method of propounding (subsection (b)), the substantive scope of the request (subsection (a)), or the confidentiality of the information disclosed (sec. 820). The power of the superior court to modify or set aside the commissioner's interrogatories shall be broadly construed.

<u>CHANGE IN FORMER ALASKA LAW:</u> ACC sec. 818(a), (b), and (c) is predicated upon former AS 10.05.777 and Section 137 of the MBCA. Subsection (d) is modeled after AS 45.52.210(f) and is designed to provide the target of interrogatories propounded under this section an opportunity for a judicial contest before incurring misdemeanor consequences of a refusal to fully comply.

<u>Official Comment to ACC Section 10.06.820.</u>

CONFIDENTIALITY OF INFORMATION DISCLOSED BY INTERROGATORIES.

<u>SCOPE:</u> ACC sec. 820 is intended to exempt the answers to interrogatories propounded under sec. 818 from the disclosure requirements of AS 09.25.110 and AS 09.25.120. The later sections of Title 9 provide that state agency records are public records unless specifically provided otherwise by state law. ACC sec. 820 specifically provides otherwise.

Note that a failure on the part of the commissioner to observe the injunction of sec. 820 would be grounds for a court to limit or set aside the interrogatories under sec. 818.

CHANGE IN FORMER ALASKA LAW: ACC sec. 820 is a reenactment of former AS 10.05.750 and is based upon Section 138 of the MBCA.

Official Comment to ACC Section 10.06.823.

FAILURE TO ANSWER INTERROGATORIES.

SCOPE: ACC sec. 823 establishes that any corporate or natural person who fails or refuses to make a timely, full, and truthful answer to interrogatories propounded by the commissioner under sec. 818 shall be guilty of a misdemeanor. Further, the commissioner shall not be under any obligation to file any document to which the interrogatories relate until they have been properly answered and need not file the document if the answers to those interrogatories disclose that the document does not conform to the provisions of this Chapter.

CHANGE IN FORMER ALASKA LAW: ACC sec. 823 combines provisions of former AS 10.05.783, 786, and 777 which were predicated upon Sections 135, 136, and 137 of the MBCA. No change in the former substantive content of Alaska law has been wrought by sec. 823.

Official Comment to ACC Section 10.06.825.

PENALTIES IMPOSED UPON OFFICERS AND DIRECTORS.

SCOPE: The failure or refusal of an officer or director to make timely, full, and truthful answers to interrogatories propounded by the commissioner under ACC sec. 818 has been rendered a misdemeanor by sec. 823. ACC sec. 825 goes beyond this requirement to impose misdemeanor consequences upon any officer or director of a domestic or foreign corporation who signs any articles, statement, report, application or other document filed with the commissioner the content of which is "known" to be false.

For the purpose of this section it should be remembered that under the ACC secs. 450(b) and 483(e) there is an active duty of inquiry commensurate with the good faith efforts of a reasonable person in like circumstances. A defendant unable to demonstrate conduct conforming to this standard would not be able to claim lack of "knowledge" for purposes of evading the penalties imposed by sec. 325.

CHANGE IN FORMER ALASKA LAW: ACC sec. 325 represents a modification of former AS 10.05.786 as amended by SB 112 (1980). As with the former provision, sec. 325 is predicated upon Sec. 136 of the MBCA.

Official Comment to ACC Section 10.06.328.

INCORPORATION OR FILING FEES.

SCOPE: ACC sec. 328 establishes a filing fee for both domestic and foreign corporations doing business in Alaska and fixes in the Department of Commerce and Economic Development the power to set the amount by regulation. However, while the department has the power to determine the amount of such fee, sec. 828 mandates that it be fixed without reference to the amount of authorized capital stock of the corporation. Not for profit corporations, organized under AS 10.20, and their foreign counterparts are exempted from this provision.

CHANGE IN FORMER ALASKA LAW: ACC sec. 328 is a modified version of former AS 10.05.708 (Section 130 of the MBCA) as amended by SB 112 (1980). Reference to shares without par value in the former statute have been eliminated following the ACC's destruction of this concept. Notwithstanding, par value continues to be a viable concept in other jurisdictions and the commissioner may take such factors into account in framing the content of departmental regulations.

Official Comment to ACC Section 10.06.330.

FEES ON APPOINTMENT OR REVOCATION OF APPOINTMENT OF PROCESS AGENT OR CHANGE OF AGENT'S ADDRESS.

SCOPE: ACC sec. 330 establishes the appointment and consent of a process agent by a foreign corporation in Alaska as an occasion for the imposition of a fee established by regulation by the Department of Commerce and Economic Development. The revocation of the appointment of a resident agent presents the foreign corporation with a second occasion for the imposition of a fee. Subsection (b) sets forth the circumstances in which the registered agent who has changed the agent's address or resigned is to pay a fee for filing the statement provided in ACC sec. 170(a) and (b).

CHANGE IN FORMER ALASKA LAW: ACC sec. 830 represents a redrafting without substantive change of former AS 10.05.714 which had been based upon Section 129 of the MBCA.

Official Comment to ACC Sections:

10.06.833. FEES AND PENALTIES PAYABLE ON WITHDRAWAL OF FOREIGN CORPORATION;
10.06.835. FEES ON DISSOLUTION OF DOMESTIC CORPORATION;
10.06.838. TAXES, PENALTIES, AND FEES ON FILING CERTIFICATE OF DISSOLUTION OF FOREIGN CORPORATION;
10.06.840. FEES FOR CERTIFIED COPIES OF DOCUMENT;
10.06.843. OTHER FILING FEES.

SCOPE: ACC secs. 833-843 establish the indicated events as occasions for the imposition of fees which are to be established by the Department of Commerce and Economic Development.

CHANGE IN FORMER ALASKA LAW: ACC secs. 833, 835, 838, 840, and 843 reenact without substantive change former AS 10.05.750, 753, 756, 762, and 747 as amended by SB 112 (1980).

Official Comment to ACC Sections:

10.06.845. BIENNIAL CORPORATION TAX; PENALTY FOR NONPAYMENT;
10.06.848. FAILURE TO PAY TAX OR MAKE REPORT AS PRECLUDING SUIT BY CORPORATION;
10.06.850. COMMISSIONER TO INSTITUTE SUITS TO COMPEL PAYMENT;
10.06.853. FAILURE TO PAY TAX AS EVIDENCE OF INSOLVENCY;

10.06.855. PAYMENTS TO BE MADE IN ADVANCE;
10.06.858. ACCOUNTING FOR AND DISPOSITION OF TAXES AND FEES PAID.

SCOPE: ACC secs. 845-858 impose on both domestic and foreign corporations doing business in Alaska a biennial corporation tax and fix the consequences for failure to make payment of such taxes.

CHANGE IN FORMER ALASKA LAW: ACC secs. 845-858 represent, with such modifications as are hereafter mentioned, a reenactment of former AS 10.05.717, 720, 723, 726, 765, and 766. In turn, these provisions are predicated upon Sections 132, 133, and 134 of the MBCA. ACC sec. 850 has substituted the Commissioner of the Department of Commerce and Economic Development for the Attorney General as the state official to commence suit to compel the payment of the biennial corporation tax.

Official Comment to ACC Section 10.06.863.

APPEAL FROM REVOCATION OF CERTIFICATE OF AUTHORITY.

SCOPE: ACC secs. 863 and 915 utilize the superior court for the purpose of contesting any disapproval of any document or the revocation of any certificate of authority. In each instance, upon compliance with the procedure set out in these sections, the appellant is entitled to a trial de novo on the disputed matter and the court is empowered to sustain the commissioner or to order the commissioner to take such action as shall, to the court, appear proper.

CHANGE IN FORMER ALASKA LAW: ACC secs. 863 and 915 are reenactments without change of former AS 10.05.792 and 789 and are based upon Section 140 of the MBCA.

Official Comment to ACC Section 10.06.865.

CANCELLATION OF CERTIFICATES ISSUED AND FILINGS ACCEPTED.

SCOPE: ACC sec. 865 recognizes that the volume of documents presented to the commissioner for filing may well preclude a full opportunity for a determination of their state of compliance with the provisions in this Chapter. To the end that the directives of the Chapter may be vindicated, sec.

865 gives the commissioner a period of one year in which to discover the defects and to act upon them. If the defect is such that it would have been grounds for refusal to issue the certificate of accept the filing, and the discovery is made within one year, the commissioner is empowered to give notice of cancellation and, upon compliance with the further provisions of this section, to cancel the certificate issued or filing accepted.

CHANGE IN FORMER ALASKA LAW: ACC sec. 865 is a reenactment with one change of former AS 10.05.794 as amended by SB 112 (1980). The alteration in language to the first sentence is intended to make it clear that the ground for cancellation must be one which existed at the time of the original filing or issuance of the certificate. Cancellations on any other grounds must be authorized by other law.

Official Comment to ACC Section 868.

FORMS TO BE FURNISHED BY THE COMMISSIONER.

SCOPE: ACC sec. 868 grants to the commissioner the right to prescribe the content of forms for any report required by this Chapter. As to both required reports and all other documents to be filed in the office of the commissioner or department, sec. 868 obliges the commissioner to furnish appropriate forms.

CHANGE IN FORMER ALASKA LAW: ACC sec. 868 is a reenactment without change of former AS 10.05.798 and is based upon Section 142 of the MBCA.

Official Comment to ACC Section 10.06.870.

IDENTIFICATION CODE.

SCOPE: ACC sec. 870 furthers the state's interest in tracking business activities within Alaska and to that end directs the commissioners of the Departments of Revenue and of Commerce and Economic Development to jointly establish and adopt a coded list of business activities and make such list available to the public.

CHANGE IN FORMER ALASKA LAW: ACC sec. 870 is a reenactment without change of former AS 10.05.799 and was added to the statutory law of Alaska by SB 112 (1980).

Official Comment to ACC Section 10.06.905.

VOTING OF SHARES.

SCOPE: ACC sec. 905 clarifies that the references to ACC secs. 990(5), 990(6), and 415 to a majority of shares means a majority of shares entitled to vote under the articles of incorporation. The ACC enfranchises shares not enfranchised by the articles in only a few limited situations; i.e., class voting on amendments to the articles and organic changes.

The second sentence makes it clear that votes disqualified from voting on a matter are not to be considered "outstanding" for any determination regarding what constitutes a "quorum" or a "majority".

CHANGE IN FORMER ALASKA LAW: ACC sec. 905 is taken from GCL Section 112. It is without precedent in Alaska law.

Official Comment to ACC Section 10.06.910.

PROCESSING OF WRITINGS FILED WITH THE COMMISSIONER

SCOPE: ACC sec. 910 directs the commissioner to review documents filed for conformity to law and ascertain whether all fees and corporation taxes have been paid by the corporation. If no inadequacy or delinquency is noted, the original and an exact copy of the writing are to be endorsed with the word "filed" and the date. The exact copy is to be filed in the office. The original is to be returned to the corporation along with any writing, such as a certificate of incorporation, amendment, merger, consolidation, exchange, authority, or dissolution, which the commission is to issue.

CHANGE IN FORMER ALASKA LAW: In former AS 10.05, the matters covered in ACC sec. 910 were repeated numerous times, see former AS 10.05.081, 258, 288, 303, 327, 339, 357, 402, 468, 483, 504, 513, 621, and 669. All of these sections have been consolidated into ACC sec. 910 without substantive impact, thus streamlining the ACC.

Official Comment to ACC Section 10.06.915.

DISAPPROVAL OF WRITING BY COMMISSIONER: APPEAL.

SCOPE: ACC sec. 915, like sec. 863, utilizes the superior court for the purpose of contesting any disapproval of any document or the revocation of any certificate of authority. In each instance, upon compliance with the procedure set out in these sections, the appellant is entitled to a trial de novo on the disputed matter and the court is empowered to sustain the commission or order him to take such action as shall, to the court, appear proper.

CHANGE IN FORMER ALASKA LAW: ACC secs. 863 and 915 are reenactments without change of former AS 10.05.792 and 789 and are based upon Section 140 of the MBCA.

Official Comment to ACC Section 10.06.920.

WRITINGS; CORRECTIONS.

SCOPE: In cases of writings which have been filed but are discovered to have minor errors, it is useful to be able to correct the mistakes without affecting the effective date of the writing filed. ACC sec. 920 permits such corrections and sets forth a procedure for making them. The scope of errors which may be corrected is not precisely defined by the language of the statute, but it is the intent of the legislature that any major omission or misinformation existing in an original writing may not be corrected by the procedure created under in this section.

CHANGE IN FORMER ALASKA LAW: ACC sec. 920 derives from BCL Section 105. Minor language alterations without substantive impact have been made.

Official Comment to ACC Section 10.06.925.

WRITINGS AS EVIDENCE.

SCOPE: ACC sec. 925 specifies that certain writings and certifications by the commission of the absence of a filing are to be regarded as prima facie evidence of the facts stated in the writing and the execution or nonexecution thereof.

CHANGE IN FORMER ALASKA LAW: ACC sec. 925 is adapted from SCL Section 106. The language in subsection (a) is similar to former AS 10.05.795, which was modeled upon MBCA Section 141.

Official Comment to ACC Section 10.06.930.

CORPORATE SEAL AS EVIDENCE.

SCOPE: ACC sec. 930 treats the presence of a corporate seal on a writing purporting to be executed by authority of either a domestic or foreign corporation as prima facie evidence that the writing was so executed.

CHANGE IN FORMER ALASKA LAW: ACC sec. 930 is predicated on Section 107 of the MBCL and is without precedent in former Alaska law.

Official Comment to ACC Section 10.06.935.

WAIVER OF NOTICE.

SCOPE: A written waiver of notice, whether executed before or after the time stated for notice, is equated to the giving of notice in any situation where notice a director or shareholder is required.

CHANGE IN FORMER ALASKA LAW: ACC sec. 935 is a reenactment of former AS 10.05.804, based upon MBCA Section 144.

Official Comment to ACC Section 10.06.950.

POWERS OF COMMISSIONER.

SCOPE: ACC sec. 950 is intended as a broad grant of nonsubstantive administrative authority to the commissioner of the Department of Commerce and Economic Development. The limited authority of the commission or the department to adopt regulations to further the provisions and objectives of this Chapter is set forth in ACC sec. 953.

CHANGE IN FORMER ALASKA LAW: ACC sec. 950 is a reenactment without change of former AS 10.05.813 and is based upon Section 139 of the MBCA.

Official Comment to ACC Section 10.06.953.

REGULATIONS.

SCOPE: ACC sec. 953 is intended as a restrictive grant of rule making authority to the commissioner and Department of Commerce and Economic Development. Such a power must be exercised in conformity with the Administrative Procedure Act (AS 44.62), and may be invoked only with respect to specific references to rule making authority contained in this Chapter.

CHANGE IN FORMER ALASKA LAW: ACC sec. 953 represents a redrafting of former AS 10.05.823 designed to make clear the restrictive nature of the grant of rule making authority.

Fees: Authority to establish various fees by regulation is set out in sections throughout the bill. Setting of fees comes under public scrutiny through publication and hearing requirements of the Administrative Procedure Act. Since that scrutiny should provide adequate protection against setting of excessive fees, a former section AS 10.05.773 is not carried over into the ACC. That section set a ceiling on fees increases based upon changes in the consumer price index, often an inaccurate gauge of changes in the cost of processing documents.

Official Comment to ACC Section 10.06.955.

APPLICATION.

SCOPE: ACC sec. 955 makes the new code applicable to domestic corporations organized under former AS 10.05 and, to the extent provided generally in Article 10 and expressly elsewhere, to foreign corporations. As to foreign corporations, it is important to note that beyond the provisions of Article 10, provisions in Article 11 and ACC sec. 488 on director and officer liability are specifically applicable by their terms.

Subsection (b) makes it clear that the existence of corporations formed under prior law is not affected. However, it is important to stress that the new law does not apply to existing corporations and may affect many aspects of the internal governance of such corporations. The requirements as to formation of corporations do not affect existing corporations except to the extent provided in Article 12.

Subsection (c) makes it clear that the new law does not affect legal disputes preexisting the enactment of the ACC.

CHANGE IN FORMER ALASKA LAW: Subsection (a) is a modified version of GCL Section 103; it replaces former AS 10.05.816, based upon MBCA Section 147. Subsection (b) is a modified version of GCL Section 102(b); it replaces former AS 10.05.816, based upon MBCA Section 147. It supplements AS 01.10.100.

Official Comment to ACC Section 10.06.958.

PROVISIONS CONSTRUED AS RESTATEMENTS AND CONTINUATIONS.

SCOPE: Much of the ACC represents a reenactment of former Alaska law, either verbatim or with minor changes to conform to ACC usage and style. These reenactments are to be construed as restatements and continuations of prior law.

CHANGE IN FORMER ALASKA LAW: ACC sec. 958 is taken from GCL Section 2.

Official Comment to ACC Section 10.06.960.

CORPORATIONS ORGANIZED UNDER P.L. 92-203.

SCOPE: Under P.L. 92-203, the Alaska Native Claims Settlement Act, either the general business corporations code or the nonprofit corporations code of the State of Alaska is to be used to organize the entities which will hold the assets distributed through ANCSA. Due to the special nature of these corporations and the federal requirement that the corporate form of business be used, a variety of special provisions apply to Native Corporations.

The capitalization of Native corporations, distributions to shareholders, approval of plans of merger or consolidation and the liability of directors and officers to contract claimants are all topics subject to special treatment by ACC sec. 960.

CHANGE IN FORMER ALASKA LAW: ACC sec. 960 is a reenactment of former AS 10.05.005 with the addition of subsection (d) which exempts Native corporations from the provisions of ACC sec. 488 on the liability of directors and officers to contract claimants.

Official Comment to ACC Section 10.06.963.

SEVERABILITY.

SCOPE: ACC sec. 963 guarantees that the ACC will not be struck down as a whole on account of the invalidity of any provision in it. Any invalid provision is declared to be severable.

CHANGE IN FORMER ALASKA LAW: ACC sec. 963 is taken from BCL Section 111. It supplements the provisions of AS 01.10.030.

Official Comment to ACC Section 10.06.965.

RESERVATION OF POWER.

SCOPE: In order to provide itself with a plenary right to alter, amend, suspend, or repeal in whole or in part the provisions of the ACC, the legislature expressly reserves such right in this section. The constitutional precedent which both permits and requires a state to reserve such power was established in Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

CHANGE IN FORMER ALASKA LAW: ACC sec. 965 is based upon former AS 10.05.822, MBCA Section 149 and BCL Section 110.

Official Comment to ACC Section 10.06.968.

SIGNATURE.

SCOPE: ACC sec. 968 specifies that a mark is a signature when the signer cannot write and the signer's name is written out by a witness who signs his own name. A mark so authenticated can be acknowledged and may serve as a signature to a sworn statement.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC sec. 968 is new to Alaska law, deriving from GCL section 17. The language of the GCL provision was altered to eliminate a requirement that two witnesses sign for a mark to be acknowledged or serve as a signature to a sworn statement.

<u>Official Comment to ACC Section 10.06.970</u>.

RULES OF CONSTRUCTION AND INTERPRETATION.

<u>SCOPE</u>: To obviate the possibility of litigation on a variety of topics susceptible of differing interpretations and to specify the handling of financial accounting procedure, ACC sec. 970 sets out basic rules of construction to be applied to matters the ACC governs. Of particular interest is subsection (5) on financial accounting. The ACC has abandoned the traditional corporate accounting concepts of "par value", "stated capital", "capital surplus" and "earned surplus". This former system has been replaced by the "retained earnings" and "ratio/assets surplus" tests found in ACC secs. 358-365; the new system relies upon the generally accepted accounting principles applicable at the time of performance of a financial accounting task. This reliance upon concepts of the accounting profession and awkwardly imposed upon accountants as under prior law, should function to yield financial reports reflecting economic realities according to the evolved customs of accountants.

Unless some other accounting principle is mandated by specific provision of the ACC, subsection (5)(a) requires that financial statements, balance sheets, income statements, and statements in changes in financial position of a corporation and references to assets, liabilities, earnings, retained earnings, and similar accounting items of a corporation be determined and expressed so as to fairly and reasonably present the purported matters. Within the specific provisions of the ACC there are two variations from this general norm. In some circumstances (e.g., sec. 358(c)), the observance of generally accepted accounting principles is mandatory. In others, the ACC specifically defines terms such as "paid-in capital" and "retained earnings" in a manner which may not conform to generally accepted accounting principles terminology or practice. These particular statutory specifications are necessary to the symmetry and clarity of the ACC and the design of the regulatory system imposed upon the dissipation of corporate assets. For these reasons, no deference to a norm of "reasonableness" or generally accepted accounting principles is made in those areas.

In any area or usage not specifically defined or commanded by a provision of the ACC, subsection (5)(b) creates a safe harbor in the use of generally accepted accounting principles. They are conclusively presumed to be "fair and reasonable." Other principles or practices may meet the "fair and reasonable" standard mandated by subsection (5)(a), but the burden of establishing such compliance would be that of the litigant responsible for or defending the election of an alternative method.

Note also that subsection (5)(c) specifies the use of consolidated statements for corporations with subsidiaries.

CHANGE IN FORMER ALASKA LAW: All of the rules of construction in ACC sec. 970 are new to Alaska law. They derive from GCL Sections 5, 6, 7, 8, 113, 114, 113, 10, 11, 12, 13, 15, and 16, respectively. In adopting subsection (3) the phrase "in the English language" was deleted from GCL Section 8. Under the GCL use of generally accepted accounting principles is mandatory. In adopting subsection (5) the ACC follows the RMBCA suggestion and does not insist upon the use of such practices and procedures. See RMBCA Section 6.40 and official comment 4a. However, use of generally accepted accounting principles does invoke a presumption of a fair and reasonable presentation of the purported matters. In adopting subsection (6) the term "electronic means" was substituted for the GCL language "telephone or wireless".

Official Comment to ACC Section 10.06.990.

DEFINITIONS.

SCOPE: Many terms used in the ACC have special meanings which must be clearly understood to gain a full comprehension of the coverage of statutes using such terms. All of these terms are defined in ACC sec. 990, which is organized in alphabetical order. Definitions of particular importance to the ACC are discussed in this comment.

"Approved by (or approval of) the outstanding shares" is a term of art in the ACC which means that an absolute majority of all outstanding shares has approved a proposal or resolution. When such approval is required, any share not voting casts, in effect, a "no" vote.

"Approved by (or approval of) the shareholders" is also a term of art in the ACC. It refers to the affirmative vote of a majority of the shares attending a duly held meeting.

"Distribution to its shareholders" is an important term of art in the ACC. It is the essential concept underlying restraints upon the dissipation of corporate assets. It includes both the traditional dividend and the share redemption or repurchase transaction. It does not include a stock split or a share dividend. The basic concept thus focuses on the transfer of assets from the corporation to shareholders. The relevant date for determining when a distribution is made is set as the declaration date for a dividend and as the date of transfer of cash or property for a share repurchase or redemption. These timing issues are important to the operation of the provisions restraining a corporation's right to make a distribution.

"Paid-in capital" and "retained earnings" are definitions which set up the two shareholders' equity accounts upon which the financial restraint provisions of Article 4 rely. The definitions are restrictive in comparison with the definitions from prior law which they replace. Unlike the concept of "stated capital", former AS 10.05.325, the concept of "paid-in capital" looks to the consideration actually received by the corporation. Thus, a corporation raising capital through a stock sale by an underwriter is to only count the net amount received from the underwriter. The "capitalization of retained earnings" permitted by ACC sec. 390 is explicitly recognized in the definition of "paid-in capital". This is important since any distribution which is accounted for by a reduction in the "paid-in capital" account must meet the tests of ACC secs. 358(b) and 365.

"Subsidiary" is clearly defined since under the ACC the financial picture of a corporation and its subsidiaries are viewed compositely. Thus, a clear definition of subsidiary is required and provided.

Senator Bettye Fahrenkamp
Page 198
May 7, 1987

<u>CHANGE IN FORMER ALASKA LAW</u>: The source of the definitions of the ACC is either former Alaska law, typically based on a definition from MBCA Section 2, or the GCL. The following chart indicates these sources:

1. New
2. Former AS 10.05.825(18) (1976)
3. Former AS 10.05.825(22) (1980)
4. GCL Section 151
5. GCL Section 152
6. GCL Section 153
7. Former AS 10.05.825(5)
8. Former AS 10.05.825(9)
9. GCL Section 155
10. Former AS 10.05.825([illegible])
11. GCL Section 159
12. Former AS 10.05.825(19)
13. Former AS 10.05.825(2)
14. Former AS 10.05.825(17)
15. Former AS 10.05.825(3)
16. GCL Section 164
17. GCL Section 166
18. GCL Section 169
19. Former AS 10.05.825(24) (1980)
20. Former AS 10.05.825(4)
21. GCL Section 115
22. GCL Section 172
23. Former AS 10.05.825(11)
24. GCL Section 173
25. GCL Section 174
26. New
27. GCL Section 175
28. New
29. Former AS 10.05.825(20)
30. GCL Section 176
31. GCL Section 178
32. GCL Section 179
33. GCL Section 180
34. New (stemming from former AS 10.05.825(14))
35. GCL Section 183
36. Former AS 10.05.825(8)
37. Former AS 10.05.825(6)
38. New
39. Former AS 10.05.825(7)
40. GCL Section 189
41. GCL Section 190
42. GCL Section 192

43. AS 09.63.040; GCL 193
44. GCL Section 194
45. GCL Section 195
46. New

Official Comment to ACC Section 10.06.995.

SHORT TITLE.

SCOPE: The title of the chapter regulating the organization and operation of business corporations has been changed from "Alaska Business Corporation Act" to "Alaska Corporations Code". The change in the official name will facilitate distinctions between old and new law.

CHANGE IN FORMER ALASKA LAW: ACC sec. 995 replaces former AS 10.05.525.

Official Comment to ACC Sections 2-4.

Amends the references to the present corporation code in AS 10.15.030, AS 10.15.075, and AS 10.20.452.

Official Comment to ACC Section 5.

REPEALER.

SCOPE: This section repeals AS 10.05.

CHANGE IN FORMER ALASKA LAW: This section is new to Alaska law.

Official Comment to ACC section 6.

APPLICATION OF PROVISIONS.

SCOPE: The basic approach of the ACC on the question of transition from the former Alaska Business Corporations Act is to establish January 1, 1986, as the effective date with the ABCA governing all transactions, contracts, or acts prior to that date. To the extent that a contract is wholly or partially executory on the effective date, subsequent performance of its terms shall conform to the provisions of the ACC unless such conformance would impair such terms, in which case performance shall be in accordance with the terms of the ABCA.

CHANGE IN FORMER ALASKA LAW: ACC Section 6 is predicated upon the approach taken in Chapter 23 of the California General Corporation Law and reflects the content of GCL Sections 162, 2300 and 2301.

Official Comment to ACC Section 7.

EXERCISE OF RESERVED POWER.

SCOPE: ACC Section 7 provides a statement of the legislature's intent to exercise to the fullest extent the reserve power of the state over corporations and to authorize any amendment of the articles permitted under AS 10.06.502(a) regardless of whether a provision contained in the amendment was permissible at the time of original incorporation.

CHANGE IN FORMER ALASKA LAW: ACC Section 7 is taken from AS 10.05.822.

Official Comment to ACC Section 8.

APPLICATION TO ARTICLES OF EXISTING CORPORATIONS.

SCOPE: One of the new features of the ACC is to require that certain aspects of the governance structure of corporations formed under the new act be placed in the articles at peril of otherwise being wholly ineffective. Section 5 grants a broad exemption to corporations formed prior to the effective date to elect to conform to this new arrangement or to continue with the content of the articles conforming to the terms of the former ABCA.

CHANGE IN FORMER ALASKA LAW: ACC Section 8 is patterned after Section 2302 of the GCL. Note that the special treatment of amendments affecting the number of directors in the GCL provision was omitted as unnecessary given the content of prior Alaska law.

Official Comment to ACC Section 9.

AMENDMENT OF ARTICLES OF INCORPORATION.

SCOPE: ACC Section 9 grants a further election to corporations existing on the effective date. The general scheme under former AS 10.05.276 was to establish a procedure under which the amendment had to originate in a resolution adopted by the board and thereafter be submitted to shareholders. At the meeting of the shareholders noticed for that purpose, the amendment was adopted only if it received two-thirds vote of the shares entitled to vote. If a class was entitled to vote under former AS 10.05.279 or 282, then the amendment was not adopted unless, in addition to receiving a two-thirds vote of the total shares entitled to vote, it also received the affirmative vote of two-thirds of each class of shares entitled to vote as a class.

Under Section 9(a) the voting procedures and rights established under former AS 10.05.276, 279, and 282 are preserved and made the norm for a corporation existing on the effective date of the ACC. Such a corporation may elect to replace this machinery with the provisions of ACC secs. 504 and 506, which establish simple absolute majorities ("approval of the outstanding shares") for the former two-thirds norm but only if the amendment making this election passes under the voting procedures and rights established under the aforementioned sections of the former ABCA. However, the provisions of the ACC which permit the amendment to originate with the shareholders as well as the content of ACC secs. 504 and 506 which does not relate to the matter of class voting or the norm of two-thirds for approval are intended to govern the election under Section 6(b).

An election to amend the corporate articles under Section 9 shall respect the voting rights and machinery preserved under Section 9(a) unless there is a Section 9(b) procedure.

CHANGE IN FORMER ALASKA LAW: ACC Section 6 is without precedent.

Official Comment to ACC Section 10.

INDEMNIFICATION OF CORPORATION.

SCOPE: ACC Section 10 is an exception to the general norm that events arising prior to the effective date are governed by the content of the former ABCA.

CHANGE IN FORMER ALASKA LAW: ACC Section 10 is modeled after GCL Section 2304.

Official Comment to ACC Section 11.

DISTRIBUTIONS AND REACQUISITION OF SHARES.

SCOPE: ACC Section 11 is designed to avoid any impairment of an executory contract for distributions to shareholders including the reacquisition by the corporation of its own shares. Note that under sec. 990(16) the time of distribution by way of dividend is deemed to be the date of the declaration. The intention of the legislature in enacting these two sections is to permit any dividend which had been declared prior to the effective date of the ACC to be governed by the ABCA.

With respect to distributions by repurchase or redemption, sec. 990(16) provides that the distribution is deemed to take place on the date of transfer of cash or other consideration to the shareholder. In order to avoid any impairment of an executory contract to make such a purchase of distribution, Section 11 specifies that any redemption or repurchase made pursuant to a contract existing prior to the effective date is permissible if it can qualify under either the ABCA or the ACC.

CHANGE IN FORMER ALASKA LAW: ACC Section 11 is a modified version of Section 2308 of the GCL.

Official Comment to ACC Section 12.

TENURE OF OFFICERS PRESERVED.

SCOPE: ACC Section 12 makes it clear that the tenure of officers and directors as established under prior law continues.

CHANGE IN FORMER ALASKA LAW: ACC Section 12 is new to Alaska law; it is taken from GCL Section 3.

<u>Official Comment to ACC Section 13.</u>

EXISTING ACTIONS.

<u>SCOPE</u>: ACC Section 13 provides that enactment of the new code does not affect a cause of action, liability, penalty, or special proceeding existing, incurred, or accrued on the effective date of the Act.

<u>CHANGE IN FORMER ALASKA LAW</u>: ACC Section 13 is taken from GCL Section 4.

<u>Official Comment to ACC Sections 14-35.</u>

These sections describe how the proposed new code amends the state's court rules.

<u>Official Comment to ACC Section 36.</u>

EFFECTIVE DATE.

<u>SCOPE</u>: ACC Section 36 provides that the effective date for the ACC is January 1, 1989.

CRC87/001

STATE OF ALASKA
THE LEGISLATURE

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Mary Van Nimwegen

House Judiciary:

3/2/88

4/12/88

Sund

## HB 322

AN ACT REVISING THE CORPORATIONS CODE; AMENDING ALASKA RULES OF CIVIL PROCEDURE 4, 10, 11, 19, 20, 23.1, 24, 65, 73, and 82 ALASKA RULES OF APPELLATE PROCEDURE 204 and 609, AND ALASKA RULE OF EVIDENCE 803(8); AND PROVIDING FOR AN EFFECTIVE DATE.

SUMMARY OF BILL

** EXISTING 10.05.010 ET SEQ. THE "CORPORATIONS CODE" WAS DRAFTED IN 1953 AND TAKEN FROM OREGON LAW IN 1957. THE CODE IS 35 YEARS OLD.

** THE EXISTING CORPORATION CODE IS POORLY ORGANIZED AND HORRIBLY OUT OF DATE, ONLY MINOR CHANGES HAVING BEEN MADE BY LEGISLATIVE AMENDMENTS TO THE CODE SINCE 1957.

** THE EXISTING CODE PROVISIONS ARE ANACHRONISTIC AND DO NOT COME CLOSE TO REFLECTING COURT DECISIONS AND LEGISLATIVE CHANGES TO CORPORATION CODES IN OTHER STATES.

** BECAUSE THE EXISTING CODE IS SO POORLY DRAFTED, FAILS TO ADDRESS SO MANY LEGAL QUESTIONS A CORPORATION MUST ANSWER, IT IS DIFFICULT FOR AN ATTORNEY TO UNDERSTAND AND IMPOSSIBLE FOR A LAY PERSON TO LEARN WHEN OBLIGATIONS EXIST WHEN ONE INCORPORATES.

** HB 322 WAS DRAFTED BY THE ALASKA CODE REVISION COMMISSION OVER A PERIOD OF EIGHT YEARS. OVER 30 PUBLIC SESSIONS WERE HELD BY THE COMMISSION FOR THE PURPOSE OF TAKING PUBLIC COMMENT.

** HB 322 HAS HAD MORE THAN EIGHT LEGISLATIVE HEARINGS OVER THE PAST SIX YEARS. IT HAS BEEN THE SUBJECT OF SEMINARS AND BAR ASSOCIATION CONVENTION TOPICS.

** MORE THAN $500,000 HAS BEEN SPENT BY THE STATE OF ALASKA ON REVISING THE CODE AND THOUSANDS OF MAN HOURS HAVE BEEN SPENT ON REVISING AND REVIEWING THE PROPOSED CODE.

** THE PROPOSED CODE HAS DRAWN HEAVILY FROM THE CORPORATION CODES OF THE STATES OF: ALASKA, CALIFORNIA, NEW YORK, OREGON, WASHINGTON AND DELEWARE.

** THE PROPOSED CODE IS A "MIDDLE OF THE ROAD" CORPORATION CODE. IT NEITHER FAVORS MANAGEMENT OR SHAREHOLDERS ALTHOUGH IT PROVIDES HANDY OPTIONAL PROVISIONS FOR THE ARTICLES OF INCORPORATION WHICH WILL ALLOW THE INCORPORATOR TO CREATE EITHER A MANAGEMENT OR SHAREHOLDER ORIENTED CORPORATION.

** THE MOST CONTROVERSIAL PROVISION OF THE PROPOSED CODE, SECTION 488 HAS BEEN REMOVED FROM THE BILL. THIS PROVISION CREATED SECONDARY LIABILITY OF OFFICERS AND DIRECTORS.

** THE PROPOSED CODE HAS BEEN WRITTEN IN LAY LANGUAGE WHENEVER POSSIBLE, USING A "COOKBOOK" APPROACH. THE INDEX IS BROKEN DOWN INTO LOGICAL SECTIONS DEALING WITH SPECIFIC MATTERS RELATING TO CORPORATIONS; E.G. INCORPORATION, OFFICERS AND DIRECTORS, AMENDMENTS AND DISSOLUTION.

** UNLIKE THE EXISTING CODE, EVERY MATTER HAVING TO DO WITH A CORPORATION IS DEALT WITH IN A LOGICALLY ORGANIZED MANNER. MANY AREAS OF CORPORATION LAW NOT EVEN MENTIONED IN THE EXISTING CODE ARE EXHAUSTIVELY DEALT WITH IN THE PROPOSED DRAFT.

** A LAY PERSON CAN READ, FIND AND UNDERSTAND THE LEGAL REQUIREMENTS FOR INCORPORATION. UNDER THE EXISTING CODE, IT IS NECESSARY TO READ THE ENTIRE CODE TO MAKE SURE YOU HAVE FOUND EVERYTHING HAVING TO DO WITH A PARTICULAR TOPIC.

** BECAUSE OF THE ORGANIZATION AND CLEAR, LAY LANGUAGE OF THE PROPOSED CODE, THE SERVICES OF AN ATTORNEY WILL BE MINIMIZED.

** THE PROPOSED CODE CONTAINS IMPORTANT INCORPORATION AND REPORTING REQUIREMENTS NEEDED BY THE DIVISION OF CORPORATIONS.

** THE PROPOSED CODE ADDRESSES IMPORTANT NEEDS AND UNIQUE PROBLEMS OF ALASKA NATIVE CORPORATIONS.

** MUCH OF EXISTING ALASKA LAW IS INCLUDED IN THE PROPOSED CODE.

** THE PROPOSED CODE HAS BEEN SPECIFICALLY TAILORED TO MEET THE NEEDS OF ALASKA CORPORATIONS.

** INTERNAL INCONSISTENCIES CONTAINED IN EXISTING ALASKA LAW HAVE BEEN RESOLVED IN THE PROPOSED CODE ALONG WITH LAN- THAT IS EASIER TO UNDERSTAND.

** THE PROPOSED CODE CONTAINS IMPORTANT SECTIONS NOT PRESENTLY FOUND IN THE EXISTING LAW, INCLUDING:

p28 → A COMPLETE FINANCIALS SECTION
A SECTION DEALING WITH SHAREHOLDER DERIVATIVE SHAREHOLDER ACTIONS
A SECTION DEALING WITH DIRECTOR CONFLICTS OF INTERESTS
A SECTION DEALING WITH MINORITY SHAREHOLDER RIGHTS
A SECTION DEALING WITH OPTIONAL PROVISIONS FOR THE ARTICLES OF INCORPORATION

** THE PROPOSED CODE APPLIES TO CORPORATIONS HAVING A LARGE NUMBER OF SHAREHOLDERS OR MOM AND POP CORPORATIONS (CLOSELY HELD CORPORATIONS).

** THE PROPOSED CODE HAS BEEN RECOMMENDED FOR APPROVAL IN PAST LEGISLATIVE COMMITTEE HEARINGS BY:

ALASKA AIRLINES, THE LARGEST CORPORATION IN ALASKA
THE ALASKA FEDERATION OF NATIVES SUBCOMMITTEE
THE DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT, DIVISION OF CORPORATIONS.

** BECAUSE THE PROPOSED CODE IS SO CLEARLY DRAFTED AND SO DETAILED IN DEALING WITH VIRTUALLY EVERY LEGAL MATTER INVOLVING A CORPORATION, IT SHOULD ENCOURAGE OUTSIDE BUSINESS TO INCORPORATE IN ALASKA. THEY WILL EASILY AND CLEARLY ANTICIPATE THE LEGAL CONSEQUENCES OF THEIR ACTIONS USING THE CORPORATE FORM.

** THE PROPOSED CODE IS REVENUE NEUTRAL. IT WILL NOT COST THE STATE ONE PENNY TO ADOPT OR IMPLEMENT.

ALASKA CODE REVISION COMMISSION
LEGISLATIVE AFFAIRS AGENCY
POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811

March 27, 1988

The Honorable John Sund
Chairman, House Judiciary Committee
Room C-122 State Capitol Building
Juneau, Alaska 99811

Re: HB 322; An Act revising the corporations code.

Dear Representative Sund:

This letter is in response to your recent request for information about HB 322, the corporations code bill.

Existing AS 10.05.010 et seq., Alaska's corporation code, was adopted from Oregon law in 1957. Oregon had previously passed its version of the American Bar Association Model Act, adopted by the ABA in 1953. As such, Alaska's corporation code is approximately 35 years old, having been amended to a small degree in 1976 and 1980. Most of the amendments dealt with specific sections of the code and no attempt was made to overhaul the entire code.

The existing Title 10 is poorly organized and horribly out of date. In order to locate all sections of the code dealing with a specific corporation matter, it is necessary to review the entire title to insure that no provisions have been overlooked. The index provides little guidance to anyone seeking to determine rights and obligations, as well as corporate procedures, under the existing law. It is written in language that makes the code difficult to use by the lay person.

In response to the great need to update and organize the corporation code, the Alaska Code Revision Commission undertook a complete rewrite of the code beginning in about 1980. In furtherance of this effort, the Commission engaged the services of Professor Daniel Wm. Fessler to serve as the reporter for the code revision project. Professor Fessler teaches corporate and business organization law at the University of California, Davis law school. He is presently the reporter for Corbin On Contracts and his texts on corporations and business associations are used in law schools throughout the United States. The Alaska Code Revision Commission is a legislatively created commission with representatives from all three branches of government as well as public members. Work on the corporations code continued through the period 1980 to the present, with the greatest emphasis on the period from 1981 to 1984. The Commission has spent more than $350,000.00 in consulting fees, has spent literally thousands of man hours in drafting and research, has conducted more than 30 public meetings on the code, has made several presentations to the Alaska Bar Association and attorney groups, and has had a commissioner or its consultant testify before a number of legislative committees. The draft bill has drawn the most articulate statements of corporation law from Alaska, California, New York, Oregon, Washington and Delaware. It is a "middle of the road" bill, meaning that there is a balance between a strong management or strong shareholder corporation model. By using the optional incorporation provisions found in the draft, an incorporator can easily create either a strong management or strong shareholder corporation.

The most controversial provision of the draft bill, Section 488, has been removed from the draft. This provision dealt with secondary liability of officers and directors in the event the corporation became insolvent. Other criticisms of the bill have focused upon provisions of the draft which are only restatements or inclusions of existing Alaska law. While the "financial" provisions of the draft will certainly remove some flexibility from the manner in which corporations declare dividends, they have not been the subject of much attention by businesses or attorneys.

To summarize, the following features of the draft strongly argue in favor of its adoption by the Legislature as a new code for Alaskan corporations:

1. The code uses a "cookbook" approach to organization. All general topics are included in sections dealing only with those topics. One need only look to one section to determine how to incorporate or to dissolve. Under the existing code, it is necessary to review the entire code to make sure that no provision has been overlooked.

2. The topic headings are informative as to the area of substantive law that is covered in each section. The code is written in lay language whenever possible. The design of the format and its organization has been accomplished so that the lay person can easily discover how to incorporate and how to carry on business in the corporate form, thus minimizing the need to have an attorney guide you through simple incorporation matters.

3. The draft bill contains important incorporation and reporting requirements needed by the Division of Corporations. The Commission worked closely with the Division in the drafting of its corporations bill so as to insure that the Division's needs would be addressed.

4. The draft bill addresses important needs and unique problems of Alaska native corporations. The Commission worked closely with a special subcommittee of the Alaska Federation Of Natives in the drafting of the bill.

5. Much of existing Alaska law is continued in the present draft, although the language has been rewritten in many instances to make it more understandable to the lay person.

6. Because the language is concisely drafted, internal inconsistencies existing in present Alaska law have been resolved, and because of its superior organization and lengthy commentary indicating the source of its provisions, the draft should reduce considerably the need for litigation over the meaning of the language contained in HB 322.

7. The draft contains important new sections not currently found in Title 10. They include:

a. A new section dealing with corporation financial activities, specifically defining the conditions when a distribution is appropriate;

b. A new section dealing with shareholder derivative actions, an area only minimally covered by rules of the Alaska Supreme Court under existing law;

c. A new, expanded section dealing with all matters involved in corporation dissolution;

d. New sections dealing with conflicts of interest by directors, minority shareholder rights, rights and obligations of various classes of shares, and the purchase of shares of a deceased shareholder.

e. A number of optional provisions for the Articles that will determine corporate bias for management or shareholders. These provisions can be easily selected and inserted by the incorporator depending upon what type of corporation is desired.

8. While drawing heavily from the best laws of other states, the draft has been carefully crafted to address corporate problems unique to Alaska. The draft can be truly characterized as an Alaska drafted code. Additionally, the draft incorporates a great many of the substantive provisions found in the recently adopted ABA revised model business corporations act.

No attempt has been made by the Commission to address the extremely complex problem of corporate takeovers. Because of the radical and rapid changes that have taken place in the past 5 or 6 years, such an undertaking would require much study and a considerable expenditure of time in order to even formulate a policy for dealing with takeovers.

The existing Title 10 is woefully outdated and poorly organized. It is difficult for the lay person and even the practitioner to use. It is full of anachronistic provisions and internal inconsistencies. It does not reflect changes in corporation law that have occurred over the past 35 years. It doesn't even contain much needed sections dealing with shareholder derivative actions, conflict of interest, indemnification of officers and directors or financial accountability. The draft has previously been approved by the Division of Corporations, the Alaska Federation of Natives and Alaska Airlines, the largest private (non-native) corporation in Alaska. It is organized and written so that it can be easily used by the lay person, but contains all of the features needed by the practitioner to advise a corporate client on sophisticated matters. There is nothing in the draft that would discourage outside business from choosing Alaska as a domicile for incorporation because the corporation can be tailored to the needs of any business. It should encourage businesses to locate in Alaska because the rights and obligations of the corporation are so clearly spelled out in the draft. Finally, the code should greatly decrease the need for litigation because of the lengthy and comprehensive commentary accompanying the draft.

good point

If you have any questions concerning the draft, please contact me and I will attempt to answer those questions.

Very truly yours,

John W. Abbott

JOHN W. ABBOTT, Chairman

**STATE OF ALASKA**
**1988 LEGISLATIVE SESSION**

BILL VERSION: HB 322
PUBLISH DATE:

# FISCAL NOTE

**REQUEST:**

Revision Date:
Title: An Act revising the corporation's code
Sponsor: Rules Committee
Requester: Legislative Council

Agency Affected: Commerce & Econ. Dev.
BRU: Banking, Securities & Corporations
Components: Corporations

**EXPENDITURES / REVENUES:** (Thousands of Dollars)

| OPERATING | FY 88 | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| 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 | -0- | -0- | -0- | -0- | -0- | -0- |

**POSITIONS:**

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

**ANALYSIS:** (Attach a separate page if necessary.)

Prepared by: Willis F. Kirkpatrick, Director
Division: Banking, Securities and Corporations
Phone: 465-2521
Date: 3-2-88

Approved by Commissioner: J. Anthony Smith
Agency: Department of Commerce and Economic Development
Date: 3/2/88

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page ___ of ___

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THE ALASKA CODE REVISION COMMISSION

August Meeting, 1984

A WORKING PAPER IN THREE PARTS

THE ORIGINS OF THE ALASKA CORPORATIONS CODE

A SECTION BY SECTION COMPARISON OF THE ALASKA CORPORATIONS CODE

with the

FINAL DRAFT OF THE REVISED MODEL BUSINESS CORPORATIONS ACT

SUGGESTED AMENDMENTS TO THE ALASKA CORPORATIONS CODE

Prepared by

THE CODE REVISION PROJECT

Professor Daniel Wm. Fessler
James J. Banks

231 G. Street # 26
Davis, California 95616

## PREFACE

This study paper consists of three parts each designed to familiarize the reader with the contents of the proposed Alaska Corporations Code [ACC] and its relationship to the final exposure draft of the Revised Model Business Corporations Act [RMBCA] (June 1, 1984). In Part I the reader will find a chart showing the origin of each provision of the ACC and its comparable coverage in existing Alaska law, the classical Model Act, and the Revised Model Act. Part II follows the organizational structure of the ACC and gives a brief description of the origin of each section, its content, and a specific comparison to provisions of the RMBCA. Part III sets an agenda for the August, 1984, meeting at which time the Code Revision Commission will consider modifications to the draft of the ACC incorporating potential improvements found in the RMBCA. The list reflects the consultant's tentative conclusions and should not be deemed exhaustive. Indeed, the August Commission meeting is an appropriate forum for the consideration of any modification to the draft content of the ACC.

## TABLE OF CONTENTS

# PART ONE

## CORRESPONDING STATUTORY COVERAGE TO EACH SECTION OF THE PROPOSED ALASKA CORPORATIONS CODE

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| ARTICLE 1. CORPORATE PURPOSES AND POWERS | | | | | | |
| .005 | P | X | | | | X |
| .010 | X | X | | | | P |
| .015 | P | P | P | P | | X |
| .020 | | | X | | | |
| .025 | | | X | | | |
| ARTICLE 2. NAME AND SERVICE OF PROCESS | | | | | | |
| .105 | X | X | | | | X |
| .110 | X | X | | | | X |
| .115 | X | X | | | | X |
| .120 | X | X | | | | X |
| .125 | X | X | | | | X |
| .130 | X | X | | | | P |
| .135 | X | X | | | | X |
| .140 | X | X | | | | X |
| .145 | X | X | | | | X |
| .150 | X | X | | | | X |
| .155 | X | | | | | |
| .160 | X | | | | | |
| .165 | X | X | | | | X |
| .170 | X | X | | | | P |
| .175 | X | X | | | ORE | P |
| ARTICLE 3. FORMATION OF CORPORATIONS | | | | | | |
| .205 | X | | | | | |
| .208 | X | X | X | | | |
| .210 | X | X | X | | DEL | |
| .213 | X | X | | | | |
| .215 | X | X | | | | |
| .218 | X | X | | | | P |
| .220 | X | X | | | | P |
| .223 | X | X | | | | X |
| .225 | | | X | | DEL | X |
| .228 | | | X | | DEL | P |
| .230 | | | X | | | P |
| .233 | | | X | | | |
| ARTICLE 4. CORPORATE FINANCE | | | | | | |
| .305 | X | X | X | | | X |
| .308 | X | X | | | | X |
| .310 | X | X | | | | P |
| .313 | X | X | | | | P |
| .315 | X | X | | | | P |
| .318 | X | X | | | | P |
| .320 | X | X | | | | P |
| .323 | X | X | | | | P |
| .325 | | | X | | | P |

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| .328 | X | X | | | | X |
| .330 | X | X | | | | X |
| .333 | X | X | | | | X |
| .335 | X | X | | | | X |
| .338 | X | X | | | | X |
| .340 | X | X | | | | X |
| .343 | | X | | | | P |
| .345 | X | X | | | | P |
| .348 | X | X | | | | P |
| .350 | X | X | | | | P |
| .353 | X | X | | | | |
| .355 | X | X | | | | X |
| .358 | | | X | | | P |
| .360 | | | X | | | P |
| .363 | | | X | | | P |
| .365 | | | X | | | P |
| .368 | | | X | | | |
| .370 | | | X | | | |
| .373 | X | X | | | | X |
| .375 | X | | | | | X |
| .378 | | | X | | | P |
| .380 | | | X | | | |
| .383 | | | X | | | |
| .385 | | | X | | | P |
| .388 | | | X | | | X |
| .390 | X | | | | | |

ARTICLE 5. MEETINGS OF SHAREHOLDERS

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| .405 | | X | P | | | P |
| .408 | | P | | | | X |
| .410 | X | X | | | | X |
| .413 | X | X | | | | X |
| .415 | X | X | P | | | X |
| .418 | | | X | | | X |
| .420 | | X | P | | | P |
| .423 | X | X | P | | | P |
| .425 | X | X | P | | | P |
| .428 | | X | | | | |
| .430 | X | X | | | | P |
| .433 | | | X | | | P |
| .435 | | P | | P | | P |
| .438 | X | X | | | | X |

ARTICLE 6. DIRECTORS AND OFFICERS

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| .450 | | X | | | | P |
| .453 | | | | P | | P |
| .455 | | X | | | | P |
| .458 | | | X | | | |
| .460 | | | X | | | P |
| .463 | | | X | | | X |
| .465 | | | X | | | P |

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| .468 | | X | | | | X |
| .470 | | | X | | | X |
| .473 | X | X | | | | X |
| .475 | X | X | | | | X |
| .478 | | | X | | | X |
| .480 | X | X | | | | X |
| .483 | | | X | X | | X |
| .485 | | X | X | | | |
| .488 | | | | P | | |
| .490 | X | X | | | | X |

ARTICLE 7. AMENDMENTS AND CHANGES

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| .502 | X | X | X | | | X |
| .504 | X | X | X | | | P |
| .506 | X | X | | | | P |
| .508 | | | X | | | X |
| .510 | X | | | | | |
| .512 | X | | | | | X |
| .514 | X | X | | | | P |
| .516 | X | | | | | P |
| .518 | X | | | | | P |
| .520 | X | | | | | P |
| .522 | | X | | | | X |
| .524 | | X | | | | X |
| .526 | | X | | | | X |

ARTICLE 8. ORGANIC CHANGE

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| .530 | X | X | | | | X |
| .532 | X | X | | | | X |
| .534 | X | X | | | | |
| .536 | X | X | | | | X |
| .538 | X | X | | | | X |
| .540 | X | X | | | | X |
| .542 | | | X | | | |
| .544 | | X | | | | P |
| .546 | X | X | | | | |
| .548 | X | X | | | | X |
| .550 | | X | | | | X |
| .552 | X | X | | | | X |
| .554 | | X | | | | X |
| .556 | | X | | | | X |
| .558 | | X | | | | X |
| .560 | | X | | | | P |
| .562 | | X | | | | X |
| .564 | X | | | | | |
| .566 | | X | | | | X |
| .568 | | X | | | | P |
| .570 | X | X | | | | P |
| .572 | X | X | | | | P |
| .574 | X | X | | | | P |
| .576 | | X | | | | X |

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| .578 | | X | | | | P |
| .580 | X | X | | | | P |
| .582 | | X | | | | P |
| .584 | | | X | | | P |
| .586 | X | X | | | | |

ARTICLE 9. DISSOLUTION

| | | | | | | |
|---|---|---|---|---|---|---|
| .605 | X | | X | | | P |
| .608 | X | X | X | | | X |
| .610 | X | X | X | | | P |
| .613 | X | X | | | | P |
| .615 | | | X | | | X |
| .618 | X | X | X | | | P |
| .620 | | | X | | | |
| .623 | X | X | | | | |
| .625 | X | X | | | | |
| .628 | | | X | | | P |
| .630 | | | X | | | |
| .633 | X | X | | | | P |
| .635 | X | | | | ORE | X |
| .638 | X | X | | | | |
| .640 | | | X | | | P |
| .643 | X | X | X | | | |
| .645 | | | X | | | |
| .648 | | | X | | | X |
| .650 | | | X | | | P |
| .653 | | | X | | | X |
| .655 | | | X | | | |
| .658 | X | X | | | | |
| .660 | | | X | | | P |
| .663 | | | X | | | |
| .665 | | | X | | | |
| .668 | | | X | | | |
| .670 | | | X | | | |
| .673 | | | X | | | |
| .675 | | | X | | | X |
| .678 | X | X | | | | X |

ARTICLE 10. FOREIGN CORPORATIONS

| | | | | | | |
|---|---|---|---|---|---|---|
| .705 | X | X | | | | X |
| .708 | X | X | | | | X |
| .710 | X | X | | | | X |
| .713 | X | X | | | | X |
| .715 | X | | | | | X |
| .718 | X | X | | | | X |
| .720 | X | X | | | | X |
| .723 | X | X | | | | X |
| .725 | X | X | | | | X |
| .728 | X | X | | | | X |
| .730 | X | X | | | | X |
| .733 | X | X | | | | X |

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| .735 | X | X | | | | X |
| .738 | X | X | | | | P |
| .740 | X | X | | | | X |
| .743 | X | X | | | | P |
| .745 | X | X | | | | X |
| .748 | X | X | | | | X |
| .750 | X | X | | | | X |
| .753 | X | X | | | | X |
| .758 | X | X | | | | X |
| .760 | X | X | | | | X |
| .763 | X | X | | | | P |
| .765 | X | X | | | | |
| .768 | X | X | | | | |
| .770 | X | X | | | | |
| .773 | X | X | | | | |
| .775 | X | X | | | | |
| .778 | X | X | | | | X |
| .780 | X | X | | | | P |
| .783 | X | X | | | | |
| .785 | X | X | | | | X |
| .788 | X | X | | | | X |

ARTICLE 11. REPORTS, FEES, AND PENALTIES

| | | | | | | |
|---|---|---|---|---|---|---|
| .805 | X | X | | | | P |
| .808 | X | X | | | | P |
| .811 | X | X | | | | X |
| .813 | X | | | | | |
| .815 | X | X | | | | |
| .818 | X | X | | | | |
| .820 | X | X | | | | |
| .823 | X | X | | | | |
| .825 | X | X | | | | P |
| .828 | X | X | | | | P |
| .830 | X | X | | | | P |
| .833 | X | X | | | | P |
| .835 | X | X | | | | P |
| .838 | X | X | | | | P |
| .840 | X | X | | | | P |
| .843 | X | X | | | | P |
| .850 | X | X | | | | |
| .853 | X | X | | | | |
| .855 | X | X | | | | |
| .858 | X | X | | | | |
| .860 | X | | | | | |
| .863 | X | X | | | | X |
| .865 | X | | | | | |
| .868 | X | X | | | | P |
| .870 | X | | | | | |

ARTICLE 12. MISCELLANEOUS PROVISIONS

| ACC | ABCL | MBCA | GCL | NBCL | OTHER | RMBCA |
|---|---|---|---|---|---|---|
| .905 | | | X | | | |
| .910 | P | | | | | X |
| .915 | X | X | | | | P |
| .920 | | | | X | | X |
| .925 | P | P | | P | | P |
| .930 | | | | X | | |
| .935 | X | X | | | | X |
| ARTICLE 13. GENERAL PROVISIONS | | | | | | |
| .950 | X | X | | | | X |
| .953 | X | | | | | |
| .955 | | | P | P | | X |
| .958 | | | X | | | |
| .960 | X | | | | | |
| .963 | | | | X | | X |
| .965 | X | X | | P | | X |
| .968 | | | X | | | |
| .970 | | | X | | | |
| .990 | P | P | P | | | P |
| .995 | P | | | | | P |

"X" indicates the presence of identical or functionally identical statutory language.

"P" indicates the presence of partial congruence between the ACC and the source code or the RMBCA. The "origin" and "comparison" discussion for each section of the ACC should be consulted in order to determine the differences.

ACC: CSSB 246/HB 343, The Alaska Corporations Code

ABCL: AS 10.05, The Alaska Business Corporations Law

MBCA: Model Business Corporations Act

GCL: California General Corporations Law

NBCL: New York Business Corporations Law

RMBCA: Tentative exposure draft of the Revised Model Business Corporations Act

PART TWO

A COMPARATIVE SURVEY OF THE CONTENTS

of the

PROPOSED ALASKA CORPORATIONS CODE

with the

REVISED MODEL BUSINESS CORPORATIONS ACT

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## *ARTICLE 1. CORPORATE PURPOSES AND POWERS*

### *Section .005 PURPOSES*

*ORIGIN: ACC Section .005 alters the content of AS 10.05.003 to conform to the content of Section 3 of the Model Business Corporation Act (MBCA).*

*SUMMARY OF COVERAGE: ACC Section .005 permits an Alaska corporation to be formed for any lawful purpose(s) other than insurance and banking. Stock and mutual insurance companies are formed under AS 21.69; the companies are of a corporate nature and are governed by the ACC to the extent provided in AS 21.69.020. Reciprocal insurance companies, noncorporate in nature, are formed under AS 21.75.*

*COMPARED WITH THE FINAL DRAFT OF THE RMBCA: ACC Section .005 is functionally identical to RMBCA Section 3.01(a). The limitations spelled out in RMBCA Section 3.01(b) are found in ACC Section .010.*

### *Section .010 GENERAL POWERS*

*ORIGIN: ACC Section .010 is predicated upon AS 10.05.009 which was, in turn, predicated upon Section 4 of the Model Business Corporation Act.*

*SUMMARY OF COVERAGE: The introductory phrase was adopted from Section 207 of the California General Corporation Law (hereafter the "GCL") and makes explicit that while the general grant of powers are co-extensive with that of a natural person, this grant is subject to limitation by provisions in the articles of incorporation or other law. Subsection (6) makes direct reference to the new provisions on loans to officers and directors (Section . 485). Subsection (15) adds "stock option plans" to the list of incentive plans which a corporation may establish for its directors, officers and employees.*

*COMPARED WITH THE FINAL DRAFT OF THE RMBCA: Section 3.02 also contains a general grant and specific enumeration of corporate powers. It is functionally identical to ACC Section .009, except that it does not contain express authority to make loans to corporate officers and directors. Within the RMBCA loans to directors are governed by Section 8.32. They are licit if approved by a majority of the outstanding voting shares. The loan may also be authorized by the direc-*

*tors if the board, in its collective judgment, determines that the loan is in the best interest of the corporation.*

*Section 3.02 follows ACC Section .009 in specifically listing "share option plans" among the incentive plans which a corporation may establish. The idea that a corporation has powers which are presumptively coextensive with those of a natural person is explicit in ACC Section .009. It is left to implication in the comment to RMBCA 3.02.*

*Section .015 DEFENSE OF ULTRA VIRES*

*ORIGIN: ACC Section .015(a) is predicated upon Section 203 of the New York Business Corporation Law (hereafter the "NBCL"). It is a modified version of former AS 10.05.018 and Section 7 of the MBCA. Section .015(b) is new and is taken from Section 208 of the GCL.*

*SUMMARY OF COVERAGE: ACC Section .015 governs the limited circumstances in which a claim of "ultra vires" may affect the rights of third parties who have dealt with a corporate entity and the impact of such behavior in creating liability on the part of the corporate officers and directors of the corporation. While the concept of "ultra vires" is frequently included in the discussion of agency problems within the corporate framework, properly understood it is not a traditional doctrine of agency law. A transaction is ultra vires when it is beyond the powers of the corporation as those powers are conferred by law and the terms of the articles of incorporation.*

*COMPARED WITH THE FINAL DRAFT OF THE RMBCA: The provisions of ACC Section .015 and those of RMBCA 3.04 are functionally identical.*

*Section .020 LIMITATIONS ON AUTHORITY OF CORPORATE AGENTS*

*ORIGIN: ACC Section .020 is predicated upon GCL Section 208.*

*SUMMARY OF CONTENT: Unlike conduct assailed as beyond the powers of the corporation, a subject covered by ACC Section .015, Section .020 deals with the consequences of an abuse of authority which was within the power of the corporate principal to confer. The provisions of Section .020 confront the common law of agency as it has been applied to the unique problems generated by an artificial corporate person as principal. The thrust of Section .020 is to shift the risk of transactions which exceed the authority of corporate agents to the corporation thus relieving the interests of innocent third persons. Subsection (3) makes it clear that either the corporation or a shareholder suing in a derivative capacity may assert lack of authority in any action against the faithless agent.*

*COMPARED WITH THE FINAL DRAFT OF THE RMBCA: The official comment to RMBCA Section 3.04 makes it clear that the Model Act has no coverage of this important question at all. See pp. 3-17, 18.*

*Section .025 CONTRACTS OR CONVEYANCES BINDING DOMESTIC AND FOREIGN CORPORATIONS*

*ORIGIN: ACC Section .025 is predicated upon GCL Section 208.*

*SCOPE OF COVERAGE: ACC Section .025 settles two important questions associated with contracts or conveyances entered by corporate agents who have exceeded their actual authority. If the transaction is within the scope of the agent's "apparent authority", it is binding upon the corporate principal and upon the third party. Thus, the defect in the authority of the agent does not defeat the corporation's liability on the transaction, nor does it prevent it from acquiring rights against the third party measured by the terms of the transaction.*

*COMPARED WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA has no statutory provision covering this important question.*

## Notes

## *ARTICLE 2. NAME AND SERVICE OF PROCESS*

### *Section .105 CORPORATE NAME*

*ORIGIN: ACC Section .105 is a reenactment of AS 10.05.021 as amended.*

*SUMMARY OF COVERAGE: ACC .105 requires that a corporation adopt as part of its name one of the listed alternatives designed to warn third parties that they are dealing with a corporate entity. ACC .105 also prohibits a person from adopting a name that contains words suggesting a corporation unless that person has either been issued a certificate of incorporation in Alaska or has obtained a certificate of authority for a foreign corporation.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: ACC Section .105 is functionally identical to RMBCA Section 4.01(a) and (b). There are, however, differences in content.*

*RMBCA Section 4.01(a)(1) requires that a corporation include as part of its name one of the traditional words or abbreviation designed to indicate corporate status. In a break with the prior Model Act and exposure draft, the final version would allow this requirement to be satisfied by the inclusion of "words or abbreviations of like import in another language. . . ." The official comment merely indicates that the change has been made. It offers no justification. At least two reasons to oppose such permission come to mind. First, I doubt that many persons would appreciate the import of initials such as "GmbH" as a signal that this was a limited liability entity. Further, even if one knew that this was a German designation for a corporation she might be fooled into belief that the entity was <u>in fact</u> a German entity.*

*RMBCA Section 4.01(c) contains provisions whereby a corporation may give written consent to the use by another entity of a name which would otherwise be deceptively similar.*

*The final draft of Section 4.01(b)(4) requires that a corporate name be distinct from the name of a registered nonprofit corporation. This provision is not contained in the ACC.*

*ACC Section .105(b) continues a 1976 amendment by the terms of which the Legislature forbade a corporation from adopting a name which contained the word "city", "borough", or "village" or otherwise implying that the corporation is a municipality. Reflecting its detachment from Alaskan concerns, RMBCA Section 4.01 contains no similar prohibition.*

### *Section .110 RESERVATION OF CORPORATE NAME*

*Section .115 APPLICATION TO RESERVE CORPORATE NAME*

*Section .120 TRANSFER OF RESERVED NAME*

*ORIGIN: ACC Sections .110, .115, and .120 are reenactments without change of former AS 10.05.024, .027, and .030 which were, in turn, predicated upon Section 9 of the MBCA.*

*SUMMARY OF COVERAGE: ACC Sections .110, .115, and .120 set forth the natural or corporate persons who may reserve a corporate name.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 4.02 is functionally identical to these provisions of the ACC except for their substitution of the commissioner for the "secretary of state."*

*Section .125 REGISTRATION OF CORPORATE NAME*

*Section .130 USE OF SAME OR DECEPTIVELY SIMILAR NAME*

*Section .135 PROCEDURE FOR REGISTRATION OF CORPORATE NAME*

*Section .140 FEE FOR AND DURATION OF REGISTERED NAME*

*Section .145 RENEWAL OF REGISTERED NAME*

*ORIGIN: ACC Sections .125, .130, .135, .140, and .145 are reenactments of AS 10.05.033, 034, .036, .039, and .042, and are based on Sections 10 and 11 of the MBCA. Section .034 was added by the Legislature in 1966. Minor language changes have been incorporated to recognize the recently enacted scheme to allow the Department of Commerce and Economic Development to determine various fees by administrative regulation.*

*SUMMARY OF COVERAGE: ACC Sections .125, .130, .135, .140, and .145 provide for the registration, protection, duration, and renewal of a corporate name. Under ACC Section .130, registration of a corporate name gives the registered holder the right to seek an injunction against the use of that name or a deceptively similar name by another. The registered name must be renewed each year under ACC Section .145.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 4.03 combines the coverage of former Model Act Sections 10 and 11. Unlike ACC Section .130, RMBCA Section 4.03 does not explicitly confer exclusive right to the use of a registered corporate name, nor does it declare that a person who has registered the corporate name may enjoin the use of the same or a deceptively similar name. Section .130 clearly provides that the remedy available for abuse of a registered corporate* name is not limited to injunctive relief, but may be a cause of action for damages. RMBCA Section 4.03 contains no such provision.

## Section .150 REGISTERED OFFICE AND REGISTERED AGENT

ORIGIN: ACC Section .150 is a reenactment without change of AS 10.05.045 which was based on Section 12 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .150 establishes the requirement that a corporation maintain both a registered office and a registered agent in the State of Alaska. The agent is necessary for service of process; and, the office is required to serve as the depository for various books and records as provided or required by the the ACC.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.03 is functionally identical to ACC Section .150.

## Section .155 REGISTRATION OF AGENT BY NONRESIDENT WITH CONTROLLING INTEREST

ORIGIN: ACC Section .155 is a reenactment without substantive change of AS 10.05.791 as amended in 1980. A rewording has been undertaken to make explicit that the designated agent must be within the State of Alaska.

SUMMARY OF COVERAGE: In order that the commissioner may readily establish official contact with a nonresident possessed of a controlling interest (ACC Section .955(12)), ACC Section .155 requires such a person to designate an agent within Alaska upon whom notice and process may be served.
Service on the Section .155 agent is equivalent to personal service on the controlling nonresident. Section .155(b) enforces this requirement by forbidding, in the event of noncompliance, either the controlling person or the controlled corporation use of the courts of the State of Alaska.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Again, reflective of its concern with the problems of no particular jurisdiction, the content of the Revised Model Act contains no provision requiring designation of agents by nonresidents with a controlling interest.

## Section .160 FILING LIST OF REGISTERED CORPORATIONS WITH SUPERIOR COURT; UPDATING AND PUBLISHING

ORIGIN: ACC Section .160 is a reenactment of AS 10.05.048 which, has been changed to require yearly compilation and weekly updating of the stipulated information.

SUMMARY OF COVERAGE: ACC Section .160 reflects the view that *it is vital that the practicing attorney be able to quickly ascertain information concerning the corporate name, address of the registered office, and the name and address of the registered agent of both domestic and authorized foreign corporations. Both geographical and communications considerations have dictated that such information be available locally and updated frequently.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.20 contains absolutely no provision requiring that this vital information be maintained or made available.*

## *Section .165 CHANGE OF REGISTERED OFFICE OR AGENT*

*ORIGIN: ACC Section .165 is a reenactment of AS 10.05.051 which was, in turn, predicated upon Section 13 of the MBCA.*

*SUMMARY OF COVERAGE: ACC Section .165 establishes the procedure whereby a domestic or foreign corporation may change its registered office or agent.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.02(a) is identical to ACC Section .165. Subsection (b) differs only in that the ACC has a uniform provision on filing with the commissioner which is not reflected in the RMBCA.*

## *Section .170 CHANGE OR RESIGNATION OF REGISTERED AGENT*

*ORIGIN: ACC Section .170 is a reenactment of AS 10.05.054, which was based on Section 13 of the MBCA. The final sentence has been changed to permit a resignation of the registered agent, to become effective sooner than 30 days after the filing of written notice with the commissioner if the corporation appoints a successor within this shortened period. This change is based upon Section 57.070(3) of the Oregon Revised Statutes.*

*SUMMARY OF COVERAGE: ACC Section .170 establishes the procedure by which a registered agent may change address or resign. Unless and until the registered agent follows these statutory procedures, the commissioner may continue to regard the last address of record as effective for all notice provisions under the ACC.*

*Subsection (b) sets forth the procedures which must be observed for a registered agent to effectively resign. Unless and until such procedures are followed, the commissioner may continue to deal with the agent and effectively notice or bind the corporate principal. In the event that such an agent ceases to function without observing these statutory provision, there would be a breach of the contract of agency with the corporation but such a breach would not serve as a defense to the corporate principal in dealing with or ac-*

*counting to the commissioner.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.03 does not provide for a shortened effective date if the corporation appoints a successor registered agent. The minimum information to be contained in the written resignation is governed by Section 5.02. The "circularity problems" noted in the official comment to RMBCA Section 5.03 have been directly solved by ACC Section .170(b). The commissioner is directed to mail a copy of the written notice of resignation to "the corporation at its principal office."*

## *Section .175 SERVICE OF PROCESS ON CORPORATION*

*ORIGIN: ACC Section .175(a), (c), and (d) are a reenactment of AS 10.05.057, and are based on Section 14 of the MBCA. ACC Section .175(b) is new to the law of Alaska. It is taken from Section 57.075(3) and (4) of the Oregon Revised Statutes and eliminates the commissioner's burden under prior law to transmit process served on the commissioner given the default of a registered agent. Under ACC Section .175(b), that burden is placed upon the party seeking to initiate litigation against the corporation.*

*SUMMARY OF COVERAGE: To assure that notice sent to a corporation without a registered agent is the best available under the circumstances, ACC Section .175(b)(2)(B) requires that the moving party send notice to such address as it knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice. Under ACC Section .175(b)(3), the moving party is obliged to file proof of the attempted service in the appropriate superior court or other tribunal.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.04 admits that there were substantial problems with the provisions of former MBCA Section 14. It, too, eliminates the burden formerly placed upon a state official to serve the substitute process. Unlike the Oregon law and the ACC, RMBCA Section 5.04(b) does not require that a best effort be made to find the actual address of the corporation. It is content if the notice is mailed to the principal office. Given the official comment's express solicitude that actual notice be communicated to the foreign corporation, it would appear that the Oregon/ACC approach is superior.*

Notes

## ARTICLE 3. FORMATION OF CORPORATIONS

### Section .205 INCORPORATORS

ORIGIN: ACC Section .205 is a reenactment with one change of AS 10.05.252 as amended in 1976 by the Legislature.

SUMMARY OF COVERAGE: The minimum age for an incorporator has been reduced from 19 to 18 to bring Section .205 into conformity with Alaska's general policy on legal majority. ACC Section .205 varies from Section 53 of the MBCA in the requirement that incorporators be natural persons. This is a continuation of prior Alaska law.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.01 differs from ACC Section .205 and existing Alaska law by permitting artificial persons (including unincorporated associations, partnerships, trusts, estates, and governments) to act as incorporators. There is no minimum age for natural persons to so function. Further, the requirement that the incorporators sign a verified copy of the articles has been eliminated.

### Section .208 ARTICLES OF INCORPORATION

### Section .210 ARTICLES OF INCORPORATION; OPTIONAL PROVISIONS

ORIGIN: ACC Section .208 subsections (1),(2), and (3) are predicated upon AS 10.05.255(1), (3), and (10), which were derived from Section 54 of the MBCA. Subsections (4) and (5) are taken from Section 202 of the GCL. Subsection (6) reenacts AS 10.05.255(13) as amended. The provision of the ACC governing the content of the articles is modeled upon Sections 202 and 204 of the GCL. ACC Section .210 is based upon GCL Section 204, Delaware Section 102(b)(4) and (5), and AS 10.05.255.

SUMMARY OF COVERAGE: In addition to the specific changes noted, Sections .208 and .210 make vital a drafting decision which was unimportant under prior Alaska law. The goal of the ACC is to follow California's example requiring that the articles of incorporation function as the fundamental agreement which structures the basic purpose of the corporation, the prerogatives of management, and the rights of shareholders. Section .208 requires that several fundamental decisions be addressed in the articles. While the provisions may be amended by following the procedures outlined in the ACC, at all times the subject matter content of Section .208 must be defined in the current corporate articles. Section .210 enumerates provisions which are optional as contents of the articles. The critical point is that if the subject matters enumerated in Section .210(1) are not settled by the initial or amended provisions of the articles, they may not be resolved or governed by the bylaws, shareholder agreements, or any other form of treaty.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: An initial comparison between RMBCA Section 2.02 and ACC Sections .208 and .210 would suggest significant differences. It would be misleading. It is true that RMBCA Section 2.02(a) has a rather short list of mandatory provisions when contrasted with ACC Section .208. In part this is because ACC Section .208(4) reflects Alaska's concern for identification of alien affiliates, a concept unknown to the Model Act. Further, there is no single provision in the RMBCA which is comparable to ACC Section .210 in gathering into one convenient place all of the optional decisions which cannot be made effective unless they are reflected in the articles. The MBCA does have such requirements, only they are scattered throughout the act. See the official comment to RMBCA Section 2.02 at page 2-9,10.

The topics which are conveniently gathered in ACC Section .210(1) and scattered throughout the lengthy text of the RMBCA are not identical. In general, it may be said that the ACC is more protective of the interests of shareholders (both actual and potential) and their interest in locating in one document a definitive statement of these basic decisions. Under the RMBCA, such decisions could be found in extrinsic resolutions or agreements which might be known and available to some but not to others.

Section .213 FILING OF ARTICLES OF INCORPORATION

ORIGIN: ACC Section .213 continues the policy of AS 10.05.258, which had been predicated upon Section 55 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .213 also reflects the general scheme of the ACC to standardize the procedures for filing with the commissioner as set forth in ACC Section .910.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.03 suggests to the legislatures of the several states that they abolish the concept and practice of a "certificate of incorporation." Instead, filing is completed upon delivering a copy of the articles to the secretary of state and having it "stamped and filed." There is to be no certificate of incorporation. Elimination of the certificate of incorporation would destroy the "bright line" event selected by the Commission for fixing the de jure commencement of corporate existence.

*Section .215 DISCLOSURE OF CORPORATE PURPOSES*

*ORIGIN: ACC Section .215 is a reenactment without change of AS 10.05.259, as amended in 1980.*

*SUMMARY OF COVERAGE: ACC Section .215 perpetuates a decision of the Legislature made in 1980 which requires that a corporation disclose to the Department of Commerce and Economic Development the activities in which it will initially engage. This is not done for the purpose of limiting corporate activity. Under the ACC, incorporation can still be as general as the pursuit of "any lawful purpose." The information is elicited so that the state may obtain a clearer idea of the dimension of economic activity.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Again, reflecting its lack of familiarity with the aspirations of the Alaska Legislature, the standard recommended text of the RMBCA contains no provision requiring disclosure of corporate purposes.*

*Section .218 EFFECT OF ISSUANCE OF CERTIFICATE OF INCORPORATION*

*ORIGIN: ACC Section .218 is derived from AS 10.05.810.*

*SUMMARY OF COVERAGE: ACC Section .218 fixes the issuance of the certificate of incorporation as the point in time when the de jure existence of a corporation commences. In adopting this "bright line" rule, the ACC goes beyond Section 56 of the MBCA and AS 10.05.810 to expressly abolish the common law doctrines of de jure compliance, de facto incorporation, and corporation by estoppel.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.03 would also create a "bright line" event fixing the initial existence of a corporation. Under RMBCA Section 2.03, that event is "the secretary of state's filing of the articles of incorporation. . . ."*

*RMBCA Section 2.04 leaves the current body of conflicting and confusing common law on de facto incorporation and corporation by estoppel unreformed. This notwithstanding the official comment that: "Incorporation under modern statutes is so simple and inexpensive that a strong argument may be made that nothing short of filing articles of incorporation should create the privilege of limited liability." ACC Section .218 adopts that "strong argument".*

*Section .220 ASSUMPTION OF PURPORTED POWERS OF NONEXISTENT CORPORATION: LIABILITY*

ORIGIN: ACC Section .220 is a modification of former AS 10.05.810, which had been predicated upon Section 146 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .220 determines the liability consequences of persons who assume to act as a corporation for which there has been no issuance of a certificate of incorporation (Section 218). Unless there is a written agreement, wherein a third party agrees to deal on a limited liability basis with individuals purporting to act for a corporation for which no certificate has been issued, those persons are jointly and severally liable.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.04 imposes joint and several liability on all persons purporting to act as or on behalf of a corporation who knew that there was no incorporation [effective filing with the secretary of state]. It does nothing to relieve the conflicting interpretations given to prior Model Act provisions dealing with the consequences of defective incorporation. See, e.g., Sherwood & Roberts-Oregon, Inc. v. Alexander, 269 Or. 389, 525 P.2d 135 (1974), which is in direct conflict with Heintze Corp. v. Northwest Tech-Manuals, Inc., 7 Wash. App. 759, 502 P.2d 486 (Div.One. 1972).

## Section .223 ORGANIZATION MEETING

ORIGIN: ACC Section .223 is a reenactment of AS 10.05.267 and is based upon Section 57 of the MBCA. Language modifications have been made to coordinate with Section .210(3), which makes optional the naming of initial directors in the articles. Another modification is the phrase in the first sentence which is intended to preclude a construction of Section .223 as a precondition to the attainment of corporate existence.

SUMMARY OF COVERAGE: ACC Section .223 defines the transition by which the entity being formed passes from the control of incorporators to that of the initial board of directors. In a reform designed to facilitate corporate formation, the articles are competent to name initial directors in which case they, and not incorporators, hold the initial meeting.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.05 parallels the ACC and permits the articles to name the initial directors.

## Section .225 POWERS OF INCORPORATORS BEFORE DIRECTORS' ELECTION

ORIGIN: ACC Section .225 is new to Alaska law being predicated upon Section 210 of the GCL and Section 107 of the

*General Corporation Law of the State of Delaware.*

*SUMMARY OF COVERAGE: Since the naming of initial directors in the articles is optional, Section .255 defines the powers which incorporators shall have in the event that they, and not the initial directors, shall hold the organizational meeting.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.05(2) is in substantial accord with the California, Delaware, and ACC innovations.*

*Section .228 BYLAWS: ADOPTION, AMENDMENT OR REPEAL*

*ORIGIN: ACC Section .228 is taken from Section 211 of the GCL and works a major change in AS 10.05.135.*

*SUMMARY OF COVERAGE: Under current Alaska law the power to adopt, amend, and repeal provisions of the bylaws is vested exclusively in the board unless reserved to the shareholders in the articles of incorporation.*

*Absent provisions in the articles, ACC Section .228 vests equal powers in the board and the shareholders with respect to determining the content of the bylaws. However, the articles are competent to restrict or eliminate the power of either the board or the outstanding shares. There are thus three possibilities: (1) concurrent, independent power in the board and the outstanding shares (the default rule); (2) an article provision restricting or eliminating the power of the board; or, (3) an article provision restricting or eliminating the power of the outstanding shares.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 10.20 provides a default rule identical to ACC Section .228. In the absence of a provision in the articles, the power to adopt, amend, or repeal bylaws is shared by the directors and shareholders. The RMBCA does not use the term "adopt", but the official comment makes explicit that it is to be included within the meaning of "amend." Under RMBCA Section 10.20(a)(1), the articles are competent to extinguish the power of the board. Apparently they cannot extinguish the power of the shareholders who, under RMBCA Section 10.20(b), are guaranteed power over the content of the bylaws. Thus the flexibility available under California, Delaware, and ACC provisions is not attainable under the RMBCA.*

*The ACC's concern that shareholders ultimately control the corporation is manifested in Section 460 wherein they are given the right to remove any or all of the directors at any time for any reason.*

*Section .230 BYLAWS: NUMBER OF DIRECTORS AND OTHER CONTENT*

*ORIGIN: ACC Section .230 is predicated upon Section 212 of* *makes a written request.*

*AS 10.05.237 through .249 cover the content of ACC Section .233, but do not clearly obligate a foreign corporation to make a copy of its bylaws available to requesting shareholders who are citizens of Alaska.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains a similar requirement although it is somewhat difficult to locate. Section 16.02 directs that a corporation keep copies of the records required in Section 16.01(c). One of the items set forth in in Section 16.01(c) is a copy of the corporate bylaws.*

Notes

## Section .305 CREATION, CLASSES, AND ISSUANCE OF SHARES

ORIGIN: ACC Section .305 is premised upon GCL Section 400, with modifications to accommodate MBCA Sections 15 and 16, which were the basis of AS 10.05.060 and .069. Section .305(a) replaces AS 10.05.060 without substantive change, and Section .305(b) replaces AS 10.05.069 without substantive change.

SUMMARY OF COVERAGE: ACC Section .305 permits great flexibility to the corporation in creating distinctions as among various classes or series of shares with respect to voting rights, as well as preferences or privileges regarding distributions during the life or at the dissolution of the entity.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.01 is functionally identical to ACC Section .305. ACC Section 210(6)'s warning that the rights, privileges, and limitations on classes of stock must be contained in the articles is reflected in RMBCA Section 6.01(b).

## Section .308 ISSUANCE OF PREFERRED OR SPECIAL CLASSES OF SHARES

ORIGIN: ACC Section .308 is largely a reenactment of AS 10.05.063, which was predicated upon Section 15 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .305 allows the establishment of classes and series with varying rights and liabilities. ACC Section .308 specifies a number of particulars which may be the subject of variation between different classes. This list should aid the practitioner in discussing with clients the variations possible in such areas as redemption, dividend preferences, liquidation preferences and conversion options.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.02 is functionally identical to ACC Section .308.

## Section .310 ISSUANCE OF SHARES IN SERIES

## Section .313 VARIATION IN RIGHTS AND PREFERENCES OF SHARES

## Section .315 SERIES RIGHTS AND PREFERENCES ESTABLISHED BY BOARD

## Section .318 MANNER OF ESTABLISHING SERIES

## Section .320 FILING OF STATEMENT BEFORE ISSUANCE OF SERIES

ORIGIN: ACC Section .310 is based upon AS 10.05.066 and MBCA Section 16 without substantive change.

MBCA Section 16 and AS 10.05.069 form the basis for ACC Section 313. Subsection (7), which permits a variation in voting rights in preferred or special classes, is new to Alaska law. The provision was added to MBCA Section 16 in 1966, after enactment of AS 10.05.069. This section thus represents an updating of Alaska law to conform to the Model Act.

ACC Section .315 is predicated upon MBCA Section 16 and reenacts AS 10.05.072 without substantive change.

ACC Section .318 is a reenactment without substantive change of AS 10.05.075 and MBCA Section 16.

ACC Section .320 is essentially a reenactment of AS 10.05.078, which was predicated upon MBCA Section 16. A modification has been made to the language of Section .320(a) to accord with the broader power of delegation to the board to fix by resolution an unissued class.

ACC Section .323 is a reenactment of AS 10.05.084, which was modeled upon Section 16 of the MBCA. A wording change has been made to reflect the broader power of a board to fix by resolution the rights and privileges of an authorized but wholly unissued class.

SUMMARY OF COVERAGE: ACC Section .310 makes clear that preferred and special classes of shares may be divided into series.

ACC Section .313 enumerates the rights and preferences which may vary between series of the same preferred or special class of shares.

ACC Section .315 specifies that the board may be granted the power by the articles to divide a class into series and fix the relative rights and preferences of the shares of a series. This power is subject to any limitation placed upon it by the articles or by ACC Sections 305-323.

ACC Section .318 specifies the procedure for establishing a series.

ACC Section .320 vindicates the interest of the state in securing information as to the equity interests outstanding for Alaska corporations. This information is supplied by the articles or any amendment thereto in cases not involving board power to fix the relative rights and preferences. However, when the power has been delegated to the board (ACC Section .208(5)(B)(C)), Section 320 requires that this information be filed with the commissioner.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.03 establishes with fewer guidelines to the practicing lawyer, the authority, scope, manner, and steps which must be taken to create series within a class of preferred shares and *to report the same to the secretary of state.*

*RMBCA Section 6.03 departs from prior provisions of the Model Act and the statutory law of all states, including Alaska, by permitting creation of a repurchase obligation in the corporation with respect to all or a part of a series. This precedent breaking suggestion would create a "put" in the hands of the holders of such shares to force the corporate issuer to reacquire the stock.*

## *Section .325 REDEMPTION OF SHARES; CREATION OF SINKING FUND; REPURCHASE AGREEMENTS*

*ORIGIN: ACC Section .325 is new and has no precedent in Alaska law. It is taken from GCL Section 402(a), (b), and (d).*

*SUMMARY OF COVERAGE: ACC Section 325 covers three crucial questions: (1) it establishes the right of the corporation to create classes or series of shares which are redeemable at the option of the corporate issuer; (2) it forbids (subject to an exception for an open-end investment company) the creation of shares which vest a right to demand redemption in the shareholders; and, (3) it permits the creation a sinking fund or similar provision, or an agreement outside of the articles which covers the subject of redemption.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.01(d) covers the topics addressed in ACC Section .325. Under the RMBCA, the extent of redemption rights, if any, must be authorized in the articles. It would thus appear that the flexibility attainable under ACC Section .325(c) is not possible under the RMBCA.*

## *Section .328 IRREVOCABILITY OF SUBSCRIPTIONS FOR SHARES*

*ORIGIN: This section is a verbatim reenactment of AS 10.05.087, modeled after MBCA Section 17.*

*SUMMARY OF COVERAGE: A subscription for shares of a corporation to be organized is basically a promise to buy shares under specified terms. Many common law cases have held that a subscription is deemed an offer and as such inherently revocable at any time prior to acceptance. These holdings cast doubt upon the ability of promoters to insure an adequate financial start for a fledgling corporate entity. In order to settle the issue of the nature of a subscription, provide a fair result to those who act in reliance on subscriptions, and put an end to any litigation over the question of revocability, ACC Section .328 makes a subscription irrevocable for a period of six months.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.20(a) is identical to ACC Section .328.*

Section. 330 PAYMENT OF SUBSCRIPTION FOR SHARES

ORIGIN: ACC Section .330 is in substance a reenactment of AS 10.05.090. Minor changes in language have been made to conform Alaska law to MBCA Section 17.

SUMMARY OF COVERAGE: ACC Section .330 places the power to determine the time of payment for subscriptions with the board. A call for payment by the board must be uniform as to all shares of the same class or series.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.20(b) and (c) is identical to ACC Section .330. Section 6.20 controls share subscriptions issued before incorporation. The initial board is given complete control over their disposition. Section 6.20(f) states that subscriptions entered into after incorporation are treated as a contract between the corporation and the subscriber and governed by Section 6.21. Unless the shareholders reserve powers granted under Section 6.21, the board has the power to control the disposition of post incorporation subscriptions.

Section .333 FORFEITURE OF SHARES FOR DEFAULT IN PAYMENT

ORIGIN: ACC Section .333 reenacts AS 10.05.093, which was based upon MBCA Section 17. The terms "penalties" and "penalty" have been changed to "remedies" and "remedy" to reflect the approved case law construction.

SUMMARY OF COVERAGE: ACC Section .333 establishes the general rights of the corporate issuer in the event of default in the payment obligation for shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.20(d) and (e) are identical to ACC Section .333.

Section .335 CONSIDERATION FOR SHARES

Section .338 PAYMENT FOR SHARES

Section .340 JUDGMENT OF BOARD OR SHAREHOLDERS AS TO VALUE OF CONSIDERATION CONCLUSIVE

ORIGIN: ACC Section .335 retains the essence of AS 10.05.096, which was derived from MBCA Section 18. Much of the former section has been deleted in the wake of the new financials (ACC Sections .358 to .370), which eliminate the concepts of par value, treasury shares, stated capital, and surplus accounts.

ACC Section .338 is a verbatim reenactment of AS

10.05.099, which was derived from Section 19 of the MBCA.

ACC Section .340 is a reenactment of AS 10.05. 102, which was modeled upon Section 19 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .335 recognizes two modes for fixing the amount of consideration (expressed in dollars) for the issuance of shares. Unless the power has been reserved to the shareholders in the articles (ACC Section .210(1)(H)), it is vested in the board. The exercise of this power is subject to the fraud standard articulated in ACC Section .340.

ACC Section .338 specifies what may and may not be received as consideration for shares. Common law authorities which have attempted to prevent "watered shares" by requiring that consideration be limited to cash are rejected in favor of a more realistic recognition that the corporation may be advantaged by the receipt of other valuable property (tangible and intangible) as well as services.

ACC Section .340 sets proof of fraud as the standard necessary to overturn a determination of the value of consideration received by the corporate issuer. The most common victim of an improper consideration exchanged for shares is the corporate creditor whose claims against the entity go unsatisfied in the wake of corporate bankruptcy, dissolution, or simple door-closing. The ACC provides considerable protection to creditors in its provision on financials and in ACC Section .488 on secondary liability of officers and directors. These provisions substantially mitigate the harshness to creditors of the fraud standard provided in ACC Section .340.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.21 is functionally identical to ACC Sections .335, .338, and .340.

## Section .343 STOCK RIGHTS AND OPTIONS

ORIGIN: ACC Section .343 is new to Alaska law and is predicated upon Section 20 of the MBCA with one modification. This section eliminates the final sentence of the Model Act provision to conform to the financial provisions of the ACC. This section was adopted to clarify and regulate the exercise of the the corporation's right to issue stock rights and options under the general power to contract.

SUMMARY OF COVERAGE: Unless otherwise defined or restricted in the article, ACC Section .343 gives the corporation acting through its board broad powers to create and issue rights or options covering authorized but unissued shares of any class or classes. The only substantive command of ACC Section .343 is that if such rights or options are to be made available to directors, officers, or employees of the corporation, or to any subsidiary but not to the shareholders generally, issuance shall not be licit until the plan is approved by the *outstanding shares.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.24 is identical to ACC Section .343, except that it does not protect shareholders by requiring their prior approval for a plan which would grant share rights and options to directors, officers, or employees only. The omission of this protection from the RMBCA is unprecedented in existing law and at variance with the Model Act. It may also contravene the rules of the New York Stock Exchange. See, Section A-25 of the Company Manual. The official comment state that shareholder approval of such a plan may be required in order to comply with SEC regulations.*

*Section .345 EXPENSES OF ORGANIZATION, REORGANIZATION, AND FINANCING*

*ORIGIN: ACC Section .345 is a reenactment of AS 10.05.111 with a minor language modification in order to parallel MBCA Section 22.*

*SUMMARY OF COVERAGE: ACC Section .345 recognizes that there are costs incurred in the issuance and marketing of shares, and protects the purchasers from further liability on the theory that since it received only the "net amount" from the gross price paid, the shares are not "fully paid" and thus "assessable."*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.28 is identical to ACC Section .345 except that it does not contain the express protection for purchasers precluding a claim that their shares are assessable. The framers of the tentative draft recognize that this language is standard in nearly all state codes, but feel that the problem has rarely arisen and the language is thus surplusage.*

*Section .348 CERTIFICATES REPRESENTING SHARES*

*Section .350 INFORMATION REQUIRED TO BE STATED ON CERTIFICATE*

*ORIGIN: ACC Section .348 is a verbatim reenactment of AS 10.05.114, and is modeled upon MBCA Section 23.*
*ACC Section .350 is a verbatim reenactment of AS 10.05.117 with the deletion of paragraph (4) regarding par value, which is no longer a matter of consequence under the ACC. With this modification Section .350 is predicated upon MBCA Section 23.*

*SUMMARY OF COVERAGE: ACC Section 348 is designed to facilitate the trend toward electronic substitutes for the traditional share certificate by permitting the seal of the corporate issuer to be affixed in a facsimile form, and to permit the signatures of the corporate officers to be facsimiles so* long as the "certificate" is countersigned by a transfer agent or a registrar who is not an employee of the corporation.

ACC Section .350 recognizes that information regarding the rights, preferences, and limitations of the shares is of importance to shareholders. If the corporation is authorized to issue only one class of stock, such shares enjoy all attributes of participation, control, and ownership defined by the ACC. However, if the corporate articles authorize the issuance of more than one class, it is both possible and likely that the relative rights, privileges, preferences, and limitations of the classes will differ. In this instance, ACC Section .350(a) requires that the corporation furnish to each shareholder either a statement or summary of the designations, preferences, limitations, and relative rights of shares of the class she has purchased, and similar basic information regarding the shares of any other authorized class. This information may be printed on the certificate, or the certificate may be imprinted with a legend that the corporation will furnish the information without charge.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: In yet another break with the prior act and the statutory content of Alaska and other states, the framers of the tentative draft recommend that the issuance of share certificates be optional with the board. This suggestion allows the corporation the ability to decide that it will issue shares which have no tangible expression at all. If the corporation does opt for share certificates, RMBCA Section 6.25(b) sets forth a minimum content which is identical to that of ACC Section .350(b). RMBCA Section 6.25(c) is functionally identical to ACC Section .350(a).

If the corporation opts to issue shares without certificates, RMBCA Section 6.26(b) requires that it send the "shareholder a complete written statement of the information required on certificates by Section 6.25(b) and (c)." As a result of this last provision, the only accomplishment of the suggested innovation would be to place the owners of "uncertificated shares" in grave danger that they would have no tangible evidence of their interest in the corporation. Should such an individual die, the burden of one charged with marshalling the assets of the estate would be obvious.

## Section .353 FULL PAYMENT REQUIRED FOR CERTIFICATE

ORIGIN: ACC Section .353 is a reenactment of AS 10.05.120, which is predicated upon Section 23 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .353 continues the Alaska policy of insisting that a share certificate may not be issued until the agreed consideration has been fully paid.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: This classical restriction from Section 23 of the original Model Act is repeated in a rather obscure manner in the RMBCA. In Section 6.21(c) and (d) shares are deemed non assessable when fully paid. Further, the corporation is empowered to escrow shares for which the full consideration has yet to be received.

Section .355 ISSUANCE OF FRACTIONAL SHARES OR SCRIPT

ORIGIN: ACC Section .355 is a verbatim reenactment of AS 10.05.123, and as such is a modification of Section 24 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .355 provides two basic options to the board under which it may deal with claims to fractional share ownership. The board may issue a certificate for a fractional share in which case the holder is entitled to the privileges conferred by shares of that class; or, the board may issue scrip entitling the holder to receive a certificate for a full share upon surrender of scrip aggregating a full share. If the second alternative is selected, the holder of the scrip is not entitled to the privileges of share ownership until the exchange of scrip aggregating a full share. Under subsection (c), the board may establish machinery to eliminate the outstanding scrip so long as it is noticed on the scrip at the time of issuance.

ACC Section .355 continues the Legislature's prior determination that it would not follow the Model Act which gives the board a third option, under which it could eliminate fractional shares by simply paying their fair market value. Given the difficulties experienced with that Model Act provision (see, e.g., Teschner v. Chicago Title & Trust Co., 59 Ill.2d 452, 322 N.E.2d 54 (1974)), that decision seems wise. A further reason for opting to continue prior Alaska policy is to prevent the use of this "cash out" option to facilitate management strategies to eliminate outside shareholders in a move to "go private". The technique is a board ordered reverse stock split that is calculated to reduce outsider shareholdings to fractions which can then be cashed out irrespective the wishes of those shareholders.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.04 is functionally similar to ACC Section .355, except that it grants the third, or "cash out", option previously rejected by the Alaska Legislature.

Section .358 DISTRIBUTIONS; CONDITIONS

Section .360 PROHIBITED DISTRIBUTION; INABILITY TO MEET MATURING DEBTS AND LIABILITIES

Section .363 PROHIBITED DISTRIBUTION OF JUNIOR SHARES; LIQUIDATION PREFERENCE

Section .365 PROHIBITED DISTRIBUTION TO JUNIOR SHARES; RATIO OF

ORIGIN: ACC Section .358 supplants the earned surplus test of AS 10.05.204(1) (payments of dividends) and .012 (repurchase of shares). With the additions and deletions noted in the Official Comment, it is premised upon the amended version of Section 500 of the GCL.

ACC Section .360 replaces AS 10.05.201 and is based on GCL Section 501.

ACC Section .363 is taken from GCL Section 502, and replaces AS 10.05.207(4).

ACC Section .365 adopts the language of GCL Section 503, and supplants AS 10.05.207(3).

SUMMARY OF COVERAGE: In general: ACC Sections .358 through .368 contain the essence of a major reform, in which antiquated and unworkable concepts of "balance sheet" and "earned surplus" (with the myriad of exceptions) are replaced by a simple ratio of assets to liabilities in determining the circumstances in which the board of directors has discretion to declare and pay distributions of corporate assets to shareholders. With minor modifications they are predicated upon the 1977 California General Corporations Law.

Pending passage of CSSB 246/HB 343, Alaska continues to rely upon a mid-1950's version of the Model Act. To its credit, the Alaska Legislature did not authorize certain aspects of Section 45 of the Model Act, which would have further enhanced the circumstances in which the board could dissipate corporate assets to the prejudice of creditors and the holders of preferred and other senior shares. Alaska, for instance, did not adopt a "nimble dividends" provision such as that suggested by alternative Section 45(a) of the Model Act. Further, if the distribution had to be charged to "capital accounts", Alaska insisted upon a two-thirds authorization of the shareholders rather than the simple majority suggested by the Model Act.

Notwithstanding these prudential rejections of Model Act suggestions, Alaska was committed to a system predicated upon an equitable insolvency test supplemented by an exception ridden earned surplus test. Though not as weak as the system in some states, this scheme is still premised upon unsound norms of "legal accounting" and mired in statutory and common law exceptions which make it nearly impossible to draw sensible limits upon the power of the board. Such a status quo is objectionable not only because it fails to deter those bent upon abusing corporate creditors, but for the more important reason that it fails to guide the honest director who is seeking maximum, licit flexibility.

In the mid-1970's, the California Legislature joined the bar association of that state in the creation of a committee to study, with a view toward revision, the California Corporations Code. At that time, California law relied upon the earned surplus test burdened by the possibilities of reduction surplus and nimble dividends. Two irrebuttable *criticisms set the stage for reform: (1) the existing restraints upon dissipation of corporate assets afforded insufficient protection to corporate creditors; and, (2) the language of the law meant little to accountants who were relied upon to prepare and audit the books and records. After a substantial debate, the 1977 California Corporations Code was framed in a manner designed to meet both of these problem areas. The earned surplus test was junked. Also discarded were the concepts of par value, stated capital, and all manner of capital surplus. In their place the statute articulated a simple test of the ratio of assets to corporate liabilities. For the purpose of complying with this test, the corporate books were to be kept in accordance with Generally Accepted Accounting Principles (GAAP).*

*In 1980, the Alaska Code Revision Commission concluded that both the substantive scheme and deference to the accounting profession pioneered in California were worthy models for a new Alaska Corporations Code. Accordingly, with the modifications hereinafter noted, Alaska is presented with the opportunity to become the second state to adopt the ratio/assets surplus test.*

*<u>Protection of Creditors</u>: Protection for the legitimate interests of corporate creditors begins with ACC Section .360's injunction that no distribution (defined by ACC Section .990(17) as a transfer of cash or property by a corporation to its shareholders without consideration) may be undertaken when the result would produce equitable insolvency. The content of this equitable insolvency restraint has been altered in several particulars:*

> *Neither a corporation nor any of its subsidiaries shall make any distribution to the corporation's shareholders if the corporation or the subsidiary making the distribution is, or as a result thereof would be, likely to be unable to meet its liabilities as they mature.*

*Two significant changes are incorporated in this formulation of the equitable insolvency standard.*

*The "likelihood" element of the formula is intended to be more restrictive than the traditional inquiry. AS 10.05.201 asked whether the corporation is now, or, giving effect to the dividend, would be insolvent. ACC Section .360 is more cautious, prohibiting distributions if the corporation is, or giving effect to the distribution, would likely be unable to meet its liabilities as they mature.*

*The inclusion of subsidiaries is the second reform. A parent corporation and its subsidiaries are to be considered as a unit; the various corporate shells are disregarded in favor of viewing the financial position of the total operations of an affiliated group. For a definition of "subsidiary" see ACC Section .990(42).*

*Assuming that insolvency within the meaning of ACC Section .360 is not threatened, ACC Section .358 establishes two circumstances under with the board enjoys discretion to* declare and pay a distribution to shareholders.

Distributions in cash or other assets may be declared and paid against "retained earnings" (ACC Section .358(a)(1)). Like the earned surplus test, this requirement reflects a legislative judgment that routine distributions should only be made from operating profits. Unlike the Model Act, the ACC contains no provision for permitting net operating losses to be charged off by writing down capital surplus. There is no such concept. If the corporation cannot make the payment out of assets charged against retained earnings, the ACC deems it a distribution in partial liquidation.

Distributions in partial liquidation are within the discretion of the board if a two part test is met.

The first requirement is that the assets of the corporation which would remain after the distribution are at least equal to 1.25 time liabilities. Compliance with this ratio guarantees a minimum cushion to creditors in that the corporation must continue to hold five dollars of assets for every four dollars of liabilities.

The second requisite focuses upon current liquidity of the corporation. The general rule is that the corporation's current assets be at least equal to current liabilities. Both current assets and current liabilities are defined by Generally Accepted Accounting Principles. Special concern is manifest for corporations which have a recent history of paying more in interest on their debt than their earnings would reflect if interest and taxes were not deducted in computing net profits. Such corporations must comply with a further requirement that current assets be at least 1.25 times current liabilities.

<u>Protecting the interests of senior shares</u>: The basic thrust of both classical and the ratio/assets restraints upon distributions has been the protection of creditors. This emphasis is natural, for by definition the creditor is an "outsider" precluded from any direct voice in corporate management. The ACC also attempts to accommodate a second source of recurrent tension respecting distribution: the interests of quasi-outsiders who have purchased shares with either a dividend or liquidation preference.

"Senior shares" achieve this status by dent of a contract between the corporate issuer and the holder of the securities. The specific terms used to identify this arrangement is "the indenture." While the content of an indenture may reflect specific understandings between the potential investors and the corporation, most are comprised of either or both of the following elements: (1) a "dividend preference" (the holders of this class of stock are "guaranteed" a dividend preference over subordinated or "junior" classes of stock); and (2) a "liquidation preference" (in the event of dissolution, the holders are guaranteed a preferential claim to assets which exceed the claims of all creditors). Neither of these guarantees is chiseled in stone. Performance is permitted only if the corporation can otherwise meet its legal obligations. Thus if the distribution *would threaten the security of creditors mandated by ACC Section .358, it cannot be made to even senior shares.*

*Adding to the vulnerability of the holders of these securities is a third classical feature of their status: they normally do not enjoy a right to elect members to the board of directors. The directors are, instead, elected by the owners of the junior, or "common", shares. Unless restrained by easily understood guidelines, there is danger that the directors will advance the interests of their constituents at the expense of the non-voting senior shares.*

*AS 10.05.207 and .210 show that the Legislature has long been interested in affording protection to senior shares. ACC Section .365 continues this policy by restricting the board's authority so that there can be no distribution to junior shares unless the amount of retained earnings immediately prior thereto equal or exceeds the amount of the proposed distribution plus the aggregate amounts of cumulative dividends in arrears on all shares having a dividend preference. The net effect of ACC Section .365 is to foreclose the use of payments in partial liquidation to holders of junior shares so long as the indenture obligations to senior shares are unmet.*

*The liquidation preference of senior shares is guarded by ACC Section .363. By its terms neither a corporation nor any of its subsidiaries may make any distribution to junior shares if, after giving effect to the proposed distribution, the excess of corporate assets over liabilities would be less than the liquidation over the class or series to which the distribution is made.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: If supporters could be found for a continuation of the baroque concepts of "legal accounting" contained in current Alaska law, they will find no comfort in the RMBCA. The official comment to RMBCA Section 6.40 makes it clear that it is intended to "sweep away all the distinctions among the various types of surplus and impose realistic restrictions on distributions build around the equity insolvency test of earlier statutes." (p. 6-60). The RMBCA also follows the California/ACC approach and yields all notions of legal accounting. It stops short, however, of requiring that books and records according to generally accepted accounting principles. While it expects that ". . .their use will be the basic rule in most cases. . . ." the final judgment is left within the business judgment of the board. (6-78).*

*There are differences between the existing California and proposed Alaska statutes and RMBCA Section 6.40. While the former use the equity insolvency test as the first of a two prong concept, RMBCA Section 6.40 relies upon it almost exclusively. Put most simply, the cushion of $5 in assets to every $4 in liabilities is not mandatory under RMBCA Section 6.40. The standard is explicit under the proposed content of the ACC. It would present a moving target under the RMBCA. A miss would ensure harm to creditors and promote litigation against the directors and shareholders of the defaulting* entity. Neither seems a desirable outcome.

RMBCA Section 6.40(c)(2) does contain protection for the holder of senior securities which is similar in object to ACC Section .360.

## Section .368 EXCEPTION FOR PURCHASE OR REDEMPTION OF SHARES OF DECEASED SHAREHOLDER

ORIGIN: ACC Section .368 is new to Alaska law; it is taken verbatim from GCL Section 503.1.

SUMMARY OF COVERAGE: It is often desirable in smaller corporation to provide for the death of a shareholder with a plan permitting the corporation to purchase or redeem the shares of the deceased. Such a plan prevents the potentially troublesome problems of having the deceased's heirs participating in the business. A common method used in effecting such plans is a corporate purchase of insurance on the shareholder's life. The insurance proceeds are to be used for the purchase or redemption. ACC Section .368 provides that, notwithstanding an inability to comply with Sections 358 through .365, the amount of the proceeds from the policy in excess of the total amount of premiums paid may be used to purchase or redeem the decedent's shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no explicit provision enabling such limited repurchase plans.

## Section .370 INAPPLICABILITY TO REGULATED INVESTMENT COMPANY

ORIGIN: ACC Section .370 is new to Alaska law, and is derived from GCL Section 504.

SUMMARY OF COVERAGE: In order to avoid any conflict with federal law, an exception to the provisions of ACC Section .358 is made for corporations defined as regulated investment companies under the United States Internal Revenue Code.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA appears to have no comparable exception, although the result would doubtless be reached through litigation.

## Section .373 SHARE DIVIDENDS: RESTRICTIONS

ORIGIN: This section is a reenactment without change of AS 10.05.204(5), and is predicated upon Section 45(e) of the MBCA.

SUMMARY OF COVERAGE: Share dividends present no direct threat to creditors who are protected by the ratio/assets surplus test of ACC Section .358. However, if the corpo-

*ration has more than one class of shares, the power of the board to distribute shares of the "senior" or "preferred" class to the common shareholders as a dividend is a direct threat to their proportional interest in the corporation. ACC Section .373 continues Alaska law by prohibiting the board from taking such a step unless it is authorized in the articles or is the subject of a majority vote of the holders of the senior shares.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.23 is functionally identical to ACC Section .373.*

*Section .375 ADDITIONAL RESTRICTIONS IN ARTICLES, BYLAWS, INDENTURES OR AGREEMENTS*

*ORIGIN: This section does not change prior Alaska law; it merely makes the law explicit.*

*SUMMARY OF COVERAGE: ACC Section .375 makes it explicit that the provisions of the ACC on the declaration of dividends and purchase or redemption of shares do not "occupy the field" and thereby prevent further regulation by the articles, bylaws, indentures or agreements.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.40 contains a prefatory clause which accomplishes the same result as ACC Section .375.*

*Section .378 LIABILITY OF SHAREHOLDERS RECEIVING PROHIBITED DISTRIBUTIONS; SUIT AGAINST SHAREHOLDERS*

*ORIGIN: ACC Section .378 is new to Alaska law, and is derived from GCL Section 506. It supplements ACC Section .480(b), itself a reenactment of AS 10.05.225.*

*SUMMARY OF COVERAGE: ACC Section .378 provides a non-exclusive remedy against shareholders who have received any distribution with knowledge that it is illicit. The remedy runs to the corporation and may be asserted to the use of the corporation by any non-consenting creditor for violation of Sections .358 or .360, provided that the creditor's claim had arisen prior to the distribution. Under subsection (b), non-consenting holders of senior shares may commence the action for violation of Section .363 or .365 provided that the senior shares were held at the time of the distribution.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.33(b)(2) achieves the goal of ACC Section .378 by indirection. Shareholders are rendered liable for contribution to a director sued for an illicit distribution to the extent that they knew it to be in violation of the act or provisions of the articles.*

Section .380 IDENTIFICATION OF DISTRIBUTION IN NOTICE TO SHAREHOLDERS

ORIGIN: ACC Section .380 is taken from GCL Section 507. It replaces AS 10.05.207(5).

SUMMARY OF COVERAGE: In order to set the stage for recovery of illicit distributions and to inform shareholders when a dividend represents a partial liquidation (as opposed to a distribution of profits), ACC Section .380 requires that management identify the source and accounting treatment of a dividend charged against any source other than the retained earnings account. Such a policy is consistent with current Alaska practice. AS 10.05. 207(5) requires identification of distributions in partial liquidation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.40 does not require that shareholders be given this prudential information. Omitting such a step fails to alert Alaskans of potentially favorable tax treatment of the dividend on their federal returns.

Section .383 INAPPLICABILITY TO WINDING UP AND INVOLUNTARY OR VOLUNTARY DISSOLUTION

ORIGIN: ACC Section .383 is taken from GCL Section 508.

SUMMARY OF COVERAGE: The provisions of Article 9 for the winding up of corporate affairs and the involuntary or voluntary dissolution of the corporation are plenary in their coverage. No additional law is required to protect the interest of creditors and holders of senior shares. Thus, the provisions of Sections .358 through .365 are made inapplicable to such procedures by ACC Section .383.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: There is no comparable provision in the RMBCA.

Section .385. REDEMPTION OF SHARES AT THE OPTION OF CORPORATION; MANNER

ORIGIN: Current Alaska law provides no statutorily approved procedure for the redemption of shares. ACC Section .385 is derived from GCL Section 509, with the deletion of language in subsection (c) which would have, nonsensically, required a corporation to send a notice to itself if it did not have the shareholder's address.

SUMMARY OF COVERAGE: ACC Section .385 creates a statutory procedure for redemption. The notice provisions of subsection (b) are subject to modification by the articles of incorporation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.31 empowers a corporation to acquire its own shares. However, the RMBCA does not appear to contain any provision defining the manner of taking such a step.

## Section .388 ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT

ORIGIN: ACC Section .388 is taken from GCL Section 510. It continues existing Alaska law (AS 10.05.312 to .345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies existing law by the elimination of the concept of "treasury shares".

SUMMARY OF COVERAGE: ACC Section .388 specifies the treatment to be given redeemed or repurchased shares. They return to the status of authorized but unissued shares unless the articles prohibit reissuance. If reissuance is prohibited, the articles stating the number of authorized shares must be amended to reflect the lower number. Such an amendment must be filed with the commissioner. Shareholder approval of the required amendment is unnecessary.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.31 is functionally identical to ACC Section .388

## Section .390 CAPITALIZATION OF RETAINED EARNINGS

ORIGIN: ACC Section .390 continues the policy of existing Alaska law, which permits directors to increase either the stated capital (AS 10.05.108) or the capital surplus (AS 10.05.366) accounts by charging the earned surplus account. There is no corresponding provision in the GCL financials.

The accounting provisions of existing law require that an amount equal to the total par value of shares distributed as dividends be transferred to the stated capital account from a surplus account (AS 10.05.204(4)(A)). No such accounting treatment is required under the ACC since the use of par value has been eliminated.

SUMMARY OF COVERAGE: ACC Section .388 permits the board to pass a resolution which transfers amounts properly allotted to the retained earnings account into the paid-in account. The effect of such a transfer would limit the ability of the board in future to make distributions under ACC Section .358(a).

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no similar provision.

Notes

## *ARTICLE 5. MEETINGS OF SHAREHOLDERS*

### *Section .405 MEETINGS OF SHAREHOLDERS*

*ORIGIN: ACC Section .405 is predicated upon Section 28 of the MBCA and Section 600(d) of the GCL. It replaces AS 10.05.138.*

*SUMMARY OF COVERAGE: ACC Section .405 requires that shareholders of any corporation organized under or subject to this Chapter meet at least once annually. For the first time in Alaska law, a shareholder is provided with standing to seek a summary court order to convene an annual meeting if such a meeting has not been held within the prior thirteen month period. ACC Section .405(c) differs from the Model Act in conferring the power to summon special meetings of the shareholders upon the chairman of the board and the president of the corporation. AS 10.05.138 confers such power upon the president, but does not reach the chairman of the board.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The content of ACC Section .405 is paralleled in RMBCA Sections 7.01, 7.02, and 7.03. RMBCA Section 7.01 requires an annual meeting of shareholders. RMBCA Section 7.03(a)(1) is similar to ACC Section .405(b) in authorizing aggrieved shareholders summary access to a court ordered meeting in the event the annual meeting is not held. Special meetings may be called by shareholders under both ACC Section .405(c) and RMBCA Section 7.02. The ACC continues current Alaska law and the original recommended content of the Model Act by requiring that 10% of the voting shares are needed to call a special meeting. In the exposure draft Section 7.02(a)(2) recommended that the minimum be lowered to 5%. In the final draft the figure was restored to the traditional 10%.*

### *Section .408 CLOSING OF TRANSFER BOOKS AND FIXING RECORD DATE*

*ORIGIN: ACC Section .408 is predicated upon Section 30 of the MBCA with two modifications. In both subsections (a) and (b), the Model Act's ten day minimum period before the action is taken has been extended to twenty days, to further the use of the twenty day notice periods found throughout the ACC. AS 10.05.144 utilizes a ten day period. Also, sixty day limitations have replaced the fifty day formula now found in Alaska law respecting the closing of transfer books or fixing of a record date. Finally, the ACC follows the Model Act in making a shareholder list compiled from the closed transfer* books or by virtue of the record date effective as to any adjournment of the meeting.

SUMMARY OF COVERAGE: ACC Section .408 provides three alternatives for effecting a determination as to shares entitled to vote in an annual or special meeting, or to participate in a distribution. Under the first alternative, the board may simply close the stock transfer books. A second alternative is for the board to declare a "record date" for such determination. Finally, the default mode for determining the shareholders if the board has not exercised its options under the first or second alternative is to adopt the date on which the notice of the meeting is called, or the date that the resolution of the board declaring the distribution is adopted.

COMPARISON WITH THE FINAL DRAFT DRAFT OF THE RMBCA: RMBCA Sections 7.07 and 7.05(d) contain the three alternatives specified in ACC Section .408 with slightly differing minimum and maximum times.

## Section .410 NOTICE OF SHAREHOLDERS' MEETING

ORIGIN: ACC Section .410 is predicated upon MBCA Section 29 and AS 10.05.141. The only change is to set a twenty day minimum for delivery of notice, a general policy running throughout the ACC.

SUMMARY OF COVERAGE: ACC Section .410 establishes the minimum content and the minimum and maximum time restraints on written or printed notice for annual or special meetings. The notice must be "delivered" not less than twenty nor more than fifty days before the date of an annual or special meeting, and in every instance, the notice must state the place, day, and hour of the meeting. For special meetings only, the notice must also declare the purpose(s) for which the meeting is being convened.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.05 is in substantive accord with ACC Section .410. The RMBCA does propose a minimum of 10 and a maximum of 60 days for notice. The ACC uses 20 and 50.

## Section .413 VOTING LIST; LIABILITY

ORIGIN: ACC Section .413 is predicated upon AS 10.05.147, which was based upon the pre-1962 version of Section 31 of the MBCA. ACC Section .413(c) is based upon MBCA Section 31 and AS 10.05.150.

SUMMARY OF COVERAGE: ACC Section .413 mandates that at least twenty days prior to each meeting of shareholders, the officer or agent having charge of the stock transfer books make a list of all shareholders entitled to vote. This list must be *kept open and subject to inspection by a shareholder at any time during usual business hours for a period of twenty days prior to the meeting. This right of inspection prior to the meeting may be exercised by an agent or attorney of the shareholder.*

*ACC Section .413(c) imposes a civil liability upon an officer or agent having charge of the stock transfer books who fails or refuses to exhibit such a list as above provided. Such a liability runs to any shareholder able to establish damage as a consequence of this failure or refusal, in an amount determined by the court's discretion.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.20 substantially mirrors the provisions of ACC Section .413. RMBCA Section 7.20(d) sanctions a summary court ordered inspection in the case that the access to the shareholder list mandated is denied. A similar provision is found in ACC Section .430(d). RMBCA Section 7.20 does not establish any potential civil liability in the event of a denial of inspection rights. In his address to the Alaska Bar Association Convention Professor Hamilton stated the view that personal liability sanctions are rarely imposed and thus do not serve as a pragmatic deterrent.*

## *Section .415 QUORUM OF SHAREHOLDERS*

*ORIGIN: ACC Section .415(a) is predicated upon MBCA Section 32 and AS 10.05.153, and reflects no change in existing Alaska law. ACC Section .415(b) is predicated upon GCL Section 602(b), and is unprecedented in Alaska law.*

*SUMMARY OF COVERAGE: Absent a provision in the articles or bylaws, the default quorum requirement is the presence, in person or by proxy, of an absolute majority of the shares entitled to vote. The articles or the bylaws may establish a greater than majority quorum requirement. Only the articles are competent to establish a less than majority quorum requirement, which may not be less than one-third of the voting shares. The affirmative vote of the majority of the shares represented at which a quorum is present is the act of the shareholder. Once a quorum has been established, it is not possible for a disgruntled minority to defeat the capacity of the majority to transact business by simply "walking out" of the meeting.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.25 is functionally identical to ACC Section .415.*

## *Section .418 PROXIES*

*ORIGIN: ACC Section .418 is taken from GCL Section 705, with a modification to eliminate Section 705(e)(3) (rights of creditors). Section .418 replaces AS 10.05.159 and .168,* which had been based on Section 33 of the MBCA. The explicit treatment of the question of "revocation" and the circumstances under which a proxy may be made "irrevocable" by agreement are unprecedented in Alaska law.

SUMMARY OF COVERAGE: ACC Section .418 permits a shareholder to create a legal power in a nominee to vote his or her shares, the life of which can not exceed eleven months. A revocable proxy is treated as destructible at the will of the proxy giver. This Section regulates the circumstances or acts which will "revoke" the proxy, thus disabling management from recognizing the power of the nominee to cast the votes represented by the shares. Finally, for the first time, Alaska law contains explicit provisions defining the circumstances under which a proxy may be made irrevocable.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.22 is identical to ACC Section .418.

## Section .420 VOTING OF SHARES

ORIGIN: ACC Section .420 is predicated upon MBCA Section 33, with the exception of subsections (d) and (i). Section .420(d) is predicated upon GCL Section 708(a), and replaces AS 10.05.156 to .168. Section .420(i) is new and unprecedented in Alaska law. It is based upon GCL Section 509(d).

SUMMARY OF COVERAGE: ACC Section .420 establishes a cumulative voting scheme designed to enhance the opportunity for minority share interests to obtain representation on the board. Section .420(d) makes cumulative voting optional and presumptive unless eliminated by a provision of the articles. It goes beyond the Model Act to provide that if elimination of cumulative voting is sought via amendment to the articles, such an amendment shall not be effective if a sufficient number of votes are cast against it as would elect a single director if voted cumulatively in an election for the entire board. Shares held by the corporation or its controlled subsidiary may not be voted or counted towards the outstanding shares entitled to vote.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.21, 7.14, and 7.28 cover the subject matter addressed in ACC Section .420. There is substantial accord except with respect to the presumptive status of cumulative voting. Cumulative voting rights exist under ACC Section .420(d) unless extinguished in the articles. This is a continuation of historic Alaska practice and reflects a Legislative solicitude for representation of minority share interests on the board. Under RMBCA Section 7.28(a) such rights do not exist unless the articles make affirmative provision.

## Section .423 ACTIONS TAKEN WITHOUT MEETING: WRITTEN CONSENT;

REVOCATION OF CONSENT

ORIGIN: ACC Section .423(a) is predicated upon Section 145 of the MBCA and AS 10.05.807, with language added to make it clear that the written consents are invalid unless of identical content as to all shareholders. Section .423(b) is adapted from GCL Section 603(c), and is unprecedented in Alaska law.

SUMMARY OF COVERAGE: ACC Section .423 provides for informal action by shareholders, as long as the action is taken by the unanimous, written consent of the shares. The Commission considered and rejected the California and Delaware positions which would tolerate informal action by less than unanimous consent, believing that the unanimous consent requirement was a valid trade-off for the abolition of a formal meeting. This presumption for informal action may be extinguished by the articles or the bylaws.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.04 is in substantial accord with ACC Section .423. The prudential requirement that the consents be identical in content is not contained in Section 7.04. The official comment (7-17, 18) makes it clear that, like the Code Revision Commission, the framers of the RMBCA do not advocate adopting a position wherein informal action may be taken by less than the unanimous consent of the voting shares.

Section .425 VOTING TRUSTS AND AGREEMENTS AMONG SHAREHOLDERS

ORIGIN: ACC Section .425(a) is taken from MBCA Section 34 and AS 10.05.171. Unlike existing Alaska law, Section .425(a) has adopted the Model Act's language designed to require disclosure of the terms and identity of voting trusts. Section .425(b) is taken from GCL Section 706(d), and is unprecedented in Alaska law.

SUMMARY OF COVERAGE: ACC Section .425 permits a voting trust, regulates its duration, and mandates disclosure of its terms and members. Shares committed to a voting trust must be surrendered to the trustee in exchange for trust certificates, while all incidents of share ownership other than voting rights remain with the shareholder/participant. The Model Act language on the extension of voting trusts has not been adopted, in the belief that at the end of the ten year maximum life, the parties are capable of forming a new trust. Section 425(b) tolerates other agreements such as pooling agreements and share classification, leaving to common law any limitations upon their use.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Sections 7.30 and 7.31 cover the subject of voting trusts and voting agreements among shareholders. Their content is in substantial accord with ACC Section .425, except for the provision

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*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Sections 7.30 and 7.31 cover the subject of voting trusts and voting agreements among shareholders. Their content is in substantial accord with ACC Section .425, except for the provision* on extending the period of time for a voting trust.

## Section .428 SHAREHOLDERS' PREEMPTIVE RIGHTS

ORIGIN: ACC Section .428 is predicated upon MBCA Section 26A and replaces AS 10.05.129. Existing Alaska law contains no provision comparable to Section .428's presumptions as to shares or offerings to which preemptive rights are not extended.

SUMMARY OF COVERAGE: Unless limited or denied by provisions of the articles, ACC Section .428 establishes preemptive rights in certain shareholders to acquire under fair and reasonable terms unissued shares or convertible securities. Preemptive rights do not exist in holders of any class of preferred shares, nor do common shareholders have preemptive rights to the issuance of nonconvertible preferred shares. If a majority of the shares approve, preemptive rights do not exist as to shares issued to directors, officers, or employees. This provision is intended to facilitate the implementation of qualified deferred compensation schemes under the Internal Revenue code. Section .428 expressly recognizes that the articles are competent to enlarge or diminish the scope of preemptive rights.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.30 reverses the statutory presumption on preemptive rights. Under ACC Section .428 such rights exist unless limited or extinguished in the articles. Under RMBCA Section 6.30(a), such rights do not exist unless affirmatively provided in the articles. Assuming the presence of such rights, the balance of RMBCA Section 6.30 is in accord with the provisions of ACC Section .428.

## Section .430 BOOKS AND RECORDS

ORIGIN: ACC Section .430 is based upon Section 52 of the MBCA and AS 10.05.237 to .249.

Section .430(a) continues the content of AS 10.05.237 with added provisions for minutes of meetings of board committees and for electronic processing. Section .430(b) continues the policy of AS 10.05.237(b), but has eliminated the durational and numerical qualifications of AS 10.05.240. Section .430(c) continues the policies of AS 10.05.243, with the modification of imposing a minimum liability of $5000. Section .430(d) has modified AS 10.05.246 in view of the standing requirements eliminated under Section .430(b). Section .430(e) adopts without change the content of AS 10.05.249 regarding the right to demand a copy of the most recent financial statement.

SUMMARY OF COVERAGE: ACC Section .430(a) creates the obligation for any corporation organized under this Chapter to keep specified books and records of account, minutes of proceedings, and a record containing the names and addresses of all shareholders and the number and class of shares held by each. This subsection facilitates the collection and keeping of such data by electronic processing so long as such data can be reduced to writing.

Subsection .430(b) creates the right of inspection and vests that right in any shareholder and the Department of Commerce and Economic Development. The shareholder must make written demand and state the purpose(s) for which inspection is demanded. The inspection may be made in person or by agent or attorney, and at a reasonable time and for a proper purpose.

Subsection .430(c) creates personal liability in any officer or agent who denies a right of inspection which the shareholder can establish was properly demanded, with certain affirmative defenses available to defeat this liability.

Subsection .430(d) affirms the power of a competent court to enforce a right of inspection properly demanded.

Subsection .430(e) gives the shareholder a right to receive, upon written request, a copy of the corporation's most recent financial statement.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.20 requires that the corporation maintain and make available for inspection a list of the names and addresses of its shareholders. RMBCA Section 16.01 requires the keeping of books, records of account and minutes of the proceedings of all shareholder, board and board committee meetings. RMBCA Section 16.02 creates a right of inspection in shareholders asserting a proper purpose to inspect reasonably related portions of the Section 16.01 materials. RMBCA Section 16.04 details the circumstances under which a court may order observance of the Section 16.03 inspection rights. In total, these provisions accord with those of ACC Section .430, except that they do not expressly allow for civil liability on the part of the officer or agent who wilfully frustrates what are later determined to have been valid assertions by shareholders of inspection rights.

## Section .433 ANNUAL REPORT TO SHAREHOLDERS: CONTENT; FINANCIAL STATEMENT ON REQUEST

ORIGIN: ACC Section .433 is new and without precedent in Alaska law. It is adapted from Sections 1501 and 2000 of the GCL. GCL Section 1501(g) on attorney fees and costs was omitted from Section .433.

SUMMARY OF COVERAGE: ACC Section .433 establishes the obligation of the board to send an annual report to shareholders within 180 days after the close of the fiscal year. The report must contain a balance sheet and an income statement prepared according to generally accepted accounting principles. The report need not be prepared by independent ac-

*countants, but if so prepared it must be certified by the independent accountant.*

*If the corporation has fewer than 100 shareholders the articles are competent to waive the obligation to provide an annual report.*

*If the corporation has more than 100 shareholders the content of the annual report is expanded to include a brief description of all "insider transactions" (transactions, other than compensation, in which the corporation has engaged with one of its officers, directors, or a controlling shareholder) involving an amount in excess of $40,000. Corporations reporting under Section 12 of the Federal Securities and Exchange Act, and those reporting under Sections 7(c), 8(c), and 28 of the Alaska Native Claims Settlement Act are exempted from ACC Section .433(b) on the grounds that their federal reporting obligations cover these important items.*

*Section .433(c) permits shareholders holding at least 5% of the outstanding shares of any class to make written requests for periodic income statements.*

*Section .433(f) establishes the penal consequences of any failure, refusal, or neglect to make or disseminate the reports and statements required by this section, and also provides that a competent court may specifically enforce these rights.*

*Section .433(g) makes this section applicable to foreign corporations with principal executive offices in or meetings held in Alaska.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 16.20 follows the California/ACC example and imposes an annual reporting obligation upon corporations. It does not contain any exemption for small corporations and the comment (16-20) makes it clear that it will have ". . .its principal impact on small, closely held corporations. . . ." Corporations which report under federal law would not be exempt from the RMBCA Section 16.20 obligation. Thus Native Corporations would face the duplicative burden of reporting.*

*RMBCA Section 16.21 requires that some of the "insider transactions" addressed in ACC Section .433(b) be reported to shareholders. In general, it does not require disclosure of major transactions with directors, officers or controlling shareholders. Yet it would require special reports of every instance of advances or indemnification. ACC Section .433(b)(2) requires this only if the instances aggregate more than $10,000 to an individual officer or director during the fiscal year.*

*The RMBCA does not guarantee access on the part of shareholders holding at least 5% of the outstanding shares to quarterly financial statements. Nor does it contain any express sanction for defiance of the reporting obligations it does impose. This last point reveals a distinction between the attitudes of the framers of the two statutes. The Alaska Code Revision Commission felt that it is unwise for a statute to create any positive obligation and then fail to spell out the consequences of a refusal on the part of affected persons* demand upon the outstanding shares.

Section .435(h) enables a corporation or the actual defendants to move the court at any time before final judgment to require the plaintiffs to give security for the reasonable expenses, including attorney fees, that may be incurred by the petitioners. The amount of security shall be determined by the court in its discretion, except that if the plaintiff shareholder(s) hold 5% or more of any class of outstanding shares or voting trust certificates representing shares, there shall be no security for expenses requirement.

Section .435(i) forbids any form of "out of court settlement" of a derivative action without court approval.

Section .435(j) provides that any recovery should be accounted for to the corporation, however, the court may award the prevailing party reasonable expenses, including attorney fees.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.40 accords with the Commission's recommendation that demands upon shareholders be eliminated. However, RMBCA Section 7.40 also would eliminate the security for expenses provided by ACC Section .435(h). Finally, the official comment to RMBCA Section 7.40 (7-85) make it clear that it takes no position on the question of the power of independent directors to seek dismissal of the derivative action on the ground that, in their collective business judgment, it is not in the best interests of the corporation. Such matters are resolved by ACC Section .435.

## Section .438 LIABILITY OF SHAREHOLDERS AND SUBSCRIBERS

ORIGIN: ACC Section .438 is predicated upon MBCA Section 25 and AS 10.05.125.

SUMMARY OF COVERAGE: ACC Section .438 establishes the basic proposition of limited liability of shareholders, except for their liability to pay the full consideration for the shares which runs to designated classes of successors in interest.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.22 is functionally identical to ACC Section .438 except that it does not clarify the non-liability of executors, administrators, conservators, guardians, trustees, assignees for the benefit of creditors, receivers or pledgees.

Notes

## ARTICLE 6. DIRECTORS AND OFFICERS

### Section .450 BOARD OF DIRECTORS; DUTY OF CARE; RIGHT OF INSPECTION; FAILURE TO DISSENT

ORIGIN: ACC Section .450(a) is premised upon the 1977 revision of the MBCA Section 35. The rights, privileges, and duties which are fixed upon the board devolve upon delegates. ACC Section .450 differs from the Model Act language to make it clear that with this delegation flows the liabilities which the Chapter otherwise imposes upon the directors. This modification follows GCL Section 300(d).

Subsection (b) is also premised upon the revised content of MBCA Section 35. Presently, there is no statutorily defined duty of care to be observed by a corporate director. One deviation from the MBCA is the provision in ACC Section .450(b) in which the duty of care includes the duty of reasonable inquiry. This is taken from GCL Section 300(d).

This section replaces AS 10.05.174, .222, and .219.

SUMMARY OF COVERAGE: Under Section .450 there must be a board of directors. ACC Section .450 provides for the exercise and delegation of board functions; the duty of care which must be observed by the directors and their right to rely upon certain information, opinions, reports, or statements from officers, experts, and committees of the board; the grant of an absolute right of inspection to every director as to all corporate books, records, and documents, together with the right to use an agent or attorney and the right to make copies or extracts; and, the consequences of a director's failure to dissent as to any action taken by the board at a meeting at which she is present.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.01 parallels ACC Section .450(a) in requiring a board of directors. The authority to delegate board functions is more limited under RMBCA Section 8.01 in that the corporations with more than 50 shareholders may not delegate board functions.

RMBCA Section 8.30 establishes the standards of care which must be observed for directors. Like ACC Section .450(b) it imposes a standard of honesty in fact augmented by the requirement that the conduct meet the level which an "ordinarily prudent person in a like position would exercise under similar circumstances. . . ." Unlike the California and ACC standard, the one articulated in the RMBCA does not reference a duty of reasonable inquiry. RMBCA Section 8.30(b) and (c) are similar to ACC Section .450(b) in enabling a director to rely upon information, opinions, reports and statements from officers, experts, or committees of the board. This right of reliance is qualified and inapplicable if the director knows, or as a reasonable person ought to know, that, as to the mater in question, reliance is unwarranted.

## Section .453 NUMBER AND ELECTION OF DIRECTORS

ORIGIN: ACC Section .453(a) and (b) are premised upon a modification of New York Business Corporation Law Section 702(a) and (b), and were adopted in lieu of comparable provisions of Section 36 of the MBCA. Section .453(c), (d), and (e) are taken from MBCA Section 36. This section replaces AS 10.05.177, .180, and .183.

SUMMARY OF COVERAGE: Section .453(a) continues the policy of AS 10.05.177, which sets the minimum number of directors at three, save for a corporation with less than three shareholders. In a corporation with less than three shareholders, the number of directors need not exceed the number of shareholders. The Model language which would permit a corporation to function with a board of one regardless of the number of shareholders was rejected. Further, Section .453(a) makes it impossible for a board to adopt bylaws changing the number of directors without participation of the shares (as now provided in AS 10.05.177), unless the board acts under a provision of the articles or bylaws adopted by approval of the outstanding shares.

This section also directs that there shall be an election of directors at each annual meeting except in the case of a classified board, and defines the tenure in office of incumbent directors. Subsection (c) sanctions a provision in the articles which would secure the election of one or more directors to the holders of the shares of a class or series voting as a class or series. Subsection (e) makes clear that a director serves until the expiration of the term for which he is elected and until a successor has been elected and qualified.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.03 governs the number and election of directors. It perpetuates the concept previously not adopted by the Legislature which would permit a board of a single director regardless of the number of persons who own shares. RMBCA Section 8.03 tracks ACC Section .453(b) in permitting the articles or bylaws to establish a formula permitting either the shareholders or the board to increase or decrease the number of positions on the board. The RMBCA limits the power of the board under such a provision to an increase or decrease of no more than 30 percent from the number last approved by the shareholders. It, too, establishes the norm of one year terms unless the board is classified with staggered terms.

RMBCA Section 8.04 parallels ACC Section .453(c) in permitting the articles to permit classes to elect certain positions on the board. Unlike the ACC, it would not permit series of shares to have discrete voting rights.

RMBCA Section 8.05 is functionally identical to ACC Section .453(e) respecting terms of directors and the continuation of a director's liability until a successor shall have been elected and qualified.

## Section .455 CLASSIFICATION OF DIRECTORS

ORIGIN: ACC Section .455 is an enactment of MBCA Section 37, and works an important change from AS 10.05.186. Under existing Alaska law, the decision to classify the board could be taken by a bylaw adopted by the board without shareholder participation. Subsection (b), continuing the concern for minority shareholder representation on the board, is new. Section .455 replaces AS 10.05.186.

SUMMARY OF COVERAGE: ACC Section .455 provides for optional classification of the board if there are nine or more board members, as long as the option is specified in the articles. However, if the corporation has not eliminated cumulative voting, an amendment to the articles attempting to provide for board classification is ineffective if the number of shares voting against classification is sufficient to elect one director under a cumulative voting scheme.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: 8.06 is functionally identical to ACC Section .455(a). Classification cannot be made unless there are nine or more directors and there may not be more than three classes serving staggered one year terms. Unfortunately, the RMBCA does not contain any protective mechanism for those corporations which have elected cumulative voting rights.

## Section .458 VACANCIES ON THE BOARD

ORIGIN: ACC Section .458 is adapted from GCL Section 302. It has no direct parallel in Alaska law.

SUMMARY OF COVERAGE: ACC Section .458 provides that the board may declare vacant the office of a director who has been declared of unsound mind by a court order, or who has had civil rights suspended due to imprisonment as provided in AS 33.30.310.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no comparable provision.

## Section .460 REMOVAL OF DIRECTOR WITHOUT CAUSE

ORIGIN: ACC Section .460 is premised upon Section 303 of the GCL, and has no parallel in Alaska law. This section provides an important shareholder check upon the incumbent di-

*rectors innovated in California (as mandatory), and now found in Delaware (optional), New York (optional), and in the MBCA (optional). Section .460 follows the California version, and is mandatory. The special provisions regarding notice are original, having no parallel in statutory precedent, and apply only to those corporations with 500 or more record shareholders.*

*SUMMARY OF COVERAGE: ACC Section .460 provides for removal of incumbent directors at any time without any reason by a vote of the outstanding shares, subject to specific notice provisions. If the attempted removal is to be made at a special meeting, or at a regular meeting of a corporation with more than 500 record shareholders, notice of the removal action must be given. Provisions are also made for the protection of representatives of a minority of the shares, or the directors elected by a class or series of shares.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.08 continues the Model Act tradition of suggesting that this provision be made optional according to provisions of the articles. It contains no notice provisions respecting corporations with a relatively large number of shareholders. Like ACC Section .460, RMBCA Section 8.08 contains provisions to protect directors seated through cumulative voting or as the representatives of a particular class of shares.*

## *Section .463 REMOVAL OF DIRECTOR BY SUPERIOR COURT*

*ORIGIN: ACC Section .463 is taken from GCL Section 304, and is without parallel in Alaska law. This section modifies the GCL by adding "gross neglect of duties" as a ground for judicial removal, and in granting standing to the board to seek removal.*

*SUMMARY OF COVERAGE: The primary recourse for shareholders dissatisfied with the performance of a director is to seek removal under ACC Section .460. However, if there are insufficient votes, ACC Section .463 specifies the serious grounds under which the holders of at least ten percent of the shares of any class or a majority of the board of directors have standing to seek removal in the superior court.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: 8.09 is functionally identical to ACC Section .463.*

## *Section .465 VACANCIES AND RESIGNATION; SPECIAL MEETING OF SHAREHOLDERS*

*ORIGIN: ACC Section .465 is modeled upon GCL Section 305 with certain modifications. Section .465(a) continues the policy of AS 10.05.189 in vesting broad authority to fill vacancies with the remaining member(s) of the board, yet* *unlike AS 10.05.189, this presumption may be modified by provisions in the articles or bylaws. The 1976 amendment to AS 10.05.189, requiring expansion vacancies to be filled by shareholders, has been dropped, given shareholders' expanded mandatory role in ACC .453. Section .465(b) has no parallel in Alaska law. Section .465(d) is a substantial modification of GCL Section 305(c), omitting Section 305(c)(2) (eliminating the role of the superior court).*

*SUMMARY OF COVERAGE: This section and Section .458 define when a vacancy exists upon the board. ACC Section .465 provides that in the absence of contrary provisions in the articles or bylaws, and unless the vacancy has occurred by removal by shareholders (Section .460), the vacant position(s) may be filled by the director(s) remaining in office, even though there may be less than a quorum of the entire board. This section also provides for resignation by a director and his status until the election and qualification of a successor.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.10 differs from ACC Section .465 in two particulars. It fails to make clear that, unless otherwise provided in the articles or bylaws, a sole remaining director may act to fill vacancies on the board. This provision may be especially important in the event of a disaster in which nearly all of the directors may have perished. To some extent this omission is remedied by Section 3.03(b)(2) under which one or more officers of the corporation may be deemed directors for a meeting during a defined period of emergency. RMBCA Section 8.10 does not contain a comparable provision to ACC Section .465(c), whereby if the directors elected by the shareholders constitute less than a majority of the board, shareholders holding as few as 10% of the outstanding shares may call a special meeting to elect the entire board.*

## *Section .468 EXECUTIVE AND OTHER BOARD COMMITTEES*

*ORIGIN: ACC Section .468 is a modified version of the new Section 42 of the MBCA, and clarifies AS 10.05.195.*

*SUMMARY OF COVERAGE: ACC Section .468 permits the articles or bylaws to empower the board to set up executive and other committees, and to delegate to such committees the powers otherwise vested in the board, with certain exceptions. The duty of care of directors not members of such committees is provided for in Section .468(b).*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.25 is functionally identical to ACC Section .468 with two exceptions. RMBCA Section 8.25(a) requires that each committee have two or more director-members. This limitation is not found in ACC Section .468. RMBCA Section 8.25 does not explicitly cover the creation of committees and the delega-*

*tion of board functions to the duty of care owed by non-member directors.*

## *Section .470 MEETINGS: CALL, PLACE, NOTICE, AND WAIVER*

*ORIGIN: ACC Section .470 is a modified version of GCL Section 307, which replaces AS 10.05.198 (which was predicated upon MBCA Section 43).*

*SUMMARY OF COVERAGE: ACC Section .470 defines the officers or directors who have authority to call regular or special meetings of the board or board committee, the notice requirements that must be observed, and the waiver of such notice requirements by unnoticed directors.*

*ACC Section .470(a) is unprecedented in Alaska law and for the first time defines the corporate officers or directors who have authority to call regular or special or special meetings of the board or board committee.*

*ACC Section .470(b) follows the Alaska's existing no notice policy for regular meetings. With respect to special meetings there is a standardization of a twenty day written notice requirement with broad authority to use the instrumentalities of electronic telecommunications in which case the time provision is the 72 hour requirement observed for personal communication. Section .470(b) goes beyond either the GCL or the Model Act in requiring that notice of special meetings disclose the purpose or business to be transacted. Section .470(c) defines the circumstances under which an unnoticed director can or will be taken to have waived the notice requirements.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Sections 8.22 and 8.23 contain coverage comparable ACC Section .470(b) and (c). RMBCA Section 8.22 does not specify who may call meetings of the board or board committees, nor does it, in the absence of a requirement in the article or bylaw, necessitate that notice of special meetings disclose the purpose and business to be transacted. This omission may prove troublesome in the context of a closely held corporation in which the minority's only pragmatic protection may be to refrain from attending a special meeting thus blocking the formation of a quorum.*

*RMBCA Section 8.23 on waiver of notice is substantively identical to ACC Section .470(c).*

## *Section .473 QUORUM OF DIRECTORS*

*ORIGIN: ACC Section .473 continues the policy and language of AS 10.05.192 and MBCA Section 40.*

*SUMMARY OF COVERAGE: ACC Section .473 fixes the quorum of the board or any board committee at an absolute majority of the positions of such body. The articles or bylaws are* competent to set a higher quorum requirement, but may not go below the majority requirement. This position reflects a continuation of prior Model Act policy which opposed less than majority quorum requirements. ACC Section .473 also establishes the norm that the act of the majority of the directors at a meeting at which a quorum is present is the act of the board unless the articles require a greater number.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.24(a) and (c) are functionally identical to ACC Section .473. RMBCA Section 8.24(b) deviates from prior Model Act policy and would permit the articles or bylaws to fix the quorum requirement as low as one-third of the number of members of the board or committee.

## Section .475 INFORMAL ACTION BY DIRECTORS

ORIGIN: ACC Section .475(a) is a straight enactment of the last paragraph of MBCA Section 43. Section .475(b) is a modified version of AS 10.05.199 and MBCA Section 44.

SUMMARY OF COVERAGE: ACC Section .475 provides for board meetings to be conducted via telecommunications equipment allowing simultaneous contact of all participants. It also provides for business to be transacted without any form of meeting via the use of written consents identical in content obtained from all directors.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.20(b) is functionally identical to ACC Section .475(a) in permitting board meetings to be conducted via communications equipment. RMBCA Section 8.21 is functionally identical to ACC Section .475(b) in permitting the board to act without a meeting utilizing written consents signed by all of the members. The prudential requirement that those consents be identical in content is omitted from the RMBCA.

## Section .478 DIRECTOR CONFLICTS OF INTEREST

ORIGIN: Existing Alaska law has no statutory law on director conflicts of interest. ACC Section .478 is modeled upon GCL Section 310, with modifications designed to produce a more stringent standard regarding director conflict of interest. One departure from the GCL was the omission of its provision permitting a committee of the board to validate certain interested transactions. Also omitted was California's third alternative for validation, which would be a showing by the proponent of a contract or transaction that such transaction was just and reasonable. Instead of being an independent vehicle for validation, such a requirement is imposed as an <u>additional</u> ground for validation under Section .478(a)(2).

SUMMARY OF COVERAGE: ACC Section .478 addresses conflict of *interests in two distinct and classical instances: (1) where the contract or other transaction is between the corporation and one or more of its directors; and (2) where the contract or transaction is between two corporations sharing a common director or directors.*

*ACC Section .478(a) provides that transactions between the corporation and a director or a business entity in which the director has a material financial interest must be approved either by validation via the informed approval of the shareholders, or by the approval of a disinterested and fully informed majority of a quorum of the full board. The director's shares are not to be computed either for purposes of determining a quorum of the shares or a quorum of the board. The proponent of the contract has the additional burden to show that the contract or transaction is just and reasonable.*

*In the case of a common director(s) on the boards of each of the corporate parties to a transaction, there is no objection as long as the other directors are fully apprised of all facts, including the common directorship. Nothing in ACC Section .478(c) is intended to influence Alaska's anti-trust laws, nor does this section intend to operate in derogation of a director's common law duty of loyalty in the context of the corporate opportunity doctrine.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.31 parallels ACC Section .478 is primarily concerned with conflicts of interest in which the director has a direct or indirect adverse financial interest. Its coverage is very similar to ACC Section .478(a). There is no explicit RMBCA coverage of the secondary conflict of interest situation in which a common director or directors serve on the boards of both corporate parties to a contract or transaction.*

## *Section .480 LIABILITY OF DIRECTORS*

*ORIGIN: ACC Section .480 is an augmented version of new Model Act Section 48, and replaces AS 10.05.216 and .225. Section .480(a) continues the policy of AS 10.05.216 imposing joint and several liability upon directors. Section .480(a)(3) continues an imposition of liability for illicit loans to officers or employees contained in AS 10.05.216(d), which is not found in MBCA Section 48. The affirmative defense by a director that she observed the duty of care defined in ACC Section 450(b) is new to Alaska law.*

*SUMMARY OF COVERAGE: ACC Section .480 imposes joint and several liability upon directors who vote for or assent to three types of illicit transactions: distributions to shareholders contrary to provisions of Article 4 of this Chapter; distributions to shareholders which are prejudicial to the rights of creditors during the liquidation of the corporation; and loans or extensions of corporate credit to any officer or employee contrary to the restrictions of ACC Section .485 and any provisions of the articles of incorpora-*

*tion. A defense to liability is proof by the defendant(s) of an observance of the duty of care articulated in Section .450(b).*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.33(a) is functionally identical to ACC Section .480(a)(1) in dealing with the consequences of a director's personal liability for voting for or assenting to illicit distributions. The rights of contribution recognized in ACC Section .480(b) are mirrored in RMBCA Section 8.33(b). The ACC's coverage of distributions which are illicit during the course of liquidation are not contained in the RMBCA. Illicit loans to officers or directors, covered by ACC Section .480(a)(3), are the subject of RMBCA Section 8.32. The circumstances under which such loans may be licitly extended are covered by ACC Section .485. They are more stringent than the circumstances recognized under RMBCA Section 8.33(a)(1) and (2).*

## *Section .483 OFFICERS: TENURE, RESIGNATION, AGENCY, DUTY OF CARE*

*ORIGIN: ACC Subsection .483(a) is adapted from GCL Section 312(a), former GCL Section 821, and NBCL Section 715(e). Unlike AS 10.05.228, Section 483(a) eliminates the necessity of a vice president.*

*Subsection .483(b) is taken from GCL Section 312(b), and differs from AS 10.05.228 by providing that officers must be selected by the board.*

*Subsection .483(c) is taken from NBCL Section 715(g), and replaces AS 10.05.231; it reflects no substantive change in defining the source of real authority of officers.*

*Subsection .483(d) is taken from GCL Section 313, which in turn, is adapted from Pennsylvania BCL Section 305.*

*Subsection .483(e) is premised upon NBCL 715(h), without inclusion of the specific "right of reliance" provision of the New York act. For the first time, the ACC defines the duty of care for officers, however, unlike NBCL Section 715, ACC Section 483(e) makes it clear that the duty of care includes a duty of reasonable inquiry.*

*SUMMARY OF COVERAGE: Five major topics are addressed by ACC Section .483: (1) the minimum number of offices which a corporation must have; (2) the manner of selection and the right of resignation of officers; (3) the source of real authority of corporate officers; (4) a strategy by which a third party can preclude a corporate principal's denial of the authority of an officer as agent; and, (5) a definition of the standard of care according to which officers are to discharge their responsibilities to the corporation.*

*COMPARISON OF THE FINAL DRAFT OF THE RMBCA: The five topics covered by ACC Section .483 are treated in five separate sections of the RMBCA.*

*RMBCA Section 8.40 deals with the required officers.*

*It differs from ACC Section .483(a) in several particulars. Section 8.40 merely requires that the corporation have "the officers described in its bylaws or appointed by the board of directors. . . ." Thus it would appear that under the RMBCA a corporation could be headed by the "Great PooBah", an individual assisted by the "Supreme Tweeb." Notwithstanding, there must be at least one officer who has the functions of the corporate secretary and who assumes all statutorily imposed duties of that office.*

*RMBCA Section 8.41 is in accord with ACC Section .483(a) in describing the duties of officers. They are fixed by the terms of the bylaws or, the the extend permitted, by the board. The RMBCA misses the accomplishment of ACC Section .483(c) in making explicit the grant of real agency authority to corporate officers.*

*RMBCA Section 8.42 joins ACC Section .483(e) in defining a duty of care for corporate officers. Unlike the ACC, the RMBCA does not make an express reference to a duty to make reasonably inquiry as part of the "reasonable person in like circumstances" standard. RMBCA Section 8.42 parallels its treatment of the duty of care for corporate directors by articulating "safe harbor" provisions wherein an officer may rely upon reports and representations of others. The ACC does not spell out this concept.*

*RMBCA Section 8.43 parallels ACC Section .483(b) in providing that officers serve at the pleasure of the board. It also recognizes circumstance under which an officer may resign her position.*

*RMBCA Section 8.44 is functionally identical to ACC Section .483(b) in providing that the removal of an officer does not prejudice any contract rights which the officer might have in the event that removal was in breach of a contract of employment. Both the ACC and RMBCA language aim to forestall circumstances in which a corporation could be ordered to specifically perform a contract with an officer in whom the board no longer reposed confidence. Such a corporation may, however, be liable in damages.*

## *Section .485 LOANS TO DIRECTORS, OFFICERS, AND EMPLOYEES*

*ORIGIN: ACC Section .485 is unique, borrowing from MBCA Section 47 and GCL Section 315, but reflecting policies which are more protective of the corporate fisc than either of those provisions. It replaces AS 10.05.213.*

*SUMMARY OF COVERAGE: ACC Section .485 repudiates AS 10.05.213's flat prohibition against loans to corporate directors or officers. However, loans may not be made to directors without the approval of two-thirds of the voting shares. The board is competent to extend loans to officers and employees. A "loan" is defined broadly, to include securities or real or personal property, as well as cash. Directors, officers, and employees of parent, subsidiary, and sibling corporate affiliates are restrained under this section for purposes of* obtaining a corporate loan.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: 8.32 also prohibits a corporation from extending loans or guarantees to corporate directors. It does not cover loans to officers or employees. Further, the power to loan or guarantee the loans of directors is easier to achieve under RMBCA Section 8.32. Either a simple majority of the voting shares may approve or the board may determine that the loan or guarantee benefits the corporation and, having so determined, approves it.

## Section .488 SECONDARY LIABILITY OF DIRECTORS AND OFFICERS

ORIGIN: ACC Section .488 is new and without direct precedent in corporate law. This section was adapted from NBCL Section 630, which imposes personal joint and several liability upon the ten largest shareholders of a non-publicly traded corporation for all debts, wages, or salaries due and owing to any of the corporation's laborers and employees.

SUMMARY OF COVERAGE: The social problem targeted for redress by ACC Section .488 is the abuse of unsecured creditors, including employees, who are precluded by the relatively small dimension of their demands, contrasted with the high costs of litigation, from asserting the more traditional common law efforts to "pierce the corporate veil".

Section .488 creates a "secondary liability" on the part of incorporators, directors (other than a provisional director appointed under Section 640), and the president, secretary, and treasurer in the event that corporate assets prove insufficient to meet corporate obligations for contract indebtedness, materials, supplies, inventory, or services furnished in the state during their period of service. This secondary liability is joint and several, and may amount to a maximum of $25,000 for each creditor. The terms of a written contract between a corporation and a third party may modify or preclude the liability created by this section. The liability of this section also extends to directors, incorporators, and officers of every foreign corporation doing business within Alaska to the extent that materials, supplies, inventory, or services were furnished within the state.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The exposure draft of the RMBCA contained nothing comparable to the New York precedent or the ACC provision on secondary liability. However, the final draft states in Section 2.02 that the articles can impose personal liability on shareholders for specified amounts in specified conditions.

## Section .490 INDEMNIFICATION OF OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS: INSURANCE

*ORIGIN:* *ACC Section .490 is premised upon Section 5 of the Model Act and works few changes on the provisions of AS 10.05.010.*

*SUMMARY OF COVERAGE:* *Corporate director, officers, and employees are vulnerable to attack in their personal capacity for acts done in their corporate roles. There is an understandable demand for financial protection from potentially ruinous costs and liabilities. Standing in opposition to this demand are social policies implicit in the condemnation of activity or behavior as criminal, violative of administrative regulations, or harmful to the interests of the corporation. These competing interests must be confronted in any statutory provision covering indemnification.*

*ACC Section .490 distinguishes between those circumstances in which a claim for indemnification may be made as of "right" from those in which it is addressed to the discretion of the corporation. As a further limitation upon discretionary indemnification, ACC Section .490(a) and (b) specify standards which must have obtained as to both the conduct and state of mind of the defendant. Finally, the corporation is empowered to purchase and maintain insurance which would recompense a defendant for any costs or liabilities incurred irrespective of the power of the corporation to have effected indemnification for its own resources.*

*Indemnification as a matter of right under ACC Section .490(c) can be asserted by a defendant who has been exonerated on the merits. Discretionary indemnification is provided in two circumstances. ACC Section .490(a) deals with a defendant in direct civil, administrative or criminal proceedings. While the decision to indemnify is left to the judgment of the corporation under subsection (d), it is conditioned upon a finding that the defendant ". . .acted in good faith an in a manner reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to a criminal action pro proceeding, had no reasonable cause to believe the conduct unlawful. . ." ACC Section .490(b) deals with the even more troubling situation of discretionary indemnification where the defendant has been assailed in a derivative proceeding. If the defendant has been adjudged guilty of violating either the duty of care or loyalty, the power of the corporation to indemnify against the very harm which it has suffered, or the court incurred costs in resisting liability, can only be exercised pursuant to a specific finding by and order of the court in which the action was tried.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:* *Chapter 8, sub-chapter E of the RMBCA contain the coverage on indemnification. RMBCA Section 8.51(a), (b) and (c). deals with the authority of a corporation to indemnify. It is functionally equivalent to ACC Section .490(c). RMBCA Section 8.51(d) prohibits indemnification in the instance of a successful derivative suit or other proceeding charging personal benefit to the defendant. However this ironclad prohibition* *is later qualified by RMBCA Section 8.54(2) where it is recognized that the court may order indemnification. The combination of these two provisions is a result not unlike ACC Section .490(b). RMBCA Section 8.52 on mandatory indemnification deals with the defendant who was wholly successful. It accords with ACC Section .490(c).*

*RMBCA Section 8.53 adopts a stricter attitude toward advances against th defendant's anticipated expenses. ACC Section .490(e) leaves the question within the discretion of the corporation conditioned only upon an undertaking by or on behalf of the defendant that the amount will be repaid if it is ultimately determined that there is no indemnification as a matter of right. The RMBCA would require a prior determination of the defendant's good faith, the furnishing of a written personal undertaking to repay the advance, and a determination that the facts then known would not preclude indemnification.*

*RMBCA Section 8.55 is in substantial accord with ACC Section .490(d)'s position on how and by whom the corporate decision to indemnify is to be made. The primary responsibility is that of disinterested and uninvolved directors so long as they constitute a majority of a quorum. If this quorum cannot be mustered the decision may be reached by independent legal counsel or approved by the outstanding shares.*

*RMBCA Section 8.56 extends the provisions on the indemnification of directors to employees and officers. This accords with the provisions of ACC Section .490.*

*RMBCA Section 8.57 accords with ACC Section .490(g) permitting a corporation to purchase and maintain a policy of insurance covering directors, officers and employees which would cover any liability arising out of that status whether or not the corporation would have the power to indemnify with its own funds.*

Notes

## ARTICLE 7. AMENDMENTS AND CHANGES

### Section .502 AUTHORIZATION: PERMITTED AND PROHIBITED AMENDMENTS

ORIGIN: ACC Section .502(a) is taken from GCL Section 900. It repeats the substance of AS 10.05.270, which it replaces. Section .502(b) is largely a reenactment of AS 10.05.273, with several deletions reflecting the elimination of the concept of par value. The language under Section .502(b)(2) is new, and reflects a major change in Alaska law, in order to carefully and unequivocally authorize only changes which extend limitations imposed upon a corporation's duration. Subsections .502(b)(5) and (6) follow MBCA Section 58, in order to conform Alaska law to the language of the Model Act.

SUMMARY OF COVERAGE: ACC Section .502 permits a corporation to amend its articles in "any and as many respects as may be desired." Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 10.01 confers a power to amend the corporate articles in the most general of terms. It does not differ substantively from ACC Section .502 but does not contain the non-exhaustive list of permitted amendments found in the ACC. This reflects a differing drafting style in which the Alaska statute would contain illustrations and examples to guide both lay persons and counsel.

### Section .504 PROCEDURE TO AMEND ARTICLES OF INCORPORATION

ORIGIN: ACC Section .504's subsections (a)(1), (b), and (c) are taken from AS 10.05.276 and MBCA Section 59. Section .504(a)(2) is adapted from Section 902(a) of the GCL, and changes Alaska law by explicitly giving shareholders the power to initiate amendments to the articles.

SUMMARY OF COVERAGE: ACC Section .504 sets forth the mandatory procedures which must be followed to amend the articles. Under Section .504(a)(2), once shares have been issued, the power to initiate amendments resides concurrently in the board and with the voting shares. An amendment initiated by the shares does not become effective until approved by the board; likewise, an amendment initiated by the board requires shareholder approval to become effective. Alaska law presently requires a two-thirds majority of the shareholders to approve amendments; ACC Section .504(a)(2) opts for a majority of the outstanding shares entitled to vote, but makes the articles competent to establish a supermajority voting re-

*quirement. This section also provides for notice as well as the power of the board alone to amend the articles if no shares have been issued.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Several provisions of the RMBCA contain coverage of topics addressed in ACC Section .504. RMBCA Section 10.05 accords with ACC Section .506(a)(1) in providing that if no shares have been issued the power to amend the articles is with the board. Once shares have been issued ACC Section .504 requires the approval of both the directors and an absolute majority of the shares to amend the articles. RMBCA Section 10.02 creates a limited exception to this norm for what the official comment terms "housekeeping amendments" (10-9). These amendments can be affected by board approval only. Among them are two which Alaska law has always prohibited: deleting the names and address of the original registered agent and initial directors.*

*Once shares are outstanding RMBCA Section 10.03 severely restricts the power of shareholders. They cannot initiate amendments but can only approve those proposed by the board. Both statutes require that shareholders be given notice of the amendment whether it is to be considered at a regular or special meeting of the shares.*

## *Section .506 CLASS VOTING ON AMENDMENTS*

*ORIGIN: ACC Section .506 is largely a reenactment of AS 10.05.282. Section .506(6) amends AS 10.05.282 to conform with Section 60 of the MBCA, and includes an increase in the authorized number of shares of a superior class as an amendment giving a right to class voting. This section also replaces AS 10.05.279.*

*SUMMARY OF COVERAGE: ACC Section .506 provides for "class voting", which obtains irrespective of any provisions in the articles, and may not be impaired or denied by any internal rule. Further, as to any amendment on which there is a right to vote by class, there is no "approval by the shareholders" unless the amendment receives the affirmative vote of a majority of the affected class as well as a majority of the other shares entitled to vote.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 10.04 accords with ACC Section .506(a) in mandating class voting rights under circumstances where an amendment would affect the rights, privileges, or restrictions imposed upon that class of shares. Unfortunately, there is nothing in the RMBCA or its official comments which parallels ACC Section .506(b)'s express statement that if the holders of shares of a class are entitled to vote as a class then the amendment is not approved unless it receives a majority vote of the outstanding shares of that class and also receives an absolute majority of the outstanding shares.*

Section .508 GREATER VOTING REQUIREMENTS

*ORIGIN:* ACC Section .508 is taken from GCL Section 902(e), and is new to Alaska law.

*SUMMARY OF COVERAGE:* This section permits the articles to set up supermajority or even unanimous voting requirements. An amendment affecting such an article must be approved by the same supermajority vote.

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:* RMBCA Section 7.27 directly parallels the content of ACC Section .508. The official comment (7-65) makes it clear that the articles may establish unanimous voting requirements.

Section .510 ARTICLES OF AMENDMENT

Section .512 FILING OF ARTICLES OF AMENDMENT

*ORIGIN:* ACC Section .510 is a reenactment of AS 10.05.285, with the deletion of the provision regarding stated capital. Section .512 is a reenactment of AS 10.05.288.

*SUMMARY OF COVERAGE:* In order for an amendment to the articles to become effective, it is necessary to make a filing with the commissioner (ACC Section .512) and receive a certificate of amendment. Section .510 specifies what the articles of amendment are to include.

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:* RMBCA Section 10.06 is functionally identical to ACC Section .512 except that it would require filing with the secretary of state and it omits the requirement that the articles of amendment be signed by designated corporate officers.

Section .514 EFFECT OF CERTIFICATE OF AMENDMENT

*ORIGIN:* ACC Section .514 is essentially a reenactment of AS 10.05.291, with language added from MBCA Section 63 permitting up to a 30-day delay in effectiveness.

*SUMMARY OF COVERAGE:* An amendment to the articles is not effective until the commissioner has reviewed the amendment to ascertain its conformity with law, and has issued a certificate of amendment. Section .514(b) specifies that an amendment does not have a retroactive effect so as to compromise any pending litigation.

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:* RMBCA Section 10.09 provides that, unless a delayed effective date is specified, the amendment or restatement becomes effective *when the articles of amendment or restatement are filed.*

*Section .516 RESTATED ARTICLES OF INCORPORATION*

*Section .518 FILING OF RESTATED ARTICLES OF INCORPORATION*

*Section .520 EFFECT OF ISSUANCE OF RESTATED CERTIFICATE OF INCORPORATION*

*ORIGIN: ACC Section .516 is a reenactment of AS 10.05.294. ACC Section .518 is a reenactment of AS 10.05.303; Section .520 is a verbatim reenactment of AS 10.05.306.*

*SUMMARY OF COVERAGE: This section authorizes a corporation to restate its articles as they may have been amended as a matter of form by resolution of the board. The substantive provisions cannot be so amended, and in fact, Section .516 requires that a statement be filed with the restated articles averring that the restated articles correctly set out without change the corresponding provisions of the articles.*

*ACC Section .518 specifies the procedure to be followed by the corporation and the commissioner in the filing and administrative handling of the restated articles. Section .520 provides that the restated articles become effective and supersede the original articles and all amendments to them upon the issuance of the restated certificate of incorporation.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 10.07(e) and (f) follow the provisions of ACC Section .516 except that the restated articles may contain an amendment not previously reported to the state. Under this section the filing is again with the Secretary of State, not the commissioner as provided in ACC Section .518.*

*Section .522 AMENDMENT OF ARTICLES OF INCORPORATION IN REORGANIZATION PROCEEDINGS*

*Section .524 FILING OF AMENDMENT OF ARTICLES IN REORGANIZATION PROCEEDINGS*

*Section .526 EFFECT OF ISSUANCE OF CERTIFICATE OF AMENDMENT IN REORGANIZATION PROCEEDINGS*

*ORIGIN: ACC Section .522 is taken from MBCA Section 65, and is new to Alaska law.*

*ACC Sections .524 and .526 are derived from MBCA Section 65, and are new to Alaska law, being added in the wake of Section .522. Section .526 varies from the MBCA by omitting the 30-day effectiveness delay provision found in the Model Act.*

*SUMMARY OF COVERAGE: ACC Section .522 is designed to coordinate Alaska law with the Federal Bankruptcy Act. It permits* *amendment of the articles as part of the reorganization proceedings, which amendment might otherwise not obtain the affirmative vote of the shares. Without this provision, an involuntary dissolution and reincorporation may be necessary to achieve the desired result of the bankruptcy reorganization, with a possible increase in federal income tax liability.*

*ACC section .524 specifies the filing procedure for any amendments to the articles accomplished by bankruptcy reorganization under ACC Section .522. Section .526 provides for the effectiveness of the amendments upon the issuance of a certificate of amendment by the commissioner.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 10.08 is functionally identical to ACC Section .522 -- .526.*

Notes

## ARTICLE 8. ORGANIC CHANGE

Section .530 MERGER

Section .532 PROCEDURE FOR MERGER

Section .534 CONSOLIDATION

Section .536 PROCEDURE FOR CONSOLIDATION

Section .538 SHARE EXCHANGE

Section .540 PROCEDURE FOR SHARE EXCHANGE

ORIGIN: ACC Sections .530 and .532 (pertaining to the definition of and procedure for merger) are taken from MBCA Section 71, and reflect without change AS 10.05.375 and .378. ACC Sections .534 and .536 (pertaining to the definition and consolidation) are taken from MBCA Section 72, and reflect without change AS 10.05.381 and .384. ACC Sections .538 and .540 (define and determine the procedure for a share exchange). They are taken from MBCA Section 72A, and are without precedent in Alaska law.

SUMMARY OF COVERAGE: These sections define and set create uniform procedures for the proposal of the three classic forms of organic change. In the event of either a merger or consolidation, one or both of the participating corporations formally ceases to exist. In the case of a share exchange there is no formal suppression of a constituent corporation but it becomes a wholly owned subsidiary of the acquiring corporate entity. In each instance, the ACC places the responsibility for the framing of the proposal within the discretion of the boards of the participating corporations. The ACC provides for a share exchange for the first time in Alaska law.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Sections 11.01 and 11.02 cover the subjects addressed in ACC Sections .530 -- .540. The RMBCA provisions on merger and share exchange parallel those of the ACC. There is no separate treatment of consolidation in the RMBCA. This departure from the prior provisions of the Model Act and the statutory laws of all jurisdictions currently following it is explained by the drafters of the RMBCA as reflecting sentiment that consolidations are currently out of fashion. If the plan is that both participating corporations are to cease existence and emerge and a new, third corporation, the RMBCA would require the extra steps of prior formation of that third corporation and then merging the two constituent corporations into it. Under ACC Section .534 this result can be effected in a single, and far simpler step.

## Section .542 DISPARATE TREATMENT OF SHARES OF THE SAME CLASS OR SERIES PROHIBITED: EXCEPTIONS

ORIGIN: ACC Section .542 is predicated upon, but not adapted from GCL Section 1101, and is unprecedented in Alaska law.

SUMMARY OF COVERAGE: ACC Section .542 establishes a legal presumption against treating the holders of shares of the same class or series in any plan for an organic change in a different manner. A major question much litigated in the last decade is whether organic changes may be used to eliminate certain shareholders by forcing them to accept cash or non voting stock for their shares while other holders of identical stock receive voting shares in the surviving corporation. ACC Section .542 resolves this issue for Alaska in a manner that comports with Delaware and California decisional law. The fiduciary duties of majority or controlling shareholders are recognized in Section .542(a). Section 542(b) recognizes that disparate treatment may be necessary to preserve a Subchapter S election under the Internal Revenue Code. Disparate treatment may also be necessary for other sound business reasons, but the proponents of the plan have the burden to prove it is consistent with fiduciary duties owed to all the shareholders.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The official comment to the RMBCA (11-4, 5) makes it clear that the framers of that statute did not resolve this basic question. Any state which chooses to follow this recommendation will condemn to totally unstructured litigation all participants in any organic change which is challenged for its discriminatory treatment of shareholders. Under ACC Section .542 the presumption is against discriminatory treatment unless it can be justified on the predicate of some corporate business reason, as opposed to the personal goals of dominant shareholders.

## Section .544 NOTICE TO AND APPROVAL BY SHAREHOLDERS

ORIGIN: ACC Section .544 is a modified version of new Section 73 of the MBCA, and has been extended to treat share exchange in a manner identical to merger or consolidation.

SUMMARY OF COVERAGE: This section mandates the steps necessary to seek the approval of shareholders of each corporation participating in a merger, consolidation, or share exchange. Written notice stating that one of the purposes of the meeting is to consider the proposed organic change, a copy of the plan for such change, and the text of the ACC provisions on the rights of dissenting shareholders must be given to each shareholder irrespective of voting rights.

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 11.03 follows ACC Section .544 in requiring notice to shareholders which specifies that an organic change is to be proposed by the board and accompanied by a summary of the plan. This notice is statutorily deficient unless it also includes notice of dissenter's rights. However, unlike ACC Section .544 which express this important obligation in the provision entitled "notice to and approval by shareholders", the RMBCA command that there be notice of dissenter's rights is found in Section 13.20(a).*

### *Section .546 MANNER OF APPROVAL BY SHAREHOLDERS*

*ORIGIN: ACC Section .546 is premised upon new Section 73 of the MBCA, with a modification to retain the two-thirds voting requirement found in AS 10.05.390. The only change worked by Section .546 pertains to the inclusion of share exchanges.*

*SUMMARY OF COVERAGE: ACC Section .546 enfranchises all shares of every class or series of each constituent corporation to an organic change. The plan prepared by the board and noticed to the shareholders is "approved" upon receiving the affirmative vote of an absolute two-thirds majority of all outstanding shares. If the articles of any of the participating corporations provide for class voting on plans for organic change, then in addition to the two-thirds voting requirement for approval by the outstanding shares, there is also a two-thirds affirmative vote requirement for that class. If the articles do not provide for class voting, but the plan for organic change contains provisions which, had they been proposed as amendments to the articles, would have required the affirmative vote of a class, then class voting is required under Section .546.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 11.03 differs radically from both existing and proposed Alaska law. Unless a greater number is required by the articles, a plan of merger or share exchange is approved by the holders of a simple majority of the shares. RMBCA Section 11.03 does not enfranchise all shares regardless of the presence or absence of voting rights under the articles. It does recognize class voting in a manner not unlike ACC Section .576. In a departure from the 1977 position of the Model Act (Section 73) and the laws of those states which currently accord with that section, the recommended content of RMBCA Section 11.03(g) would create certain circumstances in which mergers and share exchanges can be effected without shareholder approval. As explained in the official comment (11-15), "shareholders' votes should be required only if the transaction fundamentally alters the character of the enterprise or substantially reduces the shareholders' participation in voting or profit distribution." Unfortunately, RMBCA Section 11.03(g) pays no attention at all to the basic economic pursuit of the corporate entity before and after the* *organic change. So long as the number of outstanding shares is not changed plus or minus 20%, shareholders who had invested in a corporation historically tied to the fishing industry could find themselves tied to the fate and fortune of a hulla hoop concern. They would never have been consulted, their approval would not have been required, and they would have no dissenter's rights!*

*Section .548 ABANDONMENT OF PLAN OF MERGER, CONSOLIDATION, OR EXCHANGE*

*ORIGIN: ACC Section .548 is taken from MBCA Section 73, and reflects without change the content of AS 10.05.393, save for the inclusion of share exchange.*

*SUMMARY OF COVERAGE: This section provides that, notwithstanding approval by the shareholders, the plan may fail without further action if any condition precedent or concurrent is not satisfied, or if any condition subsequent is triggered.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 11.03(i) accords with ACC Section .548.*

*Section .550 ARTICLES OF MERGER, CONSOLIDATION, OR EXCHANGE*

*Section .552 FILING OF ARTICLES OF MERGER, CONSOLIDATION, OR EXCHANGE*

*ORIGIN: ACC Sections .550 and .552 are predicated upon new Section 74 of the MBCA. Section .550 changes AS 10.05.396 by the inclusion of share exchanges. Section .552 technically restates AS 10.05.402 to reflect the uniform processing procedures found in ACC Section 910.*

*SUMMARY OF COVERAGE: These sections establish the formal requirements necessary to reflect the combination. Section .550 provides that each constituent corporation must execute a set of recombination articles, including the mechanics of the shareholder vote. Section .552 directs that a duplicate copy of the recombinate articles be delivered to the commissioner.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 11.05 is functionally identical identical to ACC Section .552*

*Section .554 MERGER OF SUBSIDIARY CORPORATION*

*Section .556 PROCEDURE FOR MERGER OF SUBSIDIARY CORPORATION*

*Section .558 FILING OF ARTICLES OF MERGER OF SUBSIDIARY CORPORATION*

*ORIGIN: ACC Section .554 is taken from MBCA Section 75, and has no precedent in Alaska law.*

*ACC Section .556 is taken from MBCA Section 75, with a modification to create a presumption against disparate treatment of the shares.*

*ACC Section .558 is taken from MBCA Section 75.*

*SUMMARY OF COVERAGE: This section authorizes a merger between a parent and a subsidiary whenever at least 90 percent of all outstanding shares of each and every class are owned by the parent corporation.*

*ACC Section .556 places the power to propose and implement a merger of the subsidiary in the board of the parent. No shareholder approval is required. Disparate treatment of shares must pass muster under ACC Section .542.*

*ACC Section .558 continues the uniform filing procedures established in ACC Section .910.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 11.04 is functionally identical to ACC Sections .554, 556 and .558 in the treatment of "short form mergers" between a parent and a 90% owned subsidiary. It does not, however, contain the ACC Section .556(a)(2)'s language creating the presumption of non-discriminatory treatment of all shares of the subsidiary.*

## *Section .560 EFFECT OF MERGER, CONSOLIDATION, OR EXCHANGE*

*ORIGIN: ACC Section .560 is predicated upon revised MBCA Section 76. The provision for an optional delayed effective date, the inclusion of share exchanges, and the elimination of net surplus reflect the changes made to AS 10.05.405.*

*SUMMARY OF COVERAGE: ACC Section .560 governs the date, circumstances when an organic change becomes effective. It is a sufficient authority for the succession by the surviving or resulting corporation to all of the rights and liabilities of the constituent corporations. To the extent that the recombination articles purport to amend the articles of incorporation, such change is given effect. Finally, ACC Section .560(c) determines the fate of all shares of the constituent corporations which are to be converted or exchanged. The ownership claims and interests of shareholders in the constituent corporations are defined subject to any rights which may be asserted by a dissenting shareholder under ACC Section .574.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 11.06 is functionally identical to ACC Section .560 except for its failure to spell out the consequences of a consolidation in which constituent corporations A and B emerge as resulting corporation C.*

## Section .562 MERGER, CONSOLIDATION, OR EXCHANGE OF SHARES BETWEEN DOMESTIC AND FOREIGN CORPORATIONS

ORIGIN: ACC Section .562 is predicated upon new Section 77 of the MBCA, and replaces AS 10.05.408, .411, and .414. The inclusion of share exchange is unprecedented.

SUMMARY OF COVERAGE: ACC Section .562 removes potential conflicts of laws when domestic and foreign corporations undergo organic change. This section provides that if the surviving or resulting corporation is foreign, it must as a condition of merging with a domestic corporation agree to service of process in Alaska, and to pay promptly all dissenting shareholders.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 11.07 is functionally identical to ACC Section .562 except that the substantive law referenced and made applicable to the surviving foreign corporation differs as noted above.

## Section .564 REORGANIZATION: DISCLOSURE OF ALIEN AFFILIATES

ORIGIN: ACC Section .564 reflects the content of AS 10.05.250, as amended in 1980.

SUMMARY OF COVERAGE: This section requires the disclosure of alien affiliates and the percentage of their outstanding shares in any corporation organized under this Chapter.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA is indifferent to the status of alien affiliates.

## Section .566 SALE OF ASSETS IN REGULAR COURSE OF BUSINESS; MORTGAGE OR PLEDGE OF ASSETS

ORIGIN: ACC Section .566 is predicated on the 1962 version of Section 78 of the MBCA, and modifies the content of AS 10.05.435.

SUMMARY OF COVERAGE: The proposed Alaska Corporations Code distinguishes between a sale of assets in the normal course of business (such as a sale of all inventory) and a sale of all or substantially all assets not in the regular course of business. Shareholder approval is necessary for the latter on the theory that, like a merger or share exchange, it represents another fundamental change.

ACC Section .566 is concerned with the sale, lease, exchange, or other disposition of all or substantially all of the property and assets of the corporation in the usual and regular course of its business. The power to effectuate such a transaction resides with the board; it does not require shareholder approval. A mortgage or pledge of these assets may be made under similar authority irrespective of whether or not it is in the regular course of business. This last provision would change existing Alaska law which required shareholder approval of such mortgages or pledges of corporate property.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 12.01 is functionally identical to ACC Section .556 and would also change existing Alaska law by not requiring shareholder approval for any pledge or mortgage of corporate assets.

Section .568 SALE OF ASSETS NOT IN REGULAR COURSE OF BUSINESS

Section .570 APPROVAL OF TRANSACTION BY SHAREHOLDERS

Section .572 ABANDONMENT OF TRANSACTION BY BOARD

ORIGIN: ACC Section .568 is predicated upon MBCA Section 79. AS 10.05.438 is modified to eliminate a mortgage or pledge of all or substantially all assets (now covered under Section .566). This section differs from the Model Act by requiring shareholder notice also to include a copy of the ACC Sections on the rights of dissenting shareholders.

ACC Section .570(a) is predicated upon MBCA Section 79(c), and preserves the two-thirds voting requirement of AS 10.05.441. Section .570(b) is new.

ACC Section .572 is predicated upon MBCA Section 79(d), and reflects without change AS 10.05.444.

SUMMARY OF COVERAGE: ACC Section .568 treats the sale, lease, exchange, or other disposition of all or substantially all of the assets of a corporation as the equivalent of an organic change if not made in the usual course of business. When not in the regular course of business, written notice of the proposed disposition of assets and a copy of the ACC provisions on dissenters' rights must be given to all shareholders regardless of voting rights

The proposal for the sale of all or substantially all of the assets is approved by the affirmative vote of two-thirds of all outstanding shares, with all shares being enfranchised regardless of restrictions or limitations in the articles. Class voting is recognized. Section .572(b) requires the extraordinary absolute 90 percent approval by outstanding shares (with all shares franchised) when the buyer is in control of or under the control of the seller.

This section permits the board, in its discretion, to abandon a section .568 transaction notwithstanding its approval by the shareholders.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 12.02 accords with ACC Sections .568 -- .572 in treating the sale, lease or exchange of all or substantially all corporate property other than in the usual and regular course of business as an organic change. The proposal must originate with the board and cannot be effectuated without shareholder approval. Unlike existing and proposed Alaska law, the RMBCA requires only majority approval. The official comment makes it clear that class voting can be had in appropriate circumstances even though the section is silent on the question. The official comment also warns of the existence of dissenter's rights, a topic upon which RMBCA Section 12.02 is also silent. By contrast, the ACC gathers all of these important provisions into the three related sections rather than scattering them across a lengthy code.

## Section .574 RIGHT OF SHAREHOLDERS TO DISSENT

ORIGIN: ACC Section .574 is predicated upon MBCA section 80, with alterations to allow dissenters' rights for shareholders in corporations party to a share exchange. This section consolidates AS 10.05.417 through .432 and AS 10.05.447. through .462.

SUMMARY OF COVERAGE: ACC Section .574 provides that a shareholder who has dissented from an organic change has a right to have the corporation purchase her shares at "fair valuation." Section .574(b) changes Alaska law by recognizing that a shareholder need not dissent with respect to all of her shares. Section .574(c) changes Alaska law by denying dissenters' rights in the case of a "short form" merger (Section .556). There is an additional change by the presumptive denial of dissenters' rights for holders of shares traded on a national securities exchange on the record date fixed for ascertaining the shares entitled to vote on the organic change.

ACC Sections .576 through .586 establish the criteria for perfecting dissenter's rights, withdrawal of a demand, notice, payment for shares, action to determine value of shares upon failure to agree, presentation of and status of shares reacquired by the corporation. Aside from the right to litigate the regularity of any organic change, or to challenge any disparate treatment of shares (Section .542), the right to claim the status of a dissenter is intended to be the exclusive remedy available to shareholders.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 13.02 parallels ACC Section .574 in recognizing the right of shareholders to dissent in the case of an organic change, including the sale of all or substantially all of the corporate property other than in the usual and regular course of business. However, RMBCA Section 13.02(a)(4) goes beyond existing or proposed Alaska law, or the prior content of MBCA Section 80, in creating dissenter's rights in the event the corporation amends its articles to impair the shareholder's preemptive, redemption, or voting rights. The final draft of the RMBCA has added yet another circumstance in which dissenter's rights are recognized. It would allow a shareholder to dissent to an amendment which would reduce her shares to a *fraction of a share if the fractional share could be acquired for cash under Section 6.04.*

*The Model Act exception, reflected in ACC Section .574(d), which denies preemptive rights if the securities were readily marketable on a national exchange is not carried over into RMBCA Section 13.02.*

## *Section .576 RIGHTS OF DISSENTING SHAREHOLDERS: WITHDRAWAL OF DEMAND*

*ORIGIN: ACC Section .576 is oredicated upon MBCA Section 81. The provisions which explicitly determine the impact upon the status of the dissenting shareholder, the restoration of full shareholder status, and the exclusion of price movement in anticipation of the organic change are new to Alaska law.*

*SUMMARY OF COVERAGE: ACC Section .576 mandates a three-step procedure for the perfection of the status of a "dissenter." First, the shareholder must file a written objection to the plan; second, the shareholder must not vote in favor of the proposal; and third, within ten days after the vote, the shareholder who complies with steps one and two must make a written demand upon the corporation to be paid the "fair valuation" of his shares. Absent a written waiver by the corporation, a shareholder who fails to make a written demand within the time limitations set forth in this section shall be bound by the terms of the organic change.*

*Once a shareholder has complied with these three steps, he loses the right to vote and other shareholder rights. Section .576 provides for the restoration of these rights if the shareholder withdraws his demand for dissenters' rights (which withdrawal requires the consent of the corporation), or if the corporation rescinds, abandons, or otherwise is disabled from carrying through with the organic change.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 13.20 mirrors the first two steps outlined in ACC Section .576 for the asserting of a dissenter's rights. The third step, a written demand upon the corporation to be paid for the affected shares is found under RMBCA Section 13.23.*

## *Section .578 NOTICE TO DISSENTING SHAREHOLDER*

*ORIGIN: ACC Section .578 is predicated upon MBCA Section 81.*

*SUMMARY OF COVERAGE: This section requires that the surviving corporation make the first move by making a written offer to each dissenting shareholder which includes a copy of a recent financial statement. These provisions are not found in AS 10.05.420 and .450.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section*

*13.22 requiring that the corporation notify shareholders of their rights to dissent and the means of exercising that right are covered by provisions of the ACC which require that this information be supplied to shareholders at the time the organic change is submitted for shareholder approval. The duty of the surviving or resulting corporation is set forth in ACC Section .578. RMBCA Section 13.25 requires that the corporation tender what it estimates to be the fair value of the shares accompanied by a current balance sheet. By contrast, ACC Section .578 requires that the corporation make a written offer to purchase the shares at a price considered to be their fair value.*

*Section .580 PAYMENT TO DISSENTING SHAREHOLDER AFTER AGREEMENT ON VALUE OF SHARES*

*ORIGIN: ACC Section .580 is predicated upon MBCA Section 81, and reflects without change AS 10.05.423 and .453.*

*SUMMARY OF COVERAGE: ACC Section .580 provides for a thirty day period during which the dissenting shareholder and the corporation have to reach an agreement on the fair valuation of the dissenter's shares. If agreement is reached within 30 days, the price is to be paid and the shares surrendered within 90 days. If no agreement is reached, recourse must be had through ACC Section 582.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 13.28 addresses the options of a shareholder dissatisfied with the amount tendered by the corporation under Section 13.25. Within 30 days she must notify the corporation in writing of the amount of money she will accept for the shares and make demand for that sum. If no demand is made within this period the right to contest the fair value as determined by the corporation is deemed waived.*

*Section .582 ACTION TO DETERMINE VALUE OF SHARES UPON FAILURE TO AGREE*

*ORIGIN: ACC Section .582 is taken from MBCA Section 81, and replaces AS 10.05.426 and .456.*

*SUMMARY OF COVERAGE: If a dissenting shareholder and the corporation do not reach an agreement as to the fair valuation of the dissenter's shares, Section .582 directs that the corporation invoke the jurisdiction of a superior court to judicially determine the fair value. All dissenters are to be joined in this action. Section .582(b) provides for an award of interest. Section .582(c) vests the court with broad discretion respecting litigation costs and expenses, excluding attorneys' fees.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section*

*13.30 parallels ACC Section .582. However, if the corporation does not file for a judicial determination of fair value within the time proscribed, it is automatically obligated to pay the shareholder the amount demanded. The strategy of the ACC for coping with this eventuality is to grant to any dissenting shareholder the right to commence the judicial proceeding and then bind all shareholders to that single determination by assertion of quasi-in rem jurisdiction of the superior court.*

*RMBCA Section 13.31 parallels ACC Section .582(c) permitting the court to assess the costs associated with the determination of fair value. There is one important difference, the RMBCA would permit this award to include an assessment of counsel fees. The ACC would not.*

### *Section .584 PRESENTATION OF DISSENTERS' SHARES TO CORPORATION*

*ORIGIN: ACC Section .584 has no counterpart in Alaska law. It is predicated upon Section 1320 of the GCL.*

*SUMMARY OF COVERAGE: This section provides that the corporation may demand the physical production of the dissenters' share certificates within twenty days from the perfection of their status (Section .576), so that the corporation may confirm its potential liability. Failure of a dissenter to comply terminates all his dissenters' rights. ACC Section .584 also restricts the transferability of shares for which a demand for payment has been made.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 13.22(b) gives the corporation obliged to honor an assertion of dissenter's rights the authority to stipulate when and where the certificates must be deposited. The obligation on the part of the shareholder to deposit the shares is created by RMBCA Section 13.23(a). RMBCA Section 13.24 recognizes the right of the corporation to restrict the transfer rights of shares from the date of demand for their payment until the proposed corporate action is effectuated.*

### *Section .586 STATUS OF SHARES ACQUIRED FROM DISSENTING SHAREHOLDERS*

*ORIGIN: ACC Section .586 is predicated upon MBCA Section 81, and consolidates AS 10.05.429 and .462, with the substituted reference to "reacquired" for "treasury" shares.*

*SUMMARY OF COVERAGE: ACC Section .586 establishes that shares purchased from dissenters may be used by the surviving corporation as reacquired shares, except that in the case of merger or consolidation, they may be held and disposed of as the plan may otherwise provide.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: It would ap-*

*pear that the RMBCA has failed to include a provision comparable to former MBCA Section 81.*

## Notes

## *ARTICLE 9. DISSOLUTION*

### *Section .605 VOLUNTARY DISSOLUTION BY VOTE, WRITTEN CONSENT OF SHARES, OR ELECTION OF THE BOARD*

*ORIGIN:* *Dissolution is to a corporate entity what death is to a natural person. As with the provisions respecting the articles and bylaws, amendments and organic change, the protection of the interests of shareholders and creditors and the imposition of duties of care and loyalty upon directors and officers are addressed in the ACC provisions governing dissolution. Article 9 carefully distinguishes between two fact patterns which are united only in the conclusion that the corporation ceases to exist. The distinction is predicated upon whether the decision to dissolve is that of a majority of the shareholders, or whether that result is inflicted upon the corporation by judicial decree because of the valid contention of a minority of shareholders or the commissioner that the continued existence of the corporate entity is intolerable. If majority consent is the key, the dissolution is said to be "voluntary." If the life of the corporation is to be taken as a consequence of gross abuse of the minority or persistent and serious flaunting of the state's regulation, then corporate termination is "involuntary."*

*The ACC provisions on voluntary dissolution reflect substantial modification of prior Alaska law and follow the format and content of the California General Corporation Law. However, the California model proved unacceptable as a basis for most of the provisions respecting involuntary dissolution where the decision was made to pattern the proposed code after the Model Business Corporation Act and historic Alaska statutes. Notwithstanding, certain innovations from the GCL have been engrafted onto the involuntary provisions and are noted in the official comments to the specific sections.*

*ACC Section .605 is an adapted version of GCL Section 1900, and a consolidation of AS 10.05.465, .474, and .477. This section differs from Alaska law insofar as it curtails the role of the board in initiating and approving a plan of voluntary dissolution.*

*SUMMARY OF COVERAGE: ACC Section .605 places the decision to voluntarily dissolve a functioning corporation with the shareholders. Under the ACC, the board of directors is given no role in either proposing or passing upon the decision to voluntarily dissolve. Thus, the shareholders initiate the proposal, and must cast at least a two-thirds affirmative vote of the shares in order to approve the plan. Alternatively, unanimous written consent of the franchised shares will eliminate the need for a noticed meeting. Three excep-*

*tions, where the board does possess the power to voluntarily dissolve, are: (1) where the corporation has been adjudged bankrupt, (2) the corporation has no assets and a history of having transacted no business for the preceding five years, or (3) where the corporation is still-born having issued no shares.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA also distinguishes between voluntary and what is termed "judicial dissolution." A third category, "administrative dissolution" is a specie of involuntary dissolution worked by the state as a consequence of corporate failure to comply with applicable law. The ACC classifies such administrative procedures as a specie of involuntary dissolution. Aside from this basic similarity, there are distinctions between the two codes which will be detailed in the following section by section analysis.*

*RMBCA Section 14.02 differs significantly from the ACC Section .605/California philosophy on voluntary dissolution. Under the RMBCA the shareholders have the power to initiate and effectuate the decision to voluntarily dissolve only if they can act unanimously under Section 7.04. In all other instances they must depend upon the board of directors to initiate a proposal to voluntarily dissolve the entity. In the absence of a provision in the articles requiring a greater vote, the board's proposal is approved if ratified by a majority of the shares.*

*RMBCA Section 14.01 makes the initial board or incorporators competent to dissolve a corporation which is still born having neither issued shares nor transacted business.*

## *Section .608 CERTIFICATE OF ELECTION: CONTENTS, SIGNING, VERIFICATION AND FILING*

*ORIGIN: ACC Section .608 derives from GCL Section 1901, and consolidates AS 10.05.468, .474, .480, and .483 (MBCA Sections 82(b), 83(b), 84(b), and 85).*

*SUMMARY OF COVERAGE: ACC Section .608 imposes upon the corporation the requirement that it file with the commissioner a certificate of election to dissolve, the content of which is specified. This section works only minor changes in the signing ,verifying, and filing procedures as found in current Alaska law.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.03 is substantially in accord with ACC Section .608 substituting the term "articles of dissolution" for the "certificate of dissolution."*

## *Section .610 CERTIFICATE OF REVOCATION OF ELECTION: CONTENTS, SIGNING, VERIFICATION, AND FILING*

## Section .613 EFFECT OF CERTIFICATE OF REVOCATION OF ELECTION

ORIGIN: ACC Section .610 is an adapted version of GCL 1902, which consolidates MBCA Sections 88,89, and 90, and AS 10.05.492 through .504.

ACC Section .613 is substantially a reenactment of AS 10.05.507, based upon MBCA Section 91.

SUMMARY OF COVERAGE: ACC Section .610 permits a corporation to revoke an election to wind up and dissolve prior to the distribution of any assets, and upon approval of the same power as made the initial decision to voluntarily dissolve. The provision that no assets be distributed prior to revocation of election to dissolve is the most important change wrought by Section .610, and is crucial in protecting the interests of creditors and senior shares as provided in ACC Sections .358 through .365. The contents and procedure for filing a certificate of revocation of election are specified.

Effectiveness of the certificate of revocation of election is contingent upon inspection, filing, and return of a duplicate original by the commissioner. Until that time, the corporation is deemed to be in the process of dissolution.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.04 also permits a corporation to revoke the decision to dissolve by the same authority who made the initial decision to dissolve. The California and ACC condition that there have been no distribution of corporate assets under the aborted plan to dissolve is, unfortunately, not reflected in Section 14.04. Instead, it merely requires that the election to revoke the dissolution occur within 120 days of the date on which articles had been delivered to the secretary of state. The consequence of an effective revocation of the dissolution election under RMBCA Section 14.04(d) and (e) is identical to ACC Section .613.

## Section .615 COMMENCEMENT AND CONDUCT OF VOLUNTARY PROCEEDINGS FOR WINDING UP; CESSATION OF BUSINESS; NOTICE

ORIGIN: ACC Section .615 is adapted from GCL Section 1903, and replaces AS 10.05.486 and .489(1) (MBCA Sections 86 and 87). The express provisions for board powers during winding up and the limited circumstances in which the corporation may continue normal business activities during winding up are new to Alaska law.

SUMMARY OF COVERAGE: Under ACC Section .615, "dissolution" is the decision to terminate the corporate existence. The actual steps which effectuate that decision are termed "winding up". Those steps begin and become obligatory upon electing to dissolve. In an important break with older statutes, winding up (the marshalling of all corporate assets, payment of all creditors and distribution of any net assets to shareholders) is not vested in court appointed receivers, but is *the responsibility of the board of directors.*

*A decision to dissolve the entity dramatically affects the real authority of the board. No longer may it continue pursuit of the original corporate business or purpose(s). Instead, it is to wind up the corporate affairs, file the articles of dissolution (ACC Section .620) and in so doing terminate the corporate existence (ACC Section .625). It is the goal of the statute that voluntary dissolution can, and typically will, be accomplished without the expense and inconvenience of judicial intervention by the elected representatives of the shares.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: 14.05 is functionally identical to ACC Section .615.*

*Section .618 JUDICIAL SUPERVISION OF WINDING UP; PETITION AND NOTICE; ORDER PROTECTING SHAREHOLDERS AND CREDITORS*

*ORIGIN: ACC Section .618 is an adapted version of GCL Section 1904, broadening the coverage of AS 10.05.489(3) (which was based upon MBCA Section 87).*

*SUMMARY OF COVERAGE: ACC Section .618 creates standing in the corporation, a five percent shareholder(s), or three or more creditors to petition the superior court to assume jurisdiction over the winding up of the corporation which has elected to voluntarily dissolve. The assumption of jurisdiction is discretionary with the court. The standing in the shareholders and creditors is new to Alaska law.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.30(4) attains only one of the prudential safeguards achieved by ACC Section .618. Under Section 14.30(4) the corporation is given standing to have its voluntary dissolution continued under court supervision. The official comment (14-38) explains that such a step may be "appropriate to permit the orderly liquidation of the corporate assets and to protect the corporation from a multitude of creditors' suits or suits by dissatisfied shareholders. Unfortunately, those creditors and shareholders are given no standing to invoke suck a petition, a standing which is recognized under ACC Section .618.*

*Section .620 ARTICLES OF DISSOLUTION: CONTENT*

*Section. 623 FILING OF ARTICLES OF DISSOLUTION*

*Section .625 EFFECT OF CERTIFICATE OF DISSOLUTION*

*ORIGIN: ACC Section .620 is taken from GCL Section 1905, and replaces AS 10.05.510, which was modeled after MBCA Section 92.*

*ACC Sections .623 and .625 are reenactments of AS*

10.05.513 and .516, based upon MBCA Section .93.

SUMMARY OF COVERAGE: Upon completion of the winding up process, a corporation is to file articles of dissolution, whose content and filing procedure are specified.

ACC Sections .623 and .625 establish a procedure whereby the articles are filed, processed by the commissioner, and a certificate of dissolution is issued. The issuance of the certificate terminates the existence of the corporation except for certain purposes.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no comparable coverage. The official comment to RMBCA Section 14.03 (14-9) makes it clear that the "articles of dissolution" are comparable to the ACC's certificate of dissolution and merely stipulate the procedure whereby the decision to voluntarily dissolve was achieved. The continuation of the corporate existence after dissolution is thought by the framers of the tentative draft a sufficient protection for corporate creditors and holders of shares with a liquidation preference. Such a notion was rejected in California and it is with the California precedent that the ACC is aligned.

## Section .628 INVOLUNTARY DISSOLUTION BY VERIFIED COMPLAINT; FILING; INTERVENTION BY SHAREHOLDER OR CREDITOR

ORIGIN: ACC Section .628 is predicated upon GCL Section 1800, with the deletion of 1800(d). It replaces AS 10.05.540 through .543, which was based upon MBCA Section 97. Section .628(b)(1), (2), (3), and (4) reenact comparable provisions of AS 10.05.540(1), (2), and (3). Section .628(b)(5) is new and designed to provide relief in what are, fundamentally, incorporated partnerships. Section .628(b)(6) is also new and in combination with subsection (a)(3), permits any shareholder to dissolve a corporation whose terms has expired. Section .628(c) replaces AS 10.05.552. Prior law specified that the joinder of shareholders was not necessary; this principle is implicit in subsection (c) which grants to any shareholder a right of intervention.

SUMMARY OF COVERAGE: ACC Section .628 envisions involuntary dissolution as an adversarial process conducted before a trial court. Section .628(a) provides that a verified complaint may be filed in the superior court by one-half or more of the directors then in office, a shareholder(s) holding shares representing not less than one-third of the common shares, any shareholder if the ground for dissolution is expiration of the period of time for which the corporation was formed, or any person expressly authorized to do so in the articles.

The grounds for involuntary dissolution are specified in Section .628(b). The use of involuntary dissolution to resolve deadlocks at either the director or shareholder level *is evident in Section .628(b)(2) and (3). However, in addition to deadlock, there must be a serious threat to the business or property of the corporate entity. With respect to shareholder deadlock, there must be the further element of a history of futile effort to resolve the impasse.*

*Section .628(b)(4) sets a specific standard for involuntary dissolution predicated upon the conduct of those in control of the entity. In essence, their pattern of behavior must have risen to such a damaging level as to make their continued exercise of the prerogatives of corporate existence obnoxious to both the minority shareholders and the state. If the corporation is held beneficially by 35 or fewer persons of record, Section .628(b)(5) sets a protection of the rights of the complaining shareholder(s) as a further ground for involuntary dissolution. Finally, under Section .628(d) the definition of shareholder is expanded to include those who hold beneficial interests in shares committed to a voting trust under ACC Section .425.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.30(b) is similar to ACC Section .628(b) in enumerating grounds for involuntary dissolution. However, the standing is limited to a shareholder. By contrast, ACC Section .628(a) would grant standing to one half or more of the directors then in office, a shareholder(s) holding one-third or more of the voting power, and any other person authorized in the articles. The grounds include deadlock at either the shareholder or director level and, like ACC Section .628, require an allegation of a threat to the corporate business and affairs. Oppression, fraud, or illegal conduct by those in control of the corporation is also recognized as a ground for seeking involuntary dissolution. Unfairness toward shareholders is not an enumerated ground and, in another difference from ACC Section .628, there is no ground for utilizing involuntary dissolution proceedings to protect the interests of complaining shareholders in a closely held entity.*

*RMBCA Section 14.30(3) grants to a creditor standing to seek involuntary dissolution if her claim has been reduced to judgment and the corporation is insolvent. ACC Section .628 does not permit creditors to commence the involuntary dissolution proceeding but would permit a creditor or shareholder to intervene for reasons deemed satisfactory by the trial court.*

### *Section .630 AVOIDING DISSOLUTION BY VERIFIED COMPLAINT; PURCHASE OF PLAINTIFF'S SHARES; DETERMINATION OF FAIR VALUE; STAY; APPRAISAL; AWARD; APPEAL;*

*ORIGIN: ACC Section .630 is a modified version of GCL Section 2000, and is unprecedented in Alaska law.*

*SUMMARY OF COVERAGE: The proposed code recognizes that the involuntary dissolution of a corporation is a step attended by serious immediate and general social consequences. In* *addition to terminating the corporation as an investment vehicle for its beneficial owners, it is eliminated as an employer, competitor and vehicle for distributing goods or services in the market place. Each of these employee and consumer interests make alternatives to dissolution desirable. To accommodate these interests ACC Section .630 establishes two circumstances in which the continued corporate existence may be preserved while at the same time relieving the plight of the plaintiffs who sought involuntary dissolution. First, the corporation may avoid the dissolution by purchasing for cash at fair value the shares owned by the plaintiffs (subject to any contrary provision in the articles). If the corporation elects not to purchase plaintiffs' shares, holders of 50 percent or more of the voting power may do so. Fair valuation is determined on the basis of the liquidation value.*

*Section .630(b) provides for situations when agreement as to fair value cannot be reached between the purchasing party and the selling party. Upon application to the court and the posting of security for expenses, the court will stay the dissolution proceedings and ascertain the fair value of the shares. Section .630(c) states the procedures which the court and court appointed appraisers shall follow in ascertaining the fair value of the shares. The court is directed to include in its order an alternative decree for the winding up and dissolution of the corporation should the purchasing party fail to pay the amount determined by the appraisers. If the purchasing party wishes to appeal the appraisal, Section .630(d) requires that the purchasing party first pay the appraised value to the moving (selling) party.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Unfortunately for the public interest, the RMBCA contains no contingencies for saving the corporate existence once proceedings for judicial dissolution have been commenced.*

## *Section .633 INVOLUNTARY DISSOLUTION BY THE COMMISSIONER: GROUNDS, PROCEDURE, REINSTATEMENT*

*ORIGIN: ACC Section .633 is a reenactment of AS 10.05.519 with substantial amendments. It continues the provisions of AS 10.05.519 which modified MBCA Section 94 to substitute involuntary dissolution by administrative process for judicial proceedings inaugurated by the Attorney General. However, the provisions respecting due process rights of the corporation (administrative hearing and trial de novo) are new to Alaska law. AS 10.05.519(h) has been severed from this section and is treated in ACC Section .635.*

*SUMMARY OF COVERAGE: ACC Section .633 creates discretion in the commissioner to effect an involuntary dissolution by administrative action for specified grounds, subject to an appeal to the superior court. This section provides for notice to be sent to the corporation, and affords the corporation an* *opportunity to correct the neglect, omission, delinquency, or noncompliance, or, to request an administrative hearing. The ACC attempts to give the targeted corporation liberal due process in these administrative proceedings. Thus before the decision to administratively dissolve can be carried into effect, the corporation must be accorded a prior hearing to ascertain the presence or absence of the noticed grounds. If the commissioner continues to abide by the original decision to involuntarily dissolve, Section .633(c) grants the corporation an opportunity to appeal to a superior court where the matter will be tried de novo. Section .633(e) establishes a two year period in which a corporation dissolved by the commissioner may be reinstated. Finally, Section .633(g) provides for the non-gratuitous assignment of contract rights by the dissolved corporation, and for counterclaim and set-off to diminish liability to the assignee.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.20 establishes the grounds for administrative dissolution. The list is shorter than that advanced under ACC Section .633 and ignores such Alaska interests as the failure of a control person to comply with the requirement of appointing a registered agent; the protracted failure to fill a vacancy on the board; and, the failure to complete dissolution within two years after filing a certificate of election to voluntarily dissolve. Under the RMBCA administrative dissolution is effected by the secretary of state.*

*RMBCA Section 14.21 details procedures for administrative dissolution which correspond to ACC Section .633(b). The prior hearing and court appeal rights guaranteed in the ACC are absent from the RMBCA provisions on administrative dissolution. There is no right to a prior hearing before the administrative official in RMBCA Section 14.21. The official comment (14-29) asserts the remarkable premise that grounds will rarely be controverted. Instead of a prior hearing, the corporation must either comply with the administrative demand for correction of the alleged ground or suffer administrative dissolution! The immediate consequence is that it is forbidden to conduct business. In this state of business paralysis, it may now invoke RMBCA Section 14.23 and petition the secretary of state for reinstatement. Only if that is denied can an appeal be taken, under RMBCA Section 14.23(b) to a trial court. Whether a trial de novo can be claimed in that court is left unspecified.*

## *Section .635 COMMISSIONER'S AUTHORITY TO BRING ACTION FOR INVOLUNTARY DISSOLUTION; GROUNDS; RELIEF*

*ORIGIN: ACC Section .635 paragraphs (a)(1) and (a)(2) are taken from AS 10.05.519, which is based upon Oregon Revised Statutes Section 57.585 and MBCA Section 94. Paragraphs .635(a)(3) and (a)(4) and subsection (b) are taken from GCL Section 1801(a)(1),(3), and (c).*

*SUMMARY OF COVERAGE: The classical "quo warranto proceeding" where the corporate charter is revoked for serious legal offense is reflected in ACC Section .635. Following a longstanding legislative decision, the state's interest is guarded by the Commissioner of Commerce and Economic Development rather than the Department of Law. ACC Section .635 establishes the commissioner's authority to bring an action for involuntary dissolution in the superior court upon specified grounds. The court may order dissolution or other relief as it considers just and proper, and may appoint a receiver for the winding up or order the board to wind up the corporation under the court's supervision.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.30(a) defines the quo warranto powers recommended in the tentative draft. They do not include the ground that the corporation has seriously violated a statute regulating corporations (ACC Section .635(a)(3)). The power of a court which has assumed jurisdiction over such a proceeding is confirmed in RMBCA Section 14.31(b) in a manner functionally equivalent to ACC Section .635(b).*

## *Section .638 VENUE AND PROCESS FOR COMMISSIONER'S ACTION*

*ORIGIN: ACC Section .638 is a reenactment of AS 10.05.534, which is modeled after MBCA Section 96.*

*SUMMARY OF COVERAGE: This section establishes the venue and service of process rules governing suits for involuntary dissolution.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.31(a) covers the venue for such a proceeding which is entrusted to prosecution by the attorney general. The statute does not specify the notice requirements mandated by ACC Section .638.*

## *Section .640 APPOINTMENT OF PROVISIONAL DIRECTOR: DEADLOCK*

*ORIGIN: ACC Section .640 is predicated upon GCL Sections 308 and 1802.*

*SUMMARY OF COVERAGE: Where the ground for a complaint for involuntary dissolution is a deadlock in the board (ACC Section .628(b)(2)), Section .640 affords yet another opportunity to save the corporate existence. As an alternative to dissolving the corporation, the court may appoint a provisional director who is neither a shareholder nor a creditor of the corporation. The provisional director has all the rights and powers of a director until the deadlock is broken, or until the director is removed by order of the court or by approval of the outstanding shares. The provisional director is exempted from secondary liability of directors under ACC*

*Section .488(a).*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.31(c) details the ancillary jurisdiction of a court before which a complaint for involuntary dissolution is pending. Such a court has the power to issue injunctions, appoint a receiver or custodian pendente lite, take actions to preserve the corporate assets and carry on the business of the entity until a full hearing can be held. Unfortunately, none of these powers directly or by fair inference, includes the authority to resolve the deadlock at the board level by appointment of a provisional director.*

## *Section .643 APPOINTMENT OF RECEIVER: APPLICATION, HEARING AND NOTICE, SECURITY, QUALIFICATIONS, POWERS, COMPENSATION*

*ORIGIN: ACC section .643(a) is taken from GCL Section 1803, and is new to Alaska law. Subsection (b) is taken from MBCA Section 99 and reflects the content of AS 10.05.576. Subsection (c) is taken from MBCA Section 98 and AS 10.05.567, with the modification of omitting attorneys fees.*

*SUMMARY OF COVERAGE: ACC section .643 grants broad powers to a court which has assumed jurisdiction over a complaint seeking involuntary dissolution, to act upon plaintiff's motion for the appointment of a receiver. Unlike AS 10.05.555 through .573, and MBCA Section 98, which uses a "liquidation receiver", the receiver under the ACC serves to preserve the corporation and its business pending a hearing on the complaint for involuntary dissolution. The directors, under court supervision, are used to handle the affairs which the Model Act vests in the liquidating receiver.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.32 is similar to ACC Section .643. Since the RMBCA is rather vague on the major premise that the winding up of a corporation is normally committed to the directors, Section 14.32(a) is less clear than ACC Section .643 that the appointment of a custodian should be upon the motion of some shareholder or creditor able to convince the court that the directors cannot be entrusted to marshall and properly apply the corporate assets. A "receiver" under the RMBCA terminology does not act to manage the business and affairs of the corporation but rather acts to liquidate its assets. Under the ACC the term "receiver" embraces both functions for one acting under the authority of ACC Section .643.*

## *Section .645 DECREE FOR WINDING UP AND DISSOLUTION: FURTHER JUDICIAL RELIEF*

*ORIGIN: ACC Section .645 is new, and based upon GCL Section 1804. This section replaces AS 10.05.537, .546, and .549,* which were modeled upon MBCA Section 97.

SUMMARY OF COVERAGE: ACC Section .645 empowers the court hearing a suit for involuntary dissolution under either ACC Section .628 or .633 to decree a winding up and dissolution, or, in a final effort to preserve the social interests advanced by preservation of the corporate existence, issue such less drastic orders, decrees, and injunctions as justice and equity may require.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.33 covers the entry of a decree of dissolution. Unfortunately, it contains no reference to the authority of that court to order alternative relief aimed at the simultaneous resolution of the alleged ground for dissolution while preserving the corporate existence.

## Section .648 COMMENCEMENT AND CONDUCT OF INVOLUNTARY PROCEEDINGS FOR WINDING UP; CESSATION OF BUSINESS; NOTICE

ORIGIN: ACC Section .648 is taken from GCL 1805, and replaces AS 10.05.555 and .558, which were based on MBCA Section 98.

SUMMARY OF COVERAGE: This section provides that upon entry of a decree under Section .645, the board is to commence winding up subject to court supervision. Regular business operations are to cease, except where the continuation of business activities is necessary to preserve goodwill or the going-concern value of assets which are to be sold. In the absence of a perfected appeal or stay order, notice is to be given to all shareholders and known creditors and claimants.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.06(b) accords with ACC Section .648 that in the wake of a decree of dissolution the process of winding up and liquidation is to commence. The official comment (14-48) references Sections 14.05, 14.06, and 14.07 which import the provisions on the process of winding up, liquidation and distribution.

## Section .650 JURISDICTION OF COURT

ORIGIN: ACC Section .650 is adapted from GCL Section 1806, and replaces AS 10.05.573, .579, .582, and .585, which reflected the content of MBCA Sections 98, 100, 101, and 102.

SUMMARY OF COVERAGE: This section sets forth an extensive list of the ancillary powers and jurisdiction that may be exercised by the superior court. Of particular interest is the power conferred by Section .650(6) for the court to fill any vacancy on the board which the directors or shareholders prove unable to fill. Also of interest is Section .650(7), which grants extraordinary powers of removal and prohibition from further office holding of any director guilty of dishonesty, misconduct, neglect or abuse of trust in conducting the winding up of the corporation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: 1 .31(c) contains a less explicit and expansive list of ancillary powers.

Section .653 CLAIMS AGAINST CORPORATION; COURT AND NON-COURT DIRECTED WINDING UP; PRESENTATION; NOTICE; PAYMENT; SECURED CLAIMS; REJECTED CLAIMS

ORIGIN: ACC Section .653 is predicated upon GCL Sections 1807 and 2008, and replaces AS 10.05.579, which was based upon MBCA Section 100.

SUMMARY OF COVERAGE: ACC Section .653 details procedures for settling all claims against the corporation. All claims must be presented within a specified time after which they are barred. This section makes separate provisions for the fate of contingent, unmatured, or disputed claims, or where there is uncertainty or dispute concerning the identity or capacity of the claimant, depending upon whether the winding up is with or without judicial supervision. When assets are reduced to cash, the Commissioner of Revenue is established as a stakeholder, under a provision which ensures that disputes do not leave the commissioner with custody of the assets for an indefinite period of time.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.06 deals with known claims against the dissolved corporation. Like ACC Section .653, it provides for notice to creditors and the establishing of deadlines which, if not met, bar claims. RMBCA Section 14.07 covers unknown claims against the entity. Like ACC Section .653(d) and (f), there is provision for notice by publication. Assets covering the claims of creditors or claimants who cannot be found or who are not competent to receive them are to be deposited, under RMBCA Section 14.40 with the state treasurer.

The above provisions of the RMBCA on voluntary dissolution are made applicable in the case of judicial dissolution by Section 14.33.

Section .655 ORDER DECLARING CORPORATION WOUND UP AND DISSOLVED; DECLARATIONS; EFFECT; ADDITIONAL ORDERS; DISCHARGE OF DIRECTORS

ORIGIN: ACC Section .655 is derived from GCL Section 1808, and replaces AS 10.05.585, which was based upon MBCA Section 102.

SUMMARY OF COVERAGE: Upon final settlement of accounts and a determination that the corporation's affairs are in a condition for it to be dissolved, ACC Section .655 directs the court to make an order declaring the corporation duly wound up and dissolved. This order must specify information regarding provisions for taxes and penalties, known debts and liabilities, and distribution of assets to shareholders. The order must also declare that those conducting the winding up have settled their accounts and that their duties and liabilities are discharged. Upon the issuance of this order, corporate existence ceases.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA does not contain an explicit provision covering what, under ACC Section .655, is the last step in the orderly winding up and distribution of corporate assets.

## Section .658 FILING OF DECREE OF DISSOLUTION

ORIGIN: ACC Section .658 is a reenactment without change of AS 10.05.588, which was based upon MBCA Section 103.

SUMMARY OF COVERAGE: This section provides the procedure for filing of the decree of dissolution.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Section 14.22(a) of the RMBCA directs that the "clerk of the court shall deliver a certified copy of the decree [of dissolution] to the secretary of state, who shall file it."

## Section .660 POWERS AND DUTIES OF DIRECTORS IN DISSOLUTION PROCEEDINGS

ORIGIN: ACC Section .660 is derived from GCL Section 2001, and is new to Alaska law. It replaces AS 10.05.489(2), .564, and .570, which were based respectively on MBCA Sections 87 and 98.

SUMMARY OF COVERAGE: ACC Section .660 is the heart of the reformed framework for utilizing the incumbent directors and officers to conduct both voluntary and involuntary dissolution, a significant change from existing law, which utilizes a "liquidating receiver" appointed by the court. This section enumerates powers and duties of the board. In the event the superior court does not repose confidence in the abilities or fidelity of the incumbent management, it has power under ACC Section .648 to appoint other persons to conduct the winding up.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: As previously noted, it seems implicit under the terms of RMBCA Section 14.05 that the reform of utilizing incumbent directors in preference to court ordered authorities to conduct the winding up has been accepted by the framers of the tentative draft.

*Section .663 PROCEEDING TO DETERMINE IDENTITY OF DIRECTORS OR TO APPOINT DIRECTORS*

*ORIGIN: ACC Section .663 is taken from GCL Section 1003. There is no comparable provision in Alaska law or the MBCA.*

*SUMMARY OF COVERAGE: This section creates a procedure for establishing the identity of those who are to wind up and dissolve the corporation, and to replace those who are unwilling or unable to perform their duties.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: This power is not expressly provided in the RMBCA.*

*Section .665 DISTRIBUTION OF CORPORATE ASSETS AMONG SHAREHOLDERS; WHEN TO BE MADE*

*ORIGIN: ACC Section .665 is based upon GCL Section 2004. It replaces AS 10.05.489 and .561, which were based upon MBCA Sections 87 and 98.*

*SUMMARY OF COVERAGE: This section provides for the distribution of remaining assets to shareholders according to their respective rights and preferences once the interests of creditors and other claimants against the corporation have been settled.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.05(a)(4) appears to be the only coverage of this point. It does not settle the issue of the timing of such distributions, an ambiguity which may work to the disservice of creditors.*

*Section .668 PROVISION FOR PAYMENT OF DEBT OR LIABILITY*

*ORIGIN: ACC Section .668 is taken from Section 2005 of the GCL. It is without precedent in Alaska law.*

*SUMMARY OF COVERAGE: ACC Section .668 provides a definition of the concept "adequate provision" for a debt or liability, a concept used extensively throughout Article 9 as a precondition for distributing assets to shareholders when all claims by creditors have not yet been settled.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.05(a)(3) makes a reference to the power to ". . . mak[e] provision for discharging its liabilities." Section 14.40 utilizes the state treasurer as a repository for funds set aside to pay unknown or ineligible creditors or claimants.*

*Section .670 DISTRIBUTION IN MONEY OR IN KIND; INSTALLMENTS*

*ORIGIN: ACC Section .670 is taken from GCL Section 2006, and is without precedent in either Alaska law or the MBCA.*

*SUMMARY OF COVERAGE: ACC Section .670 gives express sanction to distribution schemes which gives shareholders property as opposed to cash. Installment plans are also sanctioned.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no coverage other than the general provisions of Section 14.05(a).*

*Section .673 PLAN OF DISTRIBUTION; ADOPTION; BINDING EFFECT; NOTICE; PAYMENT TO DISSENTING SHAREHOLDERS; ABANDONMENT*

*ORIGIN: ACC Section .673 is predicated upon GCL Section 2007, and is without precedent in Alaska law.*

*SUMMARY OF COVERAGE: ACC Section .673 permits the liquidation rights of outstanding shares to be altered to accommodate a plan of distribution of assets other than money upon the approval by the outstanding shares. Class voting is expressly provided. Preferred shares dissenting from the plan may require the corporation to make payment according to their unaltered liquidation preferences. If such dissent and demand prejudices the plan, the board is authorized to abandon the plan without further recourse to shareholders.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA does not contain provisions incorporating these powers.*

*Section .675 RECOVERY OF AMOUNTS IMPROPERLY DISTRIBUTED*

*ORIGIN: ACC Section .678 is taken from GCL Section 2009, and is new to Alaska law.*

*SUMMARY OF COVERAGE: Any amount improperly distributed to shareholders may be recovered under Section .675. There is no requirement that shareholders have knowledge of the impropriety of such a distribution. Any recovery from shareholders may not function to alter their rights to share pro rata in the residual assets of the corporation.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.07(d)(2) provides for the liability of shareholders who have received distributed corporate assets to the claims of creditors.*

*Section .678 CONTINUED EXISTENCE OF DISSOLVED CORPORATIONS; PURPOSES; ABATEMENT OF ACTIONS; DISTRIBUTION OF OMITTED ASSETS*

*ORIGIN: ACC Section 678(a) is taken from AS 10.05.594, and is based upon MBCA Section 105. Subsections (b), (c), and (d) are taken from the 1980 amendment to AS 10.05.594 (SB 112).*

*SUMMARY OF COVERAGE: This section provides that a corporation that has been dissolved may continue to exist for an indefinite period of time for the purpose of winding up its affairs, prosecuting and defending actions by or against it, collecting and discharging obligations, disposing of and conveying its property, and collecting and dividing its assets.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 14.05(b) contains similar provisions continuing the corporate existence.*

## Notes

## *ARTICLE 10. FOREIGN CORPORATIONS*

### *Section .705 ADMISSION OF FOREIGN CORPORATION*

*ORIGIN: ACC Section .705 is a reenactment of AS 10.05.597, which is based upon Section 106 of the MBCA.*

*SUMMARY OF COVERAGE: ACC Section .705 conditions entry of a foreign corporation for the purpose of transacting business within Alaska. It is intended to exercise to the fullest the police power of the state while respecting the equal protection guarantees made obligatory by the Fourteenth Amendment to the Constitution of the United States.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.01(a) parallels ACC Section .705 in requiring a certificate of authority as a precondition to a foreign corporations ability to transact business within a host state.*

### *Section .708 APPLICATION TO CORPORATIONS NOW AUTHORIZED TO TRANSACT BUSINESS IN THE STATE*

*ORIGIN: ACC Section .708 is a reenactment without change of AS 10.05.687 and is based upon Section 123 of the MBCA.*

*SUMMARY OF COVERAGE: ACC Section .708 reflects the determination of the legislature to grant to foreign corporations, irrespective of their date of entry, the equal protections of the laws of Alaska including the imposition of all limitations, restrictions, liabilities, and duties prescribed in the ACC.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 17.02 parallels ACC Section .708 in extending the provisions of a new corporations code to foreign corporations currently qualified to transact business in the host state.*

### *Section .710 LIABILITY FOR TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY*

*ORIGIN: ACC Section .710 is a reenactment of AS 10.05.696 and is based upon Section 124 of the MBCA.*

*SUMMARY OF COVERAGE: In order to enforce the requirement that a foreign corporation obtain a certificate of authority prior to transacting business within Alaska, ACC Section .710* *imposes a penalty of up to $10,000 per year or portion thereof during which such intrastate business was transacted without compliance with ACC Section .705. In addition, such a foreign corporation is made liable for all fees and taxes which would have been paid if there had been full compliance with the ACC.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.02(d) authorizes the imposition of a penalty for transacting business without a certificate of authority.*

*Section .713 TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY AS BAR TO RIGHT TO SUE*

*ORIGIN: ACC Section .713 reenacts AS 10.05.690 and is based upon Section 124 of the MBCA.*

*SUMMARY OF COVERAGE: Among the disciplinary consequences of a foreign corporation's transaction of business within Alaska without compliance with ACC Section .705 is the denial of its right to maintain any action, suit, or proceeding in Alaska state courts.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.04(a), (b), and (c) creates identical consequences to those set forth in ACC Section .713.*

*Section .715 TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY NOT AFFECTING CONTRACTS AND RIGHT TO DEFEND ACTION*

*ORIGIN: ACC Section .715 is a reenactment without change of AS 10.05..693.*

*SUMMARY OF COVERAGE: ACC Section .715 confines the disciplinary consequences of the transaction by a foreign corporation of intrastate business within Alaska without a certificate of authority to those imposed by the ACC. It does not generate grounds for a contracting party to assail the validity of a contract or transaction with a noncomplying foreign corporation. Finally, although precluded by ACC Section .713 from initiating any action, suit, or other proceeding, a noncomplying foreign corporation is not precluded from defending itself in proceedings commenced by others in Alaska courts.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.02(e) accords with the provisions of ACC Section .715.*

*Section .718 ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS IN THIS STATE*

*ORIGIN: ACC Section .718 is a reenactment of AS 10.05.600, and is based upon Section 106 of the MBCA.*

*SUMMARY OF COVERAGE: Under the interstate commerce clause and common law comity principles, a foreign corporation may engage in certain activities within a state without being required to first obtain a certificate of authority. I~ an effort to reduce litigation and clarify a murky body of decisional law precedent, ACC Section .718 enumerates activities which a foreign corporation may pursue without the necessity of obtaining a certificate of authority under ACC Section .705.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.01(b) is substantively identical to ACC Section .718.*

*Section .720 CORPORATE NAME OF FOREIGN CORPORATION*

*Section .723 ASSUMED CORPORATE NAME*

*Section .725 CHANGE OF NAME BY FOREIGN CORPORATION*

*ORIGIN: ACC Section .720 represents a modified content of AS 10.05.606 and is based upon Section 108 of the MBCA.*

*ACC Section .723(a) is based upon AS 10.05.607 and predicated upon Section 108(c)(12) of the MBCA. Wording changes have been made in order to avoid any confusion in coordinating this section with ACC Section .720. Section .723(b) is new and replaces the requirement that a corporation using an assumed name identify its true corporate name in all advertising, contracts, and other legal documents with a scheme whereby any interested party may resort to records maintained by the commissioner which references the actual and assumed names of foreign corporations.*

*ACC Section .725 reenacts AS 10.05.609, and is based upon Sections 109 of the MBCA.*

*SUMMARY OF COVERAGE: ACC Section .720 imposes upon foreign corporations seeking a certificate of authority the same limitations with respect to a corporate name which are imposed upon domestic corporations by ACC Section .105.*

*In order to accommodate a foreign corporation while at the same time vindicating the policies of Alaska law, ACC Section .723 permits a corporation disabled from using its actual name to adopt an assumed name which, if it is permissible under ACC Section .720, is the name under which it elects to do business in Alaska.*

*ACC Section .725 furthers the policy with respect to permissible and impermissible content of corporate names by providing that a foreign corporation will have its right to transact business suspended were it to adopt an impermissible name.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:* RMBCA Section 15.06 is functionally equivalent to ACC Sections .720, .723, and .725.

## Section .728 APPLICATION FOR CERTIFICATE OF AUTHORITY

## Section .730 CONTENTS OF APPLICATION

## Section .733 FILING OF APPLICATION FOR CERTIFICATE OF AUTHORITY

*ORIGIN:* ACC Section .728 is a straight reenactment of AS 10.05.612.

ACC Section .730 is a reenactment of AS 10.05.615 as amended. It is predicated upon Section 110 of the MBCA.

ACC Section .733 is identical to AS 10.05.618 and .621 and is premised upon Section 111 of the MBCA.

*SUMMARY OF COVERAGE:* ACC Section .728 provides that the foreign corporation's application to do business in Alaska shall be filed with the commissioner.

ACC Section .730 specifies the subject matter and information which must be included in an application for a certificate of authority. Three of the required items are non-uniform: Section .730(5) goes beyond the statement of purpose to require selection from the identification code established under ACC Section .950; Section .730(12) mandates disclosure of the names and address of each alien affiliate; and, Section .730(13) requires that the application state the name and address of any person(s) owning at least 5% of the shares or any class of shares and then disclose the percentage owned by such individuals.

ACC Section .733 specifies that the application shall be on forms furnished by the commissioner.

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:* RMBCA Section 15.01(a) is identical to ACC Section .728. RMBCA Section 15.01(b) is similar to ACC Section .730 with the exception of the three items added by the Alaska legislature and information regarding the capitalization of the applicant.

## Section .735 EFFECT OF CERTIFICATE OF AUTHORITY

*ORIGIN:* ACC Section .735 is a reenactment of AS 10.05.624 and based upon Section 112 of the MBCA.

*SUMMARY OF COVERAGE:* ACC Section .735 parallels ACC Section .218 by establishing a "bright line" event upon which the authority to transact intrastate business is granted by the State of Alaska.

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:* RMBCA Section 15.05(a) is the functional equivalent of ACC Section .735.

*The balance of the RMBCA section contains recitations that in granting a certificate of authority the host state does not intend to meddle in the internal affairs of the foreign corporation.*

*Section .738 AMENDED CERTIFICATE OF AUTHORITY*

*ORIGIN: ACC Section .738(a) is a reenactment of AS 10.05.657. Section .738(b) is new and conforms the entire section to MBCA Section 118.*

*SUMMARY OF COVERAGE: ACC Section .738 obliges a foreign corporation which changes its corporate name or desires to pursue an intrastate purpose in Alaska other than the one(s) set forth in its application for a certificate of authority to obtain an amended certificate as a precondition to effecting such change.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.04 is similar to ACC Section .738 except that there is no interest in the purpose(s) which the applicant corporation proposes to pursue in the host state.*

*Section .740 POWERS OF FOREIGN CORPORATION*

*ORIGIN: ACC Section .740 reenacts AS 10.05.603 and is premised upon Section 107 of the MBCA.*

*SUMMARY OF COVERAGE: Consonant with Alaska's obligation to extend the equal protection of her laws, ACC Section .740 establishes than an authorized foreign corporation shall have the same powers as would a domestic corporation organized for the purposes stated in the application for or amendment to the certificate of authority.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.05(b) is functionally identical to ACC Section .740.*

*Section .743 REVOCATION OF CERTIFICATE OF AUTHORITY*

*Section .745 LIMITATIONS ON REVOCATION OF CERTIFICATE OF AUTHORITY*

*Section .748 ISSUANCE OF CERTIFICATE OF REVOCATION*

*Section .750 EFFECT OF CERTIFICATE OF REVOCATION*

*ORIGIN: ACC Sections .743, .745, .748, and 750 are reenactments without change of AS 10.05.675, .678, .681, and .684. They are based upon Sections 121 and 122 of the MBCA.*

SUMMARY OF COVERAGE: ACC Sections .743, .745, .748, and .750 authorize, regulate, and determine the effect of a certificate of revocation issued by the commissioner. The power of revoca ion under Section .743 is similar to the commissioner's power to involuntarily dissolve a domestic corporation under ACC Section .630. The sixty day notice and grace period established by ACC Section .745 is also similar to the procedures limiting the commissioner's power to effect involuntary dissolution. If the certificate of authority is revoked pursuant to ACC Section .748, Section .750 declares that the foreign corporation is no longer authorized to transact intrastate business in Alaska.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.30 stipulates the grounds for revocation. They are similar to those set forth in ACC Section .743, except that the RMBCA lists as a ground for revocation that the foreign corporation has ceased to exist or been involved in an organic change. The ACC adds involvement in an illegal combination in restraint of trade as a ground for revocation. RMBCA Section 15.31(a) and (b) are similar to ACC Section .745 creating a grace period in which the foreign corporation can correct what would otherwise serve as a ground for revocation. This section also comports with ACC Section .748 on the issuance of a certificate of revocation and the effective date at which the authority of the foreign corporation to transact intrastate business ceases.

Section .753 REGISTERED OFFICE AND REGISTERED AGENT OF FOREIGN CORPORATION

Section .758 CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OF FOREIGN CORPORATION

Section .760 FILING OF STATEMENT OF CHANGE

ORIGIN: ACC Sections .753, .758, and .760 are reenactments without change of AS 10.05.627, .633, and .635. They reflect the content of Sections 113 and 114 of the MBCA.

SUMMARY OF COVERAGE: ACC Sections .753, .758, and .760 parallel Sections .150., 165., and .170 respecting domestic corporations. They oblige authorized foreign corporations to designate both a registered office and a registered agent, govern the change of such office or agent, and establish procedures for notification of the commissioner.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.07 is identical to ACC Section .753 creating the obligation on the part of a foreign corporation to maintain a registered office and agent in the host state. RMBCA Section 15.08 is functionally identical to ACC Sections .758 and .760 respecting the procedures for changing either the agent or office and providing notification to the state.

*Section .763 SERVICE OF PROCESS ON FOREIGN CORPORATION*

*Section .765 SERVICE ON COMMISSIONER*

*Section .768 RECORDS KEPT BY COMMISSIONER*

*Section .770 PROCEDURE NOT EXCLUSIVE*

*ORIGIN: ACC Sections .763, .765, .768, and .770 reiterate the content of AS 10.05.639, .642, and .648. They are based upon Section 115 of the MBCA. They have been modified to accord with the holding of the Supreme Court of Alaska in Northern Supply, Inc. v. Curtiss-Wright Corporation, 397 P.2d 1013 (1965), that the long-arm jurisdiction of the state courts is not dependent upon the statutory criteria requiring a certificate of authority.*

*SUMMARY OF COVERAGE: ACC Sections .763, .765, .768, and .770 balance the needs of a party desiring to initiate litigation against an authorized foreign corporation in Alaska with the need of that entity to maximize the circumstances in which notice and service of process will be actual as opposed to constructive.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.10 accords with ACC Section .763 in making the registered agent the proper party upon whom service of process may be served in the host state. If a foreign corporation does not designate or maintain a registered agent, Section 15.10(b) differs from the prior provisions of the Model Act and the historic and recommended content of Alaska law. Rather than utilizing the commissioner as an agent of last resort for the service of process, Section 15.10(b) directs the plaintiff to effectuate service by registered or certified mail sent to the address of the foreign corporation at its principal office as shown on the certificate of authority or most recent annual report.*

*Section .773 AMENDMENT TO ARTICLES OF INCORPORATION OF FOREIGN CORPORATION*

*ORIGIN: ACC Section .773 is a reenactment of AS 10.05.651. It is predicated upon Section 116 of the MBCA.*

*SUMMARY OF COVERAGE: ACC Section .773 requires that the commission be noticed of amendments to the articles of foreign corporations which have sought and are enjoying a certificate of authority.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no coverage on this point.*

Section .775 ORGANIC CHANGE OF FOREIGN CORPORATION

ORIGIN: ACC Section .775 recapitulates the content of AS 10.05.654 an reflects the content of Section 117 of the MBCA with terminology changes to clarify the scope of the section and conform to the style of the ACC.

SUMMARY OF COVERAGE: Whenever an authorized foreign corporation is involved in an organic change (defined in ACC Section .990(26)), notification of the commissioner is to be made by filing a copy of the articles of merger, consolidation, exchange, or reorganization authenticated by the proper authority in the jurisdiction in which it is domesticated.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The only related coverage in the RMBCA is Section 11.07 which requires a foreign corporation to file articles of merger with the secretary if the foreign corporation has merged with a domestic corporation with the foreign corporation as the surviving entity.

Section .778 WITHDRAWAL OF FOREIGN CORPORATION

Section .780 CONTENTS OF APPLICATION FOR WITHDRAWAL

Section .783 FORM OF APPLICATION FOR WITHDRAWAL

Section .785 FILING OF APPLICATION FOR WITHDRAWAL

Section .788 EFFECT OF CERTIFICATE OF WITHDRAWAL

ORIGIN: ACC Sections .778, .780, .783, .785, and .788 reenact AS 10.05.660, .663, .666, .669, and .672. They are based upon Sections 119 and 120 of the MBCA. ACC Section .785 has been restated to observe the consolidation of procedures effected by ACC Section .910.

SUMMARY OF COVERAGE: ACC Sections .778, .780, .783, .785, and .788 provide for the orderly and official withdrawal of a foreign corporation from Alaska. If these procedures are not followed, and the bright line events of ACC Sections .785 and .788 are not observed, the corporation would have a continued liability for taxes and fees.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.20 is identical to ACC Section .778 on the procedure for withdrawal. It differs from ACC Section .780 specification of the contents of the application reflecting the RMBCA's indifference to disclosure of the financial structure of a foreign corporation. The RMBCA does not require the state to prepare a form for the application to withdraw as does ACC Section .783. The other distinctions between 15.20 and ACC Sections .785 and .788 reflect the distinction between uti-

*lizing the secretary of state and the commissioner to inter-act with domestic and foreign corporations.*

## ARTICLE 11. REPORTS, FEES, AND PENALTIES

### Section .805 BIENNIAL REPORT OF DOMESTIC AND FOREIGN CORPORATIONS

### Section .808 CONTENTS OF BIENNIAL REPORT

### Section .811 FILING OF BIENNIAL REPORT

ORIGIN: ACC Sections .805, .808, and .811 are predicated upon AS 10.05.699, .702, and .705 as amended in 1980. These provisions of the Alaska Statutes were based upon MBCA Sections 125 and 126. ACC Section 811(d) is new, and was suggested by the Department of Commerce and Economic Development.

SUMMARY OF COVERAGE: ACC Sections .805, .808, and .811 establish an obligation on the part of each domestic and authorized foreign corporation to file a biennial report with the Department of Commerce and Economic Development, thus continuing the policy set by the 1980 legislature.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 16.22 differs from ACC Section .808 in three particulars. It would require an annual as opposed to biannual report. That report would not include identification of alien affiliates or of control persons. The requirements for timely filing are similar in both provisions as is the opportunity for correction with incursion of penalties for tardy filing.

### Section .813 FILING NOTICE OF CHANGE OF OFFICERS, DIRECTORS, FIVE PERCENT SHAREHOLDERS, AND ALIEN AFFILIATES

ORIGIN: ACC Section .813 is predicated upon AS 10.05.706 as enacted in 1980.

SUMMARY OF COVERAGE: This section reflects the intense concern of the state that it be informed as to the identity of current officers, directors, five percent shareholders, and alien affiliates.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no provision on this important issue.

### Section .815 PENALTY FOR FAILURE TO FILE BIENNIAL REPORT

ORIGIN: ACC Section .815 is predicated upon AS 10.05.771 as amended in 1980, which was based upon MBCA Section 135.

*SUMMARY OF COVERAGE: ACC Section .815 imposes a sanction applicable to any failure or refusal to file a biennial report required by this chapter, employing a strict liability standard.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA does not appear to contain a provision dealing with the consequences of late filings. The official comment (16-30) observes ". . .failure to file the annual report. . .is a ground for administrative dissolution or revocation of the certificate of authority to transact business."*

*Section .818 INTERROGATORIES BY COMMISSIONER; JUDICIAL PROCEEDING TO CONTEST*

*ORIGIN: ACC Section .818(a), (b), and (c) is predicated upon AS 10.05.777 and Section 137 of the MBCA. Subsection (d) is modeled after AS 45.52.210(f).*

*SUMMARY OF COVERAGE: ACC Section .818 grants broad powers to the commissioner to utilize interrogatories reasonably necessary to ascertain compliance with or violations of this Chapter. Subsection (d) permits either a corporation or an individual to challenge judicially the method, scope, or confidentiality of the interrogatory.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: For unexplained reasons, the RMBCA has abandoned this useful practice.*

*Section .820 CONFIDENTIALITY OF INFORMATION DISCLOSED BY INTERROGATORIES*

*ORIGIN: ACC Section .820 is a reenactment of AS 10.05.780, and is based upon MBCA 138.*

*SUMMARY OF COVERAGE: This section exempts the answers to interrogatories from the disclosure requirements of AS 09.25.110 and .120, which provide that state agency records are public records unless specifically provided otherwise by state law. ACC Section .820 specifically provides otherwise.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Since, in contravention of former Model Act policy, the RMBCA does not provide for administrative interrogatories, it contains no provision making answers confidential.*

*Section .823 FAILURE TO ANSWER INTERROGATORIES*

*ORIGIN: ACC Section .82[illegible] combines provisions of AS 10.05.783, .786, and .777, which were predicated upon Sec-*

*tions 135, 136, and 137 of the MBCA. No substantive change is worked in existing Alaska law.*

*SUMMARY OF COVERAGE: ACC Section .823 provides that any corporate or natural person who fails or refuses to make a timely, full, and truthful answer to interrogatories shall be guilty of a misdemeanor. Further, the commissioner does not have to file any document to which the interrogatories relate until they have been properly answered.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no coverage on this point.*

## *Section .825 PENALTIES IMPOSED UPON OFFICERS AND DIRECTORS*

*ORIGIN: ACC Section .825 represents a modification of AS 10.05.786 as amended in 1980. AS 10.05.786 was predicated upon MBCA Section 136.*

*SUMMARY OF COVERAGE: ACC Section .825 goes beyond Section .823, to impose further misdemeanor consequences upon any officer or director who signs any articles, statement, report, application, or other document filed with the commissioner, the content of which is known to be false.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.29 contains a generic provision on the consequences a knowingly signing a false statement which is to be filed with the state. It must be customized by the adopting jurisdiction.*

## *Section .828 INCORPORATION OR FILING FEES*

*ORIGIN: ACC Section .828 is a modified version of AS 10.05.708 (Section 130 of the MBCA) as amended in 1980. The provision fixing a filing fee for non-stock corporations organized under AS 21.69 is new, and designed to coordinate the specific provisions of Chapter 21 with the general cross reference to Chapter 10.05.*

*SUMMARY OF COVERAGE: ACC Section .828 establishes a filing fee for both domestic and foreign corporations doing business in Alaska, and fixes in the Department of Commerce and Economic Development the power to set the amount by regulation, with the mandate that the fee be fixed with reference to the amount of authorized capital stock of the corporation. The authority of the department is further subject to the provision of Section .860, which limits increases in fees to an amount that does not exceed the rise in the consumer price index for Anchorage.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.22(a) recommends that the legislature set filing, service and copying fees. ACC Section .828 grants authority to the* commissioner to set the fees within legislatively prescribed limits tied to the cost of living index. Under the RMBCA, adjustment for inflation or deflation would have to be accomplished by way of legislative amendment.

### Section .830 FEES ON APPOINTMENT OR REVOCATION OF APPOINTMENT

ORIGIN: ACC Section .830 is a redrafting without substantive change of AS 10.05.714, which was based upon MBCA Section 128.

SUMMARY OF COVERAGE: ACC Section .830 provides that when a foreign corporation files with the department a certificate of appointment of a process agent, or the change of address of a process agent, it shall pay a fee established by regulation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: See comparison of features noted under ACC Section .828.

### Section .833 FEES AND PENALTIES PAYABLE ON WITHDRAWAL OF FOREIGN CORPORATION

### Section .835 FEES ON DISSOLUTION OF DOMESTIC CORPORATION

### Section .838 TAXES, PENALTIES, AND FEES ON FILING CERTIFICATE OF DISSOLUTION OF FOREIGN CORPORATION

### Section .840 FEES FOR CERTIFIED COPIES OF DOCUMENT

### Section .843 OTHER FILING FEES

ORIGIN: ACC Sections .833, .835, .838, .840, and .843 reenact without substantive change AS 10.05.750, .753, .756 (which were based upon MBCA Section 128), .762 (which was based upon MBCA Section 129), and .747, all as amended in 1980.

SUMMARY OF COVERAGE: ACC Sections .833 through .843 establish the indicated occasions for the imposition of fees, which are to be determined by the department of Commerce and Economic Development, subject to Section .860's cost of living ceiling.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: See comparison of features noted under ACC Section .828.

### Section .845 BIENNIAL CORPORATION TAX; PENALTY FOR NONPAYMENT

### Section .848 FAILURE TO PAY TAX OR MAKE REPORT AS PRECLUDING SUIT BY CORPORATION

Section .850 COMMISSIONER TO INSTITUTE SUITS TO COMPEL PAYMENT

Section .853 FAILURE TO PAY TAX AS EVIDENCE OF INSOLVENCY

Section .855 PAYMENTS TO BE MADE IN ADVANCE

Section .858 ACCOUNTING FOR AND DISPOSITION OF TAXES AND FEES

ORIGIN: ACC Sections .845 through .858 represent modifications and reenactments of AS 10.05.717, .720, .723, .726, 765, and .768. In turn , these provisions were predicated upon MBCA Sections 132, 133, and 134. ACC Section .850 substitutes the Commissioner of the Department of Commerce and Economic Development for the Attorney General as the official to commence suit to compel the payment of the biennial corporation tax.

SUMMARY OF COVERAGE: ACC Sections .845 through .858 impose on both domestic and foreign corporations doing business in Alaska a biennial corporation tax, and fix the consequences for failure to make payment of such tax.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: As noted, the RMBCA does not address the issue of penalty consequences for failure to observe reporting requirements. The recommended fee structure is very rigid with adjustments necessitating legislative amendment.

Section .860 INCREASE IN FEES

ORIGIN: ACC Section .860 is a reenactment of AS 10.05.773, as enacted in 1980.

SUMMARY OF COVERAGE: ACC Section .860 explicitly limits increases in fees authorized throughout this Chapter to a ceiling reflecting changes in the consumer price index for Anchorage as determined by the Bureau of Labor Statistics of the United States Department of Labor.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: There is no RMBCA provision on this point.

Section .863 APPEAL FROM REVOCATION OF CERTIFICATE OF AUTHORITY

ORIGIN: ACC Section .863 is a reenactment without change of AS 10.05.792, which was based upon MBCA Section 140.

SUMMARY OF COVERAGE: ACC Section .863 authorizes recourse to the superior court to contest any disapproval of any document or revocation of any certificate of authority. Upon compliance with the procedures set out in this section, the applicant is entitled to a trial de novo, and the court is empowered to take such action as is proper.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.26 provides for judicial review of an administrative refusal to file a document. The official comment (1-27) makes it clear that the RMBCA does not take a position on either the burden of proof, scope or nature of the review. ACC Section .863 resolves these issues.

## Section .865 CANCELLATION OF CERTIFICATES ISSUED AND FILINGS ACCEPTED

ORIGIN: ACC Section .865 is a reenactment with one change of AS 10.05.794 as enacted in 1980. The change makes clear that the ground for cancellation must be one that existed at the time of the original filing or issuance of the certificate.

SUMMARY OF COVERAGE: ACC Section .865 gives the commissioner a period of one year from the time which a document is filed to discover defects and act upon them. If the defect is a ground for refusal to issue the certificate or refusal to accept a filing and the discovery is made within one year, the commissioner is empowered upon proper notice and procedure to cancel the certificate issued or filing accepted.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA does not contain an explicit provision on this important question. It is possible that the general powers provision (RMBCA Section 1.30) might be aggressively interpreted to invoke this power.

## Section .868 FORMS TO BE FURNISHED BY THE COMMISSIONER

ORIGIN: ACC Section .868 is a reenactment without change of AS 10.05.798, and is based upon MBCA Section 142.

SUMMARY OF COVERAGE: This section grants the commissioner the right to prescribe the content of forms for any report required by this Chapter. It also obligates the commissioner to furnish appropriate forms for required reports and other documents. This provision is sought to serve both the convenience of persons attempting to comply with the act as well as facilitating the record keeping efforts of the state.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.21 grants administrative authority to prescribe and furnish forms but, unlike ACC Section .868, does not oblige the state to create such forms.

## Section .870 IDENTIFICATION CODE

ORIGIN: ACC Section .870 is a reenactment without change of

*AS 10.05.799, which was enacted in 1980.*

*SUMMARY OF COVERAGE: This section requires the commissioners of the Departments of Revenue and of Commerce and Economic Development to establish a coded list of business activities and make such list available to the public.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Reflecting its character as a statute designed for the needs and interests of no particular jurisdiction, the RMBCA contains no provision on this important Alaska effort.*

## ARTICLE 12. MISCELLANEOUS PROVISIONS

### Section .905 VOTING OF SHARES; QUORUM; STATUS OF DISQUALIFIED SHARES

ORIGIN: ACC Section .905 is taken from GCL Section 112, and is without precedent in Alaska law.

SUMMARY OF COVERAGE: This section defines the references to a "majority of shares" found throughout the ACC to mean a majority of shares entitled to vote under the articles of incorporation. Votes disqualified from voting are not to be considered "outstanding" for determining a "quorum" or a "majority."

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no explicit provision defining the terms "majority" or "majority of shares."

### Section .910 PROCESSING OF WRITINGS FILED WITH THE COMMISSIONER

ORIGIN: ACC Section .910 consolidates without substantive change in one provision matters covered in AS 10.05.081, .258, .288, .303, .321, .339, .357, .402, .468, .483, .504, 513, .621, and .669.

SUMMARY OF COVERAGE: ACC Section .910 establishes a uniform procedure whereby the commissioner reviews and processes reports and documents which have been filed with the department.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.25(a) and (b) seeks to accomplish the same uniform treatment of reports and documents submitted for filing.

### Section .915 DISAPPROVAL OF WRITING BY COMMISSIONER: APPEAL

ORIGIN: ACC Section .915 is a reenactment without change of AS 10.05.792, and is based upon MBCA Section 140.

SUMMARY OF COVERAGE: ACC Section .915, like Section .863, authorizes a trial de novo in the superior court for purposes of contesting the disapproval of any document or the revocation of any certificate of authority.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.25(c) requires that a refused document be returned with a *written explanation. RMBCA Section 1.26 establishes a right to seek judicial review although, as noted, it does not specify the standard of review or burden of proof.*

*Section .920 WRITINGS; CORRECTIONS*

*ORIGIN: ACC Section .920 is derived from NBCL Section 105.*

*SUMMARY OF COVERAGE: ACC Section .920 provides procedures for correcting minor mistakes without affecting the effective date in writings which have been filed. Major omissions and misinformation may not be corrected by this procedure.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.24 is functionally identical to ACC Section .920.*

*Section .925 WRITINGS AS EVIDENCE*

*ORIGIN: ACC Section .925 is adapted from NBCL Section 106. The language in .925(a) regarding the absence of a filing is new. The remainder of subsection (a) is similar to AS 10.05.795, which was based upon MBCA Section 141.*

*SUMMARY OF COVERAGE: ACC Section .925 specifies that certain writings and certifications by the commissioner of the absence of a writing are to be regarded as prima facie evidence of the facts stated in the writings and the execution or nonexecution thereof.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.27 creates a far more limited evidentiary value for writing filed with the state. The certificate of filing merely creates a conclusive evidentiary presumption that the original of the document has been filed. Nothing is created by way of evidentiary presumptions concerning the content of such writings.*

*Section .930 CORPORATE SEAL AS EVIDENCE*

*ORIGIN: ACC Section .930 is predicated upon NBCL Section 107, and is without precedent in Alaska law.*

*SUMMARY OF COVERAGE: ACC Section .930 treats the presence of a corporate seal on a writing as prima facie evidence that the writing was executed by authority of the corporation.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.27 fails to establish this evidentiary quality respecting the use of the corporate seal.*

*Section .935 WAIVER OF NOTICE*

*ORIGIN: ACC Section .935 is a reenactment of AS 10.05.804, which was based upon MBCA Section 144.*

*SUMMARY OF COVERAGE: This section provides that a written waiver of notice, whether executed before or after the time stated for notice, is to be accepted as the equivalent of giving notice in any situation where notice to a director or shareholder is required.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.05(a) is functionally identical to ACC Section .935.*

# Notes

## ARTICLE 13. GENERAL PROVISIONS

### Section .950 POWERS OF COMMISSIONER

ORIGIN: ACC Section .950 is a reenactment without change of AS 10.05.813, and is based upon MBCA Section 139.

SUMMARY OF COVERAGE: ACC Section .950 grants broad though nonsubstantive administrative authority to the Commissioner of the Department of Commerce and Economic Development. The limited authority of the Commissioner to adopt regulations is set forth in ACC Section .953.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.30 is identical to ACC Section 950 except that it refers to the secretary of state.

### Section .953 REGULATIONS

ORIGIN: ACC Section .953 is a redrafting of AS 10.05.823, which was enacted in 1980.

SUMMARY OF COVERAGE: ACC Section .953 is a restrictive grant of rulemaking authority to the commissioner and Department of Commerce and Economic Development. This rulemaking authority must be exercised in conformity with the Administrative Procedure Act (AS 44.62), and may be invoked only as specifically provided in this Chapter.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no comparable provision restricting either the substance or limiting the procedures to be employed in administrative rule making.

### Section .955 APPLICATION

ORIGIN: ACC Section .955 subsection (a) is a modified version of NBCL Section 103, and replaces AS 10.05.816, which was based upon MBCA Section 147. Subsection (b) is a modified version of GCL Section 102(b), and replaces AS 10.05.816, which was based upon MBCA Section 147. This section supplements AS 01.10.100.

SUMMARY OF COVERAGE: ACC Section .955 makes the ACC applicable to domestic corporations formed under AS 10.05, and to foreign corporations to the extent provided generally in Article 10 and expressly elsewhere. Subsection .955(b) pro-

*vides that the existence of corporations formed under existing law is not affected. Subsection .955(c) provides that enactment of the ACC does not affect pre-enactment legal disputes.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 17.01 extends the application to domestic corporations while RMBCA Section 17.02 accomplishes the extension to foreign corporations authorized to transact business in the host state.*

*Section .958 PROVISIONS CONSTRUED AS RESTATEMENTS AND CONTINUATION*

*ORIGIN: ACC Section .958 is taken from GCL Section 2.*

*SUMMARY OF COVERAGE: Much of the ACC represents a reenactment of existing Alaska law, either verbatim or with minor changes to conform with ACC usage and style. ACC Section .958 construes these reenactments as restatements and continuations of existing law.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA does not contain this useful transaction and application section.*

*Section .960 CORPORATIONS ORGANIZED UNDER P. L. 92-203*

*ORIGIN: ACC Section .960 is a reenactment of AS 10.05.005, with the addition of subsection (d) which exempts Native corporations from the provisions of ACC Section .488 on the liability of directors and officers. AS 10.05.005 was enacted in 1972 and amended in 1975 and 1981.*

*SUMMARY OF COVERAGE: Under the Alaska Native Claims Settlement Act, P.L. 92-203, either the general business corporations code or the nonprofit corporations code of the State of Alaska is to be used to organize the entities which are to hold the assets distributed through ANCSA. Due to the special nature of these corporations and the federal requirement that the corporate form be used, the ACC contains a variety of special provisions tailored to Native corporations. ACC Section .960 provides for the capitalization of Native corporations, distributions to shareholders, approval of plans of merger or consolidation, and the liability of directors and officers to contract claimants.*

*COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no provisions accomplishing discrete treatment of corporations formed under the Alaska Native Claims Settlement Act.*

## Section .963 SEVERABILITY

ORIGIN: ACC Section .963 is taken from NBCL Section 111. It supplements the provisions of AS 01.10.030.

SUMMARY OF COVERAGE: ACC Section .963 provides that the ACC will not be struck down as a whole on account of the invalidity of any provision in it.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 17.04 contains a severability provision similar to ACC Section 963.

## Section .965 RESERVATION OF POWER

ORIGIN: ACC Section .965 is based upon AS 10.05.822, MBCA Section 149, and NBCL Section 110.

SUMMARY OF COVERAGE: This section reserves unto the legislature the plenary right to alter, amend, suspend, or repeal in whole or in part the provisions of the ACC.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.02 contains a reservation of power clause similar to ACC Section 965.

## Section .968 SIGNATURE

ORIGIN: ACC Section .968 is derived from GCL Section 17, and is new to Alaska law.

SUMMARY OF COVERAGE: This section specifies that a mark is a signature when the signer cannot write and the signer's name is written out by a witness who signs his own name.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA does not contain a provision anticipating the needs of citizens who cannot write.

## Section .970 RULES OF CONSTRUCTION AND INTERPRETATION

ORIGIN: ACC Section .970 is derived from GCL Sections 5, 6, 7, 8, 113, 114, 118, 10, 11, 12, 13, 15, and 16 respectively, and are all new to Alaska law.

SUMMARY OF COVERAGE: ACC Section .970 sets out basic rules of construction to be applied to the ACC, to obviate the possibility of litigation on a variety of topics susceptible of differing interpretations and to specify the handling of financial accounting procedure. Of particular interest is subsection (5) on financial accounting. The ACC has abandoned the traditional corporate accounting concepts of "par value", "stated capital", "capital surplus", and "earned surplus." These concepts have been replaced by the "retained earnings" and "ratio assets surplus" tests found in ACC Sections .358 through 365. This new approach relies upon generally accepted accounting principles in use at the time of performance of a financial accounting task.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no comparable specification of rules of construction and interpretation.

## Section .990 DEFINITIONS

ORIGIN: ACC Section .990 is derived from existing Alaska law, typically based upon a definition from the MBCA Section 2, or the GCL. The following chart indicates specific sources:

1. NEW
2. AS 10.05.825(18) enacted 1976
3. AS 10.05.825(22) enacted 1980
4. GCL Section 151
5. GCL Section 152
6. GCL Section 153
7. AS 10.05.825(5)
8. AS 10.05.825(9)
9. GCL Section 155
10. AS 10.05.825(1)
11. GCL section 159
12. AS 10.05.825(19) enacted 1976
13. AS 10.05.825(2)
14. AS 10.05.825(17)
15. AS 10.05.825(3)
16. GCL Section 164
17. GCL Section 166
18. GCL Section 169
19. AS 10.05.825(24) enacted 1980
20. AS 10.05.825(4)
21. GCL Section 115
22. GCL Section 172
23. AS 10.05.825(11)
24. GCL Section 173
25. GCL Section 174
26. NEW
27. GCL Section 175
28. NEW
29. AS 10.05.825(20) enacted 1976
30. GCL Section 176
31. GCL Section 178
32. GCL Section 179
33. GCL Section 180
34. NEW replacing AS 10.05.825(14)
35. GCL Section 183
36. AS 10.05.825(8)

37. AS 10.05.825(6)
38. NEW
39. AS 10.05.825(7)
40. GCL Section 189
41. GCL Section 190
42. GCL Section 192
43. AS 09.63.040
44. GCL Section 194
45. GCL Section 195
46. NEW

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.40 contains a twenty-four item list of definitions.

Section .995 SHORT TITLE

ORIGIN: ACC Section .995 replaces AS 10.05.828.

SUMMARY OF COVERAGE: The title of the chapter regulating the organization and operation of business corporations will be changed from "Alaska Business Corporations Act" to "Alaska Corporations Code", which will facilitate distinctions between the old and the new law.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.01 designates a generic short title.

Notes

# PART THREE

## MODIFICATIONS

## of the

## ALASKA CORPORATIONS ACT

*Here is a non-exhaustive list of provisions of the ACC draft which might be modified to reflect the content of the Revised Model Business Corporations Act. In each instance I will identify the provision of the ACC and indicate the page in Part Two of this memorandum where that provision is discussed in greater detail as well as the page of S.B. 246 where the text of the existing draft is set forth.*

## *ARTICLE 4: Corporate Finance*

*There are two areas in which the ACC and RMBCA differ which were noted by Professor Hamilton. While both draft statutes would eliminate the current reliance upon notions of legal "surplus", they differ in the formulation of a substitute standard for determining the financial circumstance in which a distribution of corporate assets to shareholders is licit. The two statutes also part company with respect to accounting procedures.*

*1. The restraint upon distributions: See discussion pages 29-34 of this memorandum.*

*The ACC: has followed California's "ratio/assets surplus" test. Simply stated a corporation may make a distribution at any time out of current earnings or, if there are no net current earnings, so long as the assets of the entity exceed its liabilities by a ratio of 1.25 to 1. The ACC provisions are found at pages 28-31 of S.B. 246.*

*The RMBCA: simply uses the equitable insolvency test. So long as the corporation can continue to meet its current liabilities it may licitly declare and make a distribution. See Section 6.40 in your copy of the Final Draft along with the official comment which begins at page 6-73.*

*Views of the Consultant: the California/ACC standard mandates greater protection of corporate creditors. It -lso has the advantage of being tested in a major jurisdiction for the past eight years. Reliance upon the equitable insolvency test is, to my knowledge, untested in any jurisdiction. H-wever, should the RMBCA gain a following, an alignment of Alaska with this future band of states may put it in more numerous company. Professor Hamilton notes that both Oregon and Arizona are currently looking at their existing statutes with a view toward revision. In an interesting historical aboutface, if the Commission determines that it prefers to retain the ratio/assets test it might make available to these western states a copy of its bill and comments.*

*2. Accounting Standards: See discussion pages 29-34 of this memorandum. The ACC provisions are found at pages 28-31 of S.B. 246.*

The ACC: Section 970(5) [p 150 of S.B. 246] requires the use of generally accepted accounting principles in preparing financial statements, balance sheets, income statements and statements of changes in financial position.

The RMBCA: The final draft [p. 6-78] notes that directors will normally be entitled to use generally accepted accounting principles. However there is no mandate that such principles be followed. "[S]ection 6.40 only requires the use of accounting practices and principles that are reasonable in the circumstances, and does not constitute a statutory enactment of generally accepted accounting principles."

Views of the Consultant: Professor Hamilton's talk justified the RMBCA provision on several grounds. First he questioned the degree to which there is uniformity among those who purport to follow generally accepted accounting principles. More importantly, he opined that mandating their observance might be a hardship on smaller entities for it would force recourse to accountants.

In favor of the ACC position I note that California has followed it for nearly a decade without any appellate litigation as to its meaning or application. The entire goal of the revision is to preclude the use of "creative accounting". The RMBCA comment that "accounting practices and principles. . .reasonable in the circumstances. . ." would appear an invitation to litigation.

ARTICLE 5. Meetings of Shareholders

3. Notice Requirements See page 39 of this memorandum.

The ACC: Section 410 [pp. 36-37 of S.B. 246], establishes a minimum of twenty and a maximum of fifty days for giving notice of shareholder meetings. The twenty day minimum involved a conscious deviation from the shorter recommendation of the original Model Act and was thought necessary to accommodate the physical conditions in Alaska.

The RMBCA: Section 7.05 [p 7-19] adopts a formula of a ten day minimum and a sixty day maximum.

Views of the Consultant: I am neutral on this issue. If the Commissioners believe that ten days is an insufficient minimum notice provision we could consider adopting the RMBCA's recommended sixty day maximum.

4. Civil Liability Consequences for Failure or Refusal to Accord Inspection Rights See pages 39-40 of this memorandum.

The ACC: Section 413 [pp. 37-38 of S.B. 246] imposes personal civil liability on an officer or agent of the corporation *who fails or refuses to compile, maintain and make available for shareholder inspection a voting list. The liability is to be measured by the extent of the demanding shareholder's damage.*

*The RMBCA: Section 7.20 [p. 7-32] sanctions the use of a summary court order to support a shareholder's right to inspect the voting list but does not impose any civil liability upon a corporate officer or agent who is obstructing this inspection. In his remarks to the Alaska Bar Association, Professor Hamilton indicated philosophical opposition to such tactics and also the belief that when prescribed by statute they are rarely imposed by courts.*

*Views of the Consultant: Whether one agrees with Professor Hamilton, ACC Section 413 is in need of attention. At an early stage in the evolution of the statute the Commission made a determination that it did not want to recommend any mandatory course of conduct and then be silent on the consequences of an individual's non-observance of that commandment. Accordingly, it determined to create sanctions within the statute in support of its mandatory provisions. Section 413's liability differs from that found elsewhere in the ACC in that it sets no minimum civil liability consequence but merely measures the recovery according to the shareholder's damages. If those damages are nominal or not susceptible of easy proof, there will be little incentive to undertake the burdens and costs of litigation in support of the statute. Contrast this with the provision in ACC Sections 430(c) [p. 45 of S.B. 246] and 433(f) [p. 48 of S.B. 246].*

*Section 430 mandates the keeping of minimum books and records as well as creating a right of inspection in shareholders. An officer or agent who refuses to permit inspection is liable for a penalty in the amount of 10% of the value of the shares owned by the demanding shareholder or $5,000 whichever is greater in addition to any provable damages.*

*Section 433 deals with the preparation and distribution of an annual report to shareholders. Under subsection (f) a corporation that neglects, fails, or refuses to prepare the required financial statements is subject to a penalty of $25 per day up to maximum of $1,500. This liability runs to the shareholder or shareholders making the request for performance by the duty or duties imposed by the section.*

*Should some similar minimum consequence be fixed for violation of Section 413 or should all of these minimum liability consequences be abolished in conformity with Professor Hamilton's views?*

## *ARTICLE 6. Directors and Officers*

*5. Delegation of Board Functions: see page 48 of this memorandum.*

*The ACC: Section 450(a) [p. 53 of S.B. 246] requires that* corporations have a board of directors. H⁻'ever, it also stipulates that if there is affirmative provision in the articles the powers, duties, privileges, and liabilities conferred or imposed upon the board shall be exercised, performed, extended and assumed by an identified individual or individuals.

*The RMBCA:* Section 8.01(c) [p. 8-2] limits the ability to use the articles to dispense with or limit the authority of the board to corporations with 50 or fewer shareholders. I" the number of shareholders exceeds 50 the corporation is required to have a traditional board although it may "delegate" certain functions to agents.

*Views of the Consultant:* The distinctions between the statutes suggest two problems. Y-u must decide whether to clearly permit substitution as opposed to delegation, and, if so, whether you want to adopt a limitation predicated upon the number of shareholders. As I review ACC Section 450 and the official comment (p. 119-120 of the House and Senate Joint Journal for April 8, 1983), I am struck that we fudged a very important conceptual distinction. The RMBCA does a better job.

A well drafted statute would distinguish between the circumstances in which the statute would tolerate <u>substitution</u> of some individual or individuals for the board as opposed to conditions under which it is licit for a board to <u>delegate</u> its powers to such person or persons. The issue is one of agency law. Are the individuals identified in the articles merely the agents of the board as principal or are they a substitute source of authority?

I- the RMBCA it is clear that if the corporation has 50 or fewer shareholders they may be substitutes. Unfortunately, the RMBCA does not confront the question of whether such substitutes are then limited by the term and other requirements laid down in Section 8.03.

ACC Section 450 could be construed as allowing either delegates or substitutes. The apparent mandatory presence of a board of directors would, however, cause me to interpret it as limited to agency delegation. W'y leave the matter in doubt. The Commissioner's should decide whether they wish to permit substitution and, if so, whether they want to adopt the limitation suggested in RMBCA Section 8.01(c).

6. *Minimum size of board committees:* see pages 52-53 of this memorandum.

*The ACC:* Section 468 [pp. 59-60 of S.B. 246] permits the articles or bylaws to empower the board to set up executive and other committees and to delegate to such committees the powers otherwise vested in the board. Certain powers are excepted.

*The RMBCA:* Section 8.25(a) [p. 8-43] requires that any such committees have a minimum of two members.

*View of the Consultant:* I would advocate following the RMBCA position on the minimum composition of board committees.

7. *Indemnification---advances to defendants: see pages 58-60 of this memorandum.*

*The ACC: Section 490(e) [pp. 70-71 of S.B. 246] gives the corporation discretion to advance expenses anticipated by a defendant in any civil or criminal action prior to the final disposition of the action or proceeding. This advance is conditioned upon an undertaking by the defendant to repay the funds if it should ultimately be determined that there was no entitlement to indemnification.*

*The RMBCA: Section 8.53(a) [p. 8-109] is far more conservative. Before an advance may be authorized there must be a determination of the defendant's good faith, the furnishing of a written personal undertaking to repay the funds, and a finding that the facts as then known would not preclude indemnification.*

*Views of the Consultant: I would personally favor substitution of the concepts in RMBCA Section 8.53(a) for the less restrictive provisions of ACC Section 490(e).*

## *ARTICLE 7: Amendments and Changes*

8. *Procedure to Amend Articles of Incorporation: see pages 61-62 of this memorandum.*

*The ACC: Section 504 [pp. 73-74 of S.B. 246] defines the procedures which must be followed to amend the articles of incorporation. Assuming that shares are outstanding, Section 504 vests the power to initiate amendments in both the board and the shareholders. To be adopted, the amendment must be approved by both groups.*

*The RMBCA: Section 10.03 [pp. 10-10, 10-15] differs from the ACC in restricting the power to initiate amendments to the articles to the board. Under normal circumstances, the amendment is not adopted until approved by the shareholders. H-wever, Section 10.02 [pp 10-7, 10-10] lists six changes in the articles which, unless the articles provide otherwise, are within the power of the board to effect without shareholder approval. The official comment terms them "housekeeping amendments."*

*Views of the Consultant: I can see little harm in adoption of the RMBCA position on this point. Expense would be saved in corporate entities in which there is a large body of shareholders by exempting the need to poll them in the stated circumstances. Few Alaska corporations would presently fall into this category but this would seem an insufficient reason to reject this innovation.*

## ARTICLE 8. Organic Change

*9. Right of shareholders to dissent: see pages 73-74 of this memorandum.*

*The ACC: Section 574 [pp. 90-91 of S.B. 246] recognizes the right of shareholders to dissent in the case of an organic change, including the sale of all or substantially all of the corporate assets other than in the usual and regular course of business.*

*The RMBCA: Section 13.02 [pp. 13-8, 13-16] accords these same rights but goes further. It would grant shareholders the right to force the corporation to purchase their shares in the event of an amendment to the articles which would impair existing preemptive, redemption or voting rights. In its final draft, this has been expanded further to accord the right to dissent in the event an amendment is adopted reducing the outstanding shares. Any shareholder who would, in consequence of such reduction, be left with a fraction of a share which is then subject to acquisition for cash at the option of the corporation is to be accorded dissenter's rights.*

*Views of the Consultant: I think that the provisions of Section 13.02 are desirable and commend them as additions to the present content of ACC Section 574.*

*10. Payment to dissenting shareholder: see pages 75-76 of this memorandum.*

*The ACC: ACC Sections 580 and 582 [pp 93-94 of S.B. 246] create an obligation in the corporation to pay the dissenter who has perfected her rights the fair value of the shares. The scheme is to first give the shareholder and the corporation the opportunity to agree on this figure. If they cannot, Section 582 imposes the burden upon the corporation to commence litigation seeking a judicial determination of fair value.*

*The RMBCA: Section 13.25 [p. 13-31] contains a valuable innovation. It requires that the corporation <u>pay</u> to the dissenting shareholder the amount deemed by the corporation to represent the fair value of the shares. If there is a dispute and, ultimately, litigation at least the shareholder has these funds with which to finance the fight.*

*Views of the Consultant: Professor Hamilton made a convincing presentation on this point in his address to the Alaska Bar Association and I would favor its inclusion in the ACC.*

# STATE OF ALASKA
# THE LEGISLATURE
## LEGISLATIVE AFFAIRS AGENCY

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M April 16, 1988

SUBJECT: Changes to HB 322

TO: Representative John Sund, Chair
House Judiciary Committee

FROM: Theresa L. Bannister TB
Legislative Counsel

This memo accompanies the version of CSHB 322 (Judiciary) that you have requested. In addition to the changes made in the previous version, this version includes the changes that John Abbott has suggested to coordinate proposed AS 10.06.675, 10.06.678, and 10.06.848, relating to the ability of corporations to bring court actions.

Court actions brought by corporations. This version deletes from proposed AS 10.06.678 the right of dissolved corporations to prosecute actions. In addition, a sentence has been added to subsection (b) to prohibit dissolved corporations from commencing court actions, except under AS 10.06.675 (relating to recovering improper distributions). The application of proposed AS 10.06.848 has been limited to commencing actions, not maintaining actions, and to alleging and proving that at the time of commencing the action the corporation had paid its biennial tax and filed its biennial report. Subsections (b) and (c) have been added to proposed AS 10.06.848. Subsection (b) allows involuntarily dissolved corporations to sue under proposed AS 10.06.675 without having to comply with AS 10.06.848(a). Subsection (c) clarifies that a dissolved corporation can continue to maintain a suit it started if it satisfied subsection (a) when it began the suit.

If I may be of further assistance, please advise.

Attachment

TLB:gc
WKG3:004