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STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU, ALASKA 99811  
907 465-3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 22, 1988

SUBJECT: Liability of corporate directors  
(CSSB 343(Judiciary))

TO: Senator Arliss Sturgulewski

FROM: Richard A. Bradley  
Legislative Counsel 

You have requested a sectional analysis of the above described bill.

The main effect of the bill, apart from sec. 2, discussed below, is to address the liability relationship between the directors of the corporation and the corporation itself (or its stockholders or shareholders derivatively, if it has stockholders or shareholders).

The bill applies to the widely-used general types of corporations that may be established under state law: business corporations (AS 10.05), cooperative corporations (AS 10.15), and nonprofit corporations (AS 10.20). Corporations not included in the bill are electric and telephone cooperatives (AS 10.25), cemetery associations (AS 10.30), religious corporations (AS 10.40), and professional corporations (AS 10.45).

Section 1 of the bill amends AS 10.05.255, the section establishing the contents of the articles of incorporation for business corporations. It permits a corporation to add a provision "eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for the breach of fiduciary duty as a director."

The provisions of the section establish certain public policy areas where a corporation may not agree to waive liability. The section also provides that the elimination

or limitation of liability is only prospective from the time the amendment takes effect.

An existing business corporation may amend its articles under AS 10.05.270 and following.

Section 2 of the bill amends AS 10.05.276, a section establishing the "procedure to amend articles of incorporation." It provides that a corporation incorporated under AS 10.05.005 (regional Native corporations and those village corporations that incorporate as business corporations) may take advantage of the provisions of section 1 of the bill. The main purpose of sec. 2 of the bill is to permit the Native corporation to adopt the amendment by lower thresholds than the existing provisions of law provide.

Section 3 of the bill amends AS 10.15.350, the section establishing the contents of the articles of incorporation for cooperative corporations. It permits a corporation to add a provision "eliminating or limiting the personal liability of a director to the corporation or its members for monetary damages for the breach of fiduciary duty as a director."

The provisions of the section establish certain public policy areas where a corporation may not agree to waive liability. The section also provides that the elimination or limitation of liability is only prospective from the time the amendment takes effect.

An existing cooperative corporation may amend its articles under AS 10.15.365 and following.

Section 4 of the bill amends AS 10.20.151, the section establishing the contents of the articles of incorporation for nonprofit corporations. It permits a corporation to add a provision "eliminating or limiting the personal liability of a director to the corporation for monetary damages for the breach of fiduciary duty as a director." Nonprofit corporations have neither stockholders nor members.

The provisions of the section establish certain public policy areas where a corporation may not agree to waive liability. The section also provides that the elimination or limitation of liability is only prospective from the time the amendment takes effect.

Senator Arliss Sturgulewski  
Page 3  
February 22, 1988

An existing nonprofit corporation may amend its articles under AS 10.20.171 and following.

If I may be of further assistance, please advise.

RAB:bb  
wkb3/017

5-1437N  
Bradley  
2/22/88

*Page 2, line 16 is new:  
to cover co-opt.*

Original sponsors: Sturgulewski, Uehling,  
Fahrenkamp and Kelly

1 IN THE SENATE BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 343 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the liability of directors of  
7 corporations."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 10.05.255 is amended by adding new subsections to read:

10 (c) In addition to the matters required to be set out in the  
11 articles of incorporation by (a) of this section, the articles of  
12 incorporation may also contain a provision eliminating or limiting the  
13 personal liability of a director to the corporation or its stock-  
14 holders for monetary damages for the breach of fiduciary duty as a  
15 director. The articles of incorporation may not eliminate or limit  
16 the liability of a director for

17 (1) a breach of a director's duty of loyalty to the corpo-  
18 ration or its stockholders;

19 (2) acts or omissions not in good faith or that involve  
20 intentional misconduct or a knowing violation of law;

21 (3) wilful or negligent conduct involved in the payment of  
22 dividends or the repurchase of stock from other than lawfully avail-  
23 able funds; or

24 (4) a transaction from which the director derives an im-  
25 proper personal benefit.

26 (d) The provisions of (c) of this section do not eliminate or  
27 limit the liability of a director for an act or omission that occurs  
28 before the effective date of the articles of incorporation or of an  
29 amendment to the articles of incorporation authorized by (c) of this

1 section.

2 \* Sec. 2. AS 10.05.276 is amended by adding a new subsection to read:

3 (b) A corporation organized under 43 U.S.C. 1601 - 1628 (Alaska  
4 Native Claims Settlement Act) and incorporated under AS 10.05.005 may  
5 amend its articles of incorporation under (a) of this section to add a  
6 provision eliminating or limiting the personal liability of a director  
7 to the corporation or its stockholders for monetary damages under  
8 AS 10.05.255(c). Notwithstanding (a) of this section, the amendment  
9 authorized by this subsection may be adopted by the affirmative vote  
10 of a majority of the shareholders present at a regular or special  
11 meeting at which a quorum is present in person or by proxy.

12 \* Sec. 3. AS 10.15.350 is amended by adding new subsections to read:

13 (b) In addition to the matters required to be set out in the  
14 articles of incorporation by (a) of this section, the articles of  
15 incorporation may also contain a provision eliminating or limiting the  
16 personal liability of a director to the corporation or its members for  
17 monetary damages for the breach of fiduciary duty as a director. The  
18 articles of incorporation may not eliminate or limit the liability of  
19 a director for

20 (1) a breach of a director's duty of loyalty to the corpo-  
21 ration;

22 (2) acts or omissions not in good faith or that involve  
23 intentional misconduct or a knowing violation of law;

24 (3) wilful or negligent conduct involved in the payment of  
25 dividends or the redemption of stock from other than lawfully avail-  
26 able funds; or

27 (4) a transaction from which the director derives an im-  
28 proper personal benefit.

29 (c) The provisions of (b) of this section do not eliminate or

1 limit the liability of a director for an act or omission that occurs  
2 before the effective date of the articles of incorporation or of an  
3 amendment to the articles of incorporation authorized by (b) of this  
4 section.

5 \* Sec. 4. AS 10.20.151 is amended by adding new subsections to read:

6 (d) In addition to the matters required to be set out in the  
7 articles of incorporation by (a) of this section, the articles of  
8 incorporation may also contain a provision eliminating or limiting the  
9 personal liability of a director to the corporation for monetary  
10 damages for the breach of fiduciary duty as a director. The articles  
11 of incorporation may not eliminate or limit the liability of a direc-  
12 tor for

13 (1) a breach of a director's duty of loyalty to the corpo-  
14 ration;

15 (2) acts or omissions not in good faith or that involve  
16 intentional misconduct or a knowing violation of law; or

17 (3) a transaction from which the director derives an im-  
18 proper personal benefit.

19 (e) The provisions of (d) of this section do not eliminate or  
20 limit the liability of a director for an act or omission that occurs  
21 before the effective date of the articles of incorporation or of an  
22 amendment to the articles of incorporation authorized by (d) of this  
23 section.

**FISCAL NOTE**

REQUEST:

Revision Date: \_\_\_\_\_  
Title: Relating to the liability  
of directors of corporations  
Sponsor: Sturgulewski, Uehling,  
Requester: Fahrenkamp and Kelly

Agency Affected: Commerce & Econ. Dev.  
BRU: Banking, Securities & Corporations  
Components: \_\_\_\_\_

EXPENDITURES / REVENUES : (Thousands of Dollars)

OPERATING	FY 83	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-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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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: \_\_\_\_\_

Approved by Commissioner: J. Anthony Smith, Commissioner  
Agency: Department of Commerce and Economic Development

Date: 1-26-88

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February 17, 1988

9864 4 1 634

FEB 17 1988

Senator Jalmar Kerttula  
P. O. Box V  
Juneau, Alaska 99811

Re: SB 343

Dear Senator Kerttula:

On Thursday, February 18, the Senate Judiciary Committee will revisit SB 343 -- a bill that would allow corporations, with shareholder approval, to limit their directors' liability for simple negligence. On behalf of Sealaska, I wanted to explain the purpose of an amendment to SB 343 that will be considered by the Committee in the form of a proposed Committee Substitute. That amendment would allow corporations formed under the Alaska Native Claims Settlement Act to amend their articles of incorporation with respect to directors' liability by a majority shareholders' vote, rather than the two-thirds vote otherwise required.

There are four sound public policy reasons for adopting the amendment. The proposal does not represent a "special deal" for Alaska Natives; rather, it recognizes that there are some fundamental differences between ANCSA corporations on the one hand, and general Alaska business corporations on the other, that must be addressed if the legislation is to achieve its intended goal. These considerations include:

1. Virtually all Alaska corporations have only a handful of shareholders. Indeed, in a typical situation the

only shareholders will be the directors themselves. As a result, obtaining a super-majority (or even unanimity) on this issue among shareholders would be an easy task. Typical of other regional corporations, however, Sealaska has 16,000 shareholders -- spread from southcentral Alaska to the lower 48. It is hard enough for corporations with such dispersed ownership to obtain a quorum; obtaining a two-thirds vote on any matter -- no matter how non-controversial -- is a virtual impossibility;

2. Normally, a corporation's directors hold large (and often controlling) blocks of shares in the company. As a result, they stand to realize substantial and direct profits from the corporation's business activities. This prospect of large personal gain compensates for the risk of liability that a director might suffer, and makes that potential for liability seem equitable. Native corporation directors, however, have no prospect of direct and substantial economic gain. They hold no more shares than any shareholder; and, as a result, directorship on a Native corporation is often viewed more as a form of community service than as an avenue of personal enrichment. The equitable symmetry of gain on the upside, and exposure on the downside, doesn't exist in the Native corporate context, and director liability legislation ought to recognize this substantial difference;

3. In the normal business setting, venturers voluntarily embark upon the corporate form in the expectation of gain. They voluntarily assume the risk, and they are usually familiar with the standard of care demanded of business men. Alaska's Natives, on the other hand, had the corporate form imposed upon them by Congress. They were told to administer their lands through a business organization with which -- particularly at the village level -- they were unfamiliar. Had the lands been administered through the Tribe, these same Native leaders would have performed essentially the same functions under the cloak of Tribal immunity. Moreover, they are not, by and large, familiar with the latest New York Court of Appeals cases defining permissible director conduct. It is perfectly proper for the state to be a bit sensitive in imposing personal liability for administering land entitlements through a form that is unfamiliar and, to a large extent, involuntarily; and

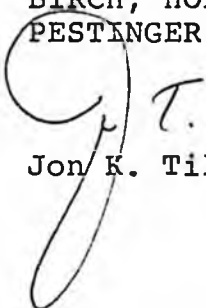
February 17, 1988  
Page 3

4. The purpose of the legislation is to encourage the formation of new corporations in Alaska. For new corporate ventures, a liability provision will be inserted in the initial articles of incorporation. Shareholders will, quite frankly, never read those articles. I will confess to never having reviewed the articles of incorporation of any company in which I have purchased stock. If, however, I receive a proxy solicitation from a company in which I own shares, asking me to accept limited director liability, I would probably give the matter some scrutiny. The point, of course, is that even majority shareholder approval for existing corporations will result in substantially broader scrutiny than that attendant the formation of new companies.

For these reasons, I believe the Judiciary Committee will be on firm footing in concluding that the sound philosophy behind SB 343 would be better served by acknowledging important differences between ANCSA and other business corporations. If I can be of any further assistance, or if you have any reservations about Sealaska's amendment, please do not hesitate to call.

Sincerely,

BIRCH, HORTON, BITTNER  
PESTINGER & ANDERSON

  
Jon K. Tillinghast

JKT/jrm

STATE OF ALASKA  
THE LEGISLATURE

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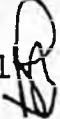
LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

January 22, 1988

SUBJECT: Liability of corporate directors  
(SB 343)

TO: Senator Arliss Sturgulewski

FROM: Richard A. Bradley  
Legislative Counsel 

Frank Homan has asked that I comment on the provisions of SB 343.

As you know, you asked for a bill that would limit the liability of directors of business (for profit) corporations in certain instances. The amendment tracks the provisions of a recent amendment to the Delaware Corporations Code: 8 Delaware Code Ann., sec. 102(b)(7).

The recent Delaware law did not address the liability of directors of cooperative corporations or of nonprofit corporations. Neither does SB 343.

I have noted before that neither the cooperative corporations law (AS 10.15), nor the nonprofit corporations law (AS 10.20), is at all as comprehensive as the general business corporations law, AS 10.05. I suspect that the gaps in AS 10.15 and AS 10.20 are dealt with by "borrowing" from the in AS 10.05 to the extent necessary. But if the legislature wishes to deal explicitly with the liability concepts of the directors of cooperative corporations or nonprofit corporations, it may do so.

If I may be of further assistance, please advise.

RAB:bb  
WKB1/089

NOVEMBER 11, 1987

MEMO

TO: CHUCK BUNDRANT  
BART EATON

FROM: JOE PLESHA

RE: LIMITATION OF DIRECTOR LIABILITY UNDER DELAWARE LAW

INTRODUCTION

On July 1, 1986, a new law became effective in Delaware which permits a Delaware corporation to include in its certificate of incorporation a provision which limits or eliminates a director's personal monetary liability to the corporation or its stockholders for breach of his or her fiduciary duty of care to the corporation.<sup>1</sup>

BACKGROUND

Delaware law has generally permitted a Delaware corporation to purchase insurance on behalf of its directors and officers against liability incurred in their corporate capacity, regardless of whether the corporation would have the power to indemnify the director against such liability under Delaware law.<sup>2</sup> The market for directors' and officers' liability insurance has, however, changed dramatically over the past several years. Despite the statutory authorization of Delaware corporations to purchase and maintain directors' liability insurance, many corporations have reportedly experienced difficulties in obtaining or maintaining sufficient coverage at a reasonable cost. As a result, many corporations have been forced to accept insurance with lower dollar limits of coverage, higher deductible amounts, and broader policy exclusions at a significantly higher cost.<sup>3</sup>

The insurance crisis for directors may be exacerbated by the courts increasing tendency to scrutinize the decisions of a director, even when the director acted in good faith and not out

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<sup>1</sup> Indemnification of directors and officers, and limitation or elimination of director liability as authorized by the new Delaware law, are separate and distinct concepts. Alaska law already provides that directors can be indemnified for actions under certain circumstances. Alaska Stat. § 10.05.101.

<sup>2</sup> Del. Code Ann. tit. 8, § 145(g) (Supp. 1986) (amended 1986) provides:

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

<sup>3</sup> See Hilder, *Liability insurance is Difficult to Find Now for Directors, Officers*. Wall St. J., July 10, 1985, at 1, col. 6.

of self interest. For example, the court in the case of *Smith v. Van Gorkom*<sup>4</sup> found that the board of directors of Trans Union Corporation breached their fiduciary duty of due care in approving a proposed cash merger and the court held members of the board personally liable for the resulting damages.

The expense of defending these lawsuits and the inevitable uncertainties with respect to application of the business judgment rule (the rule by which corporate directors actions are judged) may impact upon an individual's willingness to serve as director of a corporation. In addition, such uncertainty could cause directors to act defensively out of concern over costly litigation and potential personal liability, rather than acting to manage the business in the best interest of the corporation. For these reasons, Delaware adopted legislation in 1986 which would permit a corporation to limit or eliminate the director's personal monetary liability to the corporation or its stockholders for breach of his or her fiduciary duty of care to the corporation.

### ANALYSIS OF NEW DELAWARE LAW

Title 8, §102(b)(7) of the Delaware General Corporation Law enables a Delaware corporation to include in its articles of incorporation a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of their fiduciary duty as a director. In addition, § 102(b)(7) states that no such provision can eliminate or limit a director's liability (i) for breach of the director's *duty of loyalty* to the corporation or its stockholders; (ii) for acts of omissions *not in good faith or involving intentional misconduct or a knowing violation of law*; (iii) for willful or negligent conduct *paying dividends or repurchasing stock out of other than lawfully available funds*; or, (iv) for any transaction from which the director derives an *improper personal benefit*.

Section 102(b)(7) is an enabling provision only. Amendment of the corporate articles of incorporation, therefore, is required to include the provision authorized by this section before it is an effective limitation of personal liability for a corporation's directors. The ultimate determination as to the propriety of limiting the opportunity of a corporation or its stockholders to seek monetary damages from the directors rest with the stockholders of the corporation who vote on any amendments to the articles of incorporation. As a practical note, it can be argued that a board which proposes an amendment pursuant to this law is an "interested party," since the individual directors of the board will benefit from the elimination of monetary liability which they otherwise may be required to pay. Obtaining the required stockholder approval after full disclosure of all material facts, however, eliminates any conflict of interest which might otherwise arise.

Section 102(b)(7) does not preclude or limit damages in actions instituted by third parties. In addition, it can be argued that §102(b)(7) permits limitation or elimination of monetary liability only for directors acting as directors. Actions taken by a majority stockholder in his capacity as such cannot be exempted from liability. Finally, §102(b)(7) does not permit limitation or elimination of liability arising under other laws or regulations. A director's potential liability under state and federal securities laws, for example, is unaffected by this section

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<sup>4</sup> 488 A.2d 858 (Del. 1985). The court found the board grossly negligent in that the directors had failed to fully inform themselves of "all material information reasonably available to them," and had acted hastily in approving the proposed merger, after two hours' consideration. *id.* at 872.

### Fiduciary Duty

Directors are charged with the fiduciary duty of *due care* and *loyalty* to the corporation. Loyalty basically requires that a director, in making a business decision, act in good faith and in the honest belief that the action taken is in the best interest of the corporation. Under the new Delaware law, a director can still be found to be personally liable for monetary damages where they violate the fiduciary duty of loyalty by acting in their own "self-interest," and not in the best interest of the corporation.<sup>5</sup> (For example, by usurping a corporate opportunity for their own personal benefit or competing with the corporation.)

The official legislative synopsis of §102(b)(7) notes that this provision permits a corporation to protect its directors from monetary liability only from liability for breach of the *fiduciary duty of due care*.<sup>6</sup> It is clear that if a director negligently or with gross negligence (want of even scant care, or failure to exercise even that care which a careless person would use) disregarded his fiduciary duty of due care, they could be protected from monetary liability under the new Delaware law.

It is not clear, however, whether §102(b)(7) exempts directors from liability for reckless (actions that fall somewhere between gross negligence and intentional wrongdoing) disregard for the fiduciary duty of due care. It could be argued that to the extent that the recklessness involves conscious disregard for a known risk, such conduct is not taken in good faith and therefore, would not be a liability subject to limitation under §102(b)(7)(ii). To the extent recklessness encompasses merely inattention to duty by the directors, however, I believe that such conduct should be labeled "gross negligence" and therefore any liability resulting from it would be subject to limitation.

§102(b)(7), however, does not *eliminate* a director's fiduciary duty to act with due care, it merely insulates directors from personal *monetary* liability for failure to satisfy that duty. A director's conduct would, therefore, still be subject to injunctive or rescissory relief. A stockholder can institute an action to enjoin completion of a board's action or to rescind a completed action if such action involves violations of the duty of care. This may be relevant in proxy contest, elections, resignations, etc.

In conclusion, Delaware's new law only allows for a corporation to limit or eliminate the monetary damages a corporation or its shareholders can receive from its directors for a breach of the director's fiduciary duty of due care. It does not limit damages that can be awarded for a director's breach of their fiduciary duty of loyalty, or violations of law, or any transaction from which a director derives an improper personal benefit. In addition, the corporation or shareholder can still seek equitable remedies, such as rescission or injunctive relief for a director's breach of their fiduciary duty of due care.

### WASHINGTON & ALASKA LAW

Like Delaware, Washington State and Alaska law provide that a corporation may purchase insurance on behalf of its directors and officers to protect against personal liability incurred

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<sup>5</sup> Del. Code Ann. tit. 8, § 102(b)(7)(i).

<sup>6</sup> The synopsis notes: "[t]his provision enables a corporation in its original certificate of incorporation or an amendment thereto validly approved by stockholders to eliminate or limit personal liability of members of its board of directors or governing body for violations of a director's fiduciary duty of care."

in their corporate capacity, regardless of whether the corporation would have the power to indemnify against such liability under the relevant state law.<sup>7</sup>

On Washington recently enacted legislation similar to Delaware's which would allow for a Washington corporation limit the monetary liability of directors for a breach of their fiduciary duty of due care to the corporation.<sup>8</sup> I am having a copy of the new provision sent to me. Alaska has not yet enacted such legislation.

I have attached the relevant portions of the Delaware, Alaska and Washington State law.

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<sup>7</sup> Nearly identically to Delaware law, Wash. Rev. Code § 23A.08.025(11) (1980) provides:

A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent to the corporation, or is or was serving at the request of the corporation as a officer, employee or agent of another corporation, partnership, joint venture, trust or other employee benefit plan against any liability asserted against him incurred by him in any such capacity, or arising out of his status as such, *whether or not the corporation would have the power to indemnify him against such liability under this section.*

The Alaska Statutes §10.05.015(g) (1970) provide that:

A corporation may purchase and maintain insurance on behalf of a person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership joint venture, trust or other enterprise against any liability asserted against him and incurred by the person in such a capacity, or arising out of the person's status as such, *whether or not the corporation would have the power to indemnify the person against the liability under the provisions of this section.*

<sup>8</sup> S.B. 6048, effective July 26, 1987.

## TITLE 8

### Corporations

#### CHAPTER 1. GENERAL CORPORATION LAW

<b>Subchapter I. Formation</b>	<b>Sec.</b>
Sec. 102. Contents of certificate of incorporation.	230. Exception to requirements of notice.
<b>Subchapter II. Powers</b>	<b>Subchapter X. Sale of Assets, Dissolution and Winding Up</b>
122. Specific powers. 125. Conferring academic or honorary degrees.	271. Sale, lease or exchange of assets; consideration; procedure.
<b>Subchapter IV. Directors and Officers</b>	<b>Subchapter XIV. Close Corporations; Special Provisions</b>
141. Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonprofit corporations; reliance upon books; action without meeting; removal. 145. Indemnification of officers, directors, employees and agents; insurance.	349. Corporate action where a restriction on transfer of a security is held invalid.
<b>Subchapter V. Stock and Dividends</b>	<b>Subchapter XV. Foreign Corporations</b>
151. Classes and series of stock; rights. 165. Revocability of preincorporation subscriptions. 173. Declaration and payment of dividends.	380. Foreign corporation as fiduciary in this State.
<b>Subchapter VII. Meetings, Elections, Voting and Notice</b>	<b>Subchapter XVI. Domestication and Transfer of Non-United States Corporations</b>
221. Voting, inspection and other rights of bondholders and debenture holders. 225. Contested election of directors; proceedings to determine validity.	388. Domestication of non-United States corporations. 389. Temporary transfer of domicile into this State.
	<b>Subchapter XVII. Miscellaneous Provisions</b>
	391. Taxes and fees payable to Secretary of State upon filing certificate or other paper.

#### *Subchapter I. Formation*

#### § 102. Contents of certificate of incorporation.

(a) The certificate of incorporation shall set forth:

(4) If the corporation is to be authorized to issue only 1 class of stock, the total number of shares of stock which the corporation shall have authority to issue and the par value of each of such shares, or a statement that all such shares are to be without par value. If the corporation is to be authorized to issue more than 1 class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class, and shall specify with respect to each class those shares that are to be without par value and those shares that are to have a par value and the par value of each share of each such class. The certificate of

incorporation shall also set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by § 151 of this title in respect of any class or classes of stock or any series of any class of stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant to the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation. Such grant of authority may include the power to specify the number of shares of any series. The foregoing provisions of this paragraph shall not apply to corporations which are not organized for profit and which are not to have authority to issue capital stock. In the case of such corporations, the fact that they are not to have authority to issue capital stock shall be stated in the certificate of incorporation. The conditions of membership of such corporations shall likewise be stated in the certificate of incorporation or the certificate may provide that the conditions of membership shall be stated in the bylaws;

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(6) A provision imposing personal liability for the debts of the corporation on its stockholders or members to a specified extent and upon specified conditions; otherwise, the stockholders or members of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts;

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer to a member of the governing body of a corporation which is not authorized to issue capital stock.

(65 Del. Laws, c. 127, § 1; 65 Del. Laws, c. 289, §§ 1, 2.)

Revisor's note. — Section 13 of 65 Del. Laws, c. 127, provides: "All rights, privileges and immunities vested or accrued by and under any laws enacted prior to the adoption or amendment of this act, all suits pending, all rights of action conferred and all duties, restrictions, liabilities and penalties imposed or required by and under laws enacted prior to the adoption or amendment of this act shall not

be impaired, diminished or affected by this act."

Section 14 of 65 Del. Laws, c. 127, provides: "This act shall become effective on July 1, 1985. Without limiting the foregoing, § 7 of this act shall be effective only as to elections and votes of stockholders occurring on or after July 1, 1985 and § 8 of this act shall be effective as to all notices required to be given in

(b) A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.

(c) Corporations for constructing, maintaining and operating public utilities, whether in or outside of this State, may be organized under this chapter, but corporations for constructing, maintaining and operating public utilities within this State shall be subject to, in addition to this chapter, the special provisions and requirements of Title 26 applicable to such corporations. (8 Del. C. 1953, § 101; 56 Del. Laws, c. 50.)

**Cross reference.** — As to number of incorporators of state banks and trust companies, see § 722 of Title 5.

**Corporation is artificial being created by law and acting under the authority of law for designated purposes and being artificial and the mere creature of the law, it can only act by its officers and agents.** *Joseph Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co.*, Del. Super., 156 A. 350 (1931).

**With same status as if created by special act.** — Corporations organized under the general corporation law have the same legal status as if they had been created by a special act of the General Assembly. *State ex rel. Cochran v. Penn-Beaver Oil Co.*, Del. Supr., 143 A. 257 (1926).

**And corporation is entity distinct from its stockholders.** *Bird v. Wilmington Soc'y of*

*Fine Arts*, Del. Supr., 43 A.2d 476 (1945).

**Even if there is only 1 stockholder.** — The fact that 1 person owns all of the stock of a corporation does not make him and the corporation 1 and the same person. *Martin v. D.B. Martin Co.*, Del. Ch., 88 A.2d 612 (1913).

**But this fiction should be ignored when used for fraudulent acts.** — The fiction of a legal corporate entity should be ignored when it has been used as a shield for fraudulent or other illegal acts. *Martin v. D.B. Martin Co.*, Del. Ch., 88 A. 612 (1913).

**Cemetery corporation operated for profit not forbidden.** — The public policy of this State does not forbid the operation of a cemetery corporation for private profit. *Wilmington Mem. Co. v. Silverbrook Cem. Co.*, Del. Ch., 287 A.2d 405, *aff'd*, Del. Supr., 297 A.2d 378 (1972).

## § 102. Contents of certificate of incorporation.

(a) The certificate of incorporation shall set forth:

(1) The name of the corporation which shall contain 1 of the words "association," "company," "corporation," "club," "foundation," "fund," "incorporated," "institute," "society," "union," "syndicate," or "limited," or 1 of the abbreviations ["co.," "corp.," "inc.," "ltd."], or words or abbreviations of like import in other languages (provided they are written in roman characters or letters), and which shall be such as to distinguish it upon the records in the office of the Division of Corporations in the Department of State from the names of other corporations organized, reserved or registered as a foreign corporation under the laws of this State;

(2) The address (which shall include the street, number, city and county) of the corporation's registered office in this State, and the name of its registered agent at such address;

(3) The nature of the business or purposes to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any;

(4) If the corporation is to be authorized to issue only 1 class of stock, the total number of shares of stock which the corporation shall have authority to issue and the par value of each of such shares, or a statement that all such shares are to be without par value. If the corporation is to be authorized to issue more than 1 class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class that are to have a par value and the par value of each share of each such class, the number of shares of each class that are to be without par value, and a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by § 151 of this title in respect of any class or classes of stock or any series of any class or stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant to the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation. The foregoing provisions of this paragraph shall not apply to corporations which are not organized for profit and which are not to have authority to issue capital stock. In the case of such corporations, the fact that they are not to have authority to issue capital stock shall be stated in the certificate of incorporation. The conditions of membership of such corporations shall likewise be stated in the certificate of incorporation or the certificate may provide that the conditions of membership shall be stated in the bylaws;

(5) The name and mailing address of the incorporator or incorporators;

(6) If the powers of the incorporator or incorporators are to terminate upon the filing of the certificate of incorporation, the names and mailing addresses of the persons who are to serve as directors until the first annual meeting of stockholders or until their successors are elected and qualify.

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation;

(2) The following provisions, in haec verba, viz:

"Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or

OFFICE OF THE  
SECRETARY OF STATE  
ALASKA  
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stockholder thereof or on the application of any receiver or receivers appointed for this corporation under § 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under § 279 of Title 8 of the Delaware Code order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation”;

(3) Such provisions as may be desired granting to the holders of the stock of the corporation, or the holders of any class or series of a class thereof, the preemptive right to subscribe to any or all additional issues of stock of the corporation of any or all classes or series thereof, or to any securities of the corporation convertible into such stock. No stockholder shall have any preemptive right to subscribe to an additional issue of stock or to any security convertible into such stock unless, and except to the extent that, such right is expressly granted to him in the certificate of incorporation. All such rights in existence on July 3, 1967, shall remain in existence unaffected by this paragraph unless and until changed or terminated by appropriate action which expressly provides for the change or termination;

(4) Provisions requiring for any corporate action, the vote of a larger portion of the stock or of any class or series thereof, or of any other securities having voting power, or a larger number of the directors, than is required by this chapter;

(5) A provision limiting the duration of the corporation's existence to a specified date; otherwise, the corporation shall have perpetual existence;

(6) A provision imposing personal liability for the debts of the corporation on its stockholders or members to a specified extent and upon specified conditions; otherwise, the stockholders or members of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts.

(c) It shall not be necessary to set forth in the certificate of incorporation any of the powers conferred on corporations by this chapter. (8 Del. C. 1953, § 102; 56 Del. Laws, c. 50; 57 Del. Laws, c. 148, § 1.)

**Cross references.** — As to issuance and recording of certificates of incorporation of cooperative agriculture associations, see § 8504 of Title 3. As to contents and execution of articles of association of state banks and trust companies, see § 703 of Title 5. As to form of

IN THE LEGISLATURE  
of the  
STATE OF WASHINGTON



CERTIFICATION OF ENROLLED ENACTMENT

SUBSTITUTE SENATE BILL NO. 6048

PARTIAL VETO

Chapter 212, Laws of 1987

50th Legislature  
Regular Session

EFFECTIVE DATE: July 26, 1987  
Except: Sections 401, 402, 701  
through 710, 901, 1001, 1101,  
1201, 1401, 1501, 1601, 1602,  
and 1701 which become effective  
on April 29, 1987.

Passed the Senate March 12, 1987  
Yeas 48 Nays 1


Passed the House April 14, 1987  
As Amended  
Yeas 94 Nays 1

4/21/87 - The Senate concurred in the  
House amendments and passed the bill  
as amended by the House.

YEAS 37 NAYS 1

CERTIFICATE

I, Sidney R. Sawyer, Secretary of the Senate of the  
State of Washington do hereby certify that the attached  
is entitled Substitute Senate Bill No. 6048 as  
passed by the Senate and the House of Representatives  
on the dates hereon set forth.

  
Secretary of the Senate

WASHINGTON

1 instituted primary coverage, either through pooling arrangements,  
2 self-insurance, or an authorized insurer, that meets the underwriting  
3 requirements established by the risk manager; (2) the funding of an  
4 excess insurance program shall be on an actuarially sound basis and  
5 all premiums, assessments, and charges are to reflect this policy;  
6 (3) no amount in excess of five million dollars may be paid from an  
7 excess insurance program for the payment and settlement of any claims  
8 arising out of any single occurrence.

9 For purposes of the study, "excess insurance" means a contract by  
10 which the state insures, or procures a third person to insure, a  
11 political subdivision against property loss or liability in excess of  
12 its primary insurance.

13 A report on the results of the study shall be submitted not later  
14 than December 31, 1987, to the judiciary committees of the senate and  
15 house of representatives.

16 PART VII

17 CORPORATE AND COOPERATIVE DIRECTORS LIABILITY

18 Sec. 701. Section 55, chapter 53, Laws of 1965 as last amended  
19 by section 10, chapter 250, Laws of 1985 and RCW 23A.12.020 are each  
20 amended to read as follows:

21 The articles of incorporation shall set forth:

22 (1) The name of the corporation.

23 (2) The period of duration, which may be perpetual or for a  
24 stated term of years.

25 (3) The purpose or purposes for which the corporation is  
26 organized which may be stated to be, or to include, the transaction  
27 of any or all lawful business for which corporations may be  
28 incorporated under this title.

29 (4) The aggregate number of shares which the corporation shall  
30 have authority to issue and if such shares are to be divided into  
31 classes, the number of shares of each class.

32 (5) If the shares are to be divided into classes, the designation  
33 of each class and a statement of the preferences, limitations and  
34 relative rights in respect of the shares of each class.

35 (6) If the corporation is to issue the shares of any preferred or

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1 special class in series, then the designation of each series and a  
2 statement of the variations in the relative rights and preferences as  
3 between series insofar as the same are to be fixed in the articles of  
4 incorporation, and a statement of any authority to be vested in the  
5 board of directors to establish series and fix and determine the  
6 variations in the relative rights and preferences as between series.

7 (7) Any provision limiting or denying to shareholders the  
8 preemptive right to acquire additional shares of the corporation.

9 (8) The address of its initial registered office and the name of  
10 its initial registered agent at such address.

11 (9) The number of directors constituting the initial board of  
12 directors and the names and addresses of the persons who are to serve  
13 as directors until the first annual meeting of shareholders or until  
14 their successors be elected and qualify.

15 (10) The name and address of each incorporator.

16 In addition to the provisions required under this section, the  
17 articles of incorporation may also contain provisions not  
18 inconsistent with law regarding:

19 (a) The direction of the management of the business and the  
20 regulation of the affairs of the corporation;

21 (b) The definition, limitation, and regulation of the powers of  
22 the corporation, the directors, and the shareholders, or any class of  
23 the shareholders, including restrictions on the transfer of shares;

24 (c) The par value of any authorized shares or class of shares;  
25 ((and))

26 (d) Eliminating or limiting the personal liability of a director  
27 to the corporation or its shareholders for monetary damages for  
28 conduct as a director, provided that such provisions shall not  
29 eliminate or limit the liability of a director for acts or omissions  
30 that involve intentional misconduct by a director or a knowing  
31 violation of law by a director, for conduct violating RCW 23A.08.450,  
32 or for any transaction from which the director will personally  
33 receive a benefit in money, property, or services to which the  
34 director is not legally entitled. No such provision shall eliminate  
35 or limit the liability of a director for any act or omission  
36 occurring prior to the date when such provision becomes effective;

1 and

2 (e) Any provision which under this title is required or permitted  
3 to be set forth in the bylaws.

4 It shall not be necessary to set forth in the articles of  
5 incorporation any of the corporate powers enumerated in this title.

6 Sec. 702. Section 2, chapter 58, Laws of 1969 ex. sess. as last  
7 amended by section 1, chapter 99, Laws of 1980 and RCW 21A.08.025 are  
8 each amended to read as follows:

9 (1) As used in this section:

10 (a) "Director" means any person who is or was a director of the  
11 corporation and any person who, while a director of the corporation,  
12 is or was serving at the request of the corporation as a director,  
13 officer, partner, trustee, employee, or agent of another foreign or  
14 domestic corporation, partnership, joint venture, trust, other  
15 enterprise, or employee benefit plan.

16 (b) "Corporation" includes any domestic or foreign predecessor  
17 entity of the corporation in a merger, consolidation, or other  
18 transaction in which the predecessor's existence ceased upon  
19 consummation of such transaction.

20 (c) "Expenses" includes attorneys' fees.

21 (d) "Official capacity" means: (i) When used with respect to a  
22 director, the office of director in the corporation, and (ii) when  
23 used with respect to a person other than a director as contemplated  
24 in subsection (10) of this section, the elective or appointive office  
25 in the corporation held by the officer or the employment or agency  
26 relationship undertaken by the employee or agent in behalf of the  
27 corporation, but in each case does not include service for any other  
28 foreign or domestic corporation or any partnership, joint venture,  
29 trust, other enterprise, or employee benefit plan.

30 (e) "Party" includes a person who was, is, or is threatened to  
31 be, made a named defendant or respondent in a proceeding.

32 (f) "Proceeding" means any threatened, pending, or completed  
33 action, suit, or proceeding whether civil, criminal, administrative,  
34 or investigative.

35 (2) A corporation shall have power to indemnify any person made a  
36 party to any proceeding (other than a proceeding referred to in

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1 subsection (2) of this section) by reason of the fact that he is or  
2 was a director against judgments, penalties, fines, settlements and  
3 reasonable expenses actually incurred by him in connection with such  
4 proceeding if:

5 (a) He conducted himself in good faith, and: (i) in the case of  
6 conduct in his own official capacity with the corporation, he  
7 reasonably believed his conduct to be in the corporation's best  
8 interests, or (ii) in all other cases, he reasonably believed his  
9 conduct to be at least not opposed to the corporation's best  
10 interests; and

11 (b) In the case of any criminal proceeding, he had no reasonable  
12 cause to believe his conduct was unlawful.

13 The termination of any proceeding by judgment, order, settlement,  
14 conviction, or upon a plea of nolo contendere or its equivalent,  
15 shall not, of itself be determinative that the person did not meet  
16 the requisite standard of conduct set forth in this subsection.

17 (3) A corporation shall have power to indemnify any person made a  
18 party to any proceeding by or in the right of the corporation by  
19 reason of the fact that he is or was a director against reasonable  
20 expenses actually incurred by him in connection with such proceeding  
21 if he conducted himself in good faith, and:

22 (a) In the case of conduct in his official capacity with the  
23 corporation, he reasonably believed his conduct to be in its best  
24 interests; or

25 (b) In all other cases, he reasonably believed his conduct to be  
26 at least not opposed to its best interests;

27 PROVIDED, That no indemnification shall be made pursuant to this  
28 subsection in respect of any proceeding in which such person shall  
29 have been adjudged to be liable to the corporation.

30 (4) A director shall not be indemnified under a subsection (2) or  
31 (3) of this section in respect of any proceeding ((charging--improper  
32 personal--benefit--to--him)), whether or not involving action in his  
33 official capacity, in which he shall have been adjudged to be liable  
34 on the basis that ((personal-benefit-was-improperly-receive-by-him))  
35 the director personally received a benefit in money, property, or  
36 services to which the director was not legally entitled.

1 (5) Unless otherwise limited by the articles of incorporation:  
2 (a) A director who has been wholly successful, on the merits or  
3 otherwise, in the defense of any proceeding referred to in subsection  
4 (2) or (3) of this section shall be indemnified against reasonable  
5 expenses incurred by him in connection with the proceeding; and  
6 (b) A court of appropriate jurisdiction, upon application of a  
7 director and such notice as the court shall require shall have  
8 authority to order indemnification in the following circumstances:  
9 (i) If the court determines a director is entitled to  
10 reimbursement under (a) of this subsection, the court shall order  
11 indemnification, in which case the director shall be entitled to  
12 recover the expenses of securing such reimbursement; or  
13 (ii) If the court determines that the director is fairly and  
14 reasonably entitled to indemnification in view of all the relevant  
15 circumstances, whether or not he has met the standards of conduct set  
16 forth in subsection (2) or (3) of this section or has been adjudged  
17 liable under subsection (4) of this section, the court may order such  
18 indemnification as the court shall deem proper, except that  
19 indemnification with respect to any proceeding referred to in  
20 subsection (3) of this section and with respect to any proceeding in  
21 which liability shall have been adjudged pursuant to subsection (4)  
22 of this section shall be limited to expenses.  
23 A court of appropriate jurisdiction may be the same court in  
24 which the proceeding involving the director's liability took place.  
25 (6) No indemnification under subsection (2) or (3) of this  
26 section shall be made by the corporation unless authorized in the  
27 specific case after a determination that indemnification of the  
28 director is permissible in the circumstances because he has met the  
29 standard of conduct set forth in the applicable subsection. Such  
30 determination shall be made:  
31 (a) By the board of directors by a majority vote of a quorum  
32 consisting of directors not at the time parties to such proceeding;  
33 or  
34 (b) If such a quorum cannot be obtained, then by a majority vote  
35 of a committee of the board, duly designated to act in the matter by  
36 a majority vote of the full board (in which designation directors who

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1 are parties may participate), consisting solely of two or more  
2 directors not at the time parties to such proceeding; or

3 (c) In a written opinion by legal counsel other than an attorney,  
4 or a firm having associated with it an attorney, who has been  
5 retained by or who has performed services within the past three years  
6 for the corporation or any party to be indemnified, selected by the  
7 board of directors or a committee thereof by vote as set forth in (a)  
8 or (b) of this subsection, or if the requisite quorum of the full  
9 board cannot be obtained therefor and such committee cannot be  
10 established, by a majority vote of the full board (in which selection  
11 directors who are parties may participate); or

12 (d) By the shareholders.

13 Authorization of indemnification and determination as to  
14 reasonableness of expenses shall be made in the same manner as the  
15 determination that indemnification is permissible, except that if the  
16 determination that indemnification is permissible is made by such  
17 legal counsel, authorization of indemnification and determination as  
18 to reasonableness of expenses shall be made in a manner specified in  
19 (c) of this subsection for the selection of such counsel. Shares  
20 held by directors who are parties to the proceeding shall not be  
21 voted on the subject matter under this subsection.

22 (7) Reasonable expenses incurred by a director who is party to a  
23 proceeding may be paid or reimbursed by the corporation in advance of  
24 the final disposition of such proceeding:

25 (a) Upon receipt by the corporation of a written undertaking by  
26 or on behalf of the director to repay such amount if it shall  
27 ultimately be determined that the director has not met the standard  
28 of conduct necessary for indemnification by the corporation as  
29 authorized by this section; and

30 (b) Either:

31 (i) After a determination, made in the manner specified by  
32 subsection (6) of this section, that the information then known to  
33 those making the determination (without undertaking further  
34 investigation for purposes thereof) does not establish that  
35 indemnification would not be permissible under subsection (2) or (3)  
36 of this section; (and) or

1        ~~((b))~~ (ii) Upon receipt by the corporation of (~~(~~  
 2        ~~vi))~~ a written affirmation by the director of his good faith  
 3 belief that he has met the standard of conduct necessary for  
 4 indemnification by the corporation as authorized in this section (~~(~~  
 5 end

6        ~~(ii) A written undertaking by or on behalf of the director to~~  
 7 ~~repay such amount if it shall ultimately be determined that he has~~  
 8 ~~not met such standard of conduct).~~

9        The undertaking required by ~~((b)(ii))~~ (a) of this subsection  
 10 shall be an unlimited general obligation of the director but need not  
 11 be secured and may be accepted without reference to financial ability  
 12 to make the repayment. Payments under this subsection may be  
 13 authorized in the manner specified in subsection (6) of this section.

14        (8) ~~((No provision for the corporation to indemnify a director~~  
 15 ~~who is made a party to a proceeding, whether contained in the~~  
 16 ~~articles of incorporation, the bylaws, a resolution of shareholders~~  
 17 ~~or directors, an agreement, or otherwise (except as contemplated by~~  
 18 ~~subsection (i) of this section), shall be valid unless consistent~~  
 19 ~~with this section or to the extent that indemnity hereunder is~~  
 20 ~~limited by the articles of incorporation, consistent therewith.~~  
 21 ~~Nothing contained in this section shall limit the corporation's~~  
 22 ~~ability to reimburse expenses incurred by a director in connection~~  
 23 ~~with his appearance as a witness in a proceeding at a time when he~~  
 24 ~~has not been made a named defendant or respondent in the~~  
 25 ~~proceeding.)~~ Any corporation shall have power to make or agree to  
 26 any further indemnity, including advance of expenses, to any director  
 27 that is authorized by the articles of incorporation, any bylaw  
 28 adopted or ratified by the shareholders, or any resolution adopted or  
 29 ratified, before or after the event, by the shareholders, provided  
 30 that no such indemnity shall indemnify any director from or on  
 31 account of acts or omissions of such director finally adjudged to be  
 32 intentional misconduct or a knowing violation of law, or from or on  
 33 account of conduct of such director finally adjudged to be in  
 34 violation of RCW 23A.08.450, or from or on account of any transaction  
 35 with respect to which it was finally adjudged that such director  
 36 personally received a benefit in money, property, or services to

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1 which the director was not legally entitled. Unless the articles of  
2 incorporation, or any such bylaw or resolution provide otherwise, any  
3 determination as to any further indemnity shall be made in accordance  
4 with subsection (6) of this section. Each such indemnity may  
5 continue as to a person who has ceased to be a director and may insure  
6 to the benefit of the heirs, executors, and administrators of such a  
7 person.

8 (9) For purposes of this section, the corporation shall be deemed  
9 to have requested a director to serve an employee benefit plan where  
10 the performance by him of his duties to the corporation also imposes  
11 duties on, or otherwise involves services by, him to the plan or  
12 participants or beneficiaries of the plan; excise taxes assessed on a  
13 director with respect to an employee benefit plan pursuant to  
14 applicable law shall be deemed "fines"; and action taken or omitted  
15 by him with respect to an employee benefit plan in the performance of  
16 his duties for a purpose reasonably believed by him to be in the  
17 interest of the participants and beneficiaries of the plan shall be  
18 deemed to be for a purpose which is not opposed to the best interests  
19 of the corporation.

20 (10) Unless otherwise limited by the articles of incorporation:

21 (a) An officer of the corporation shall be indemnified as and to  
22 the extent provided in subsection (5) of this section for a director  
23 and shall be entitled to seek indemnification pursuant to subsection  
24 (5) of this section to the same extent as a director;

25 (b) A corporation shall have the power to provide indemnification  
26 including advances of expenses, to an officer, employee, or agent of  
27 the corporation to the same extent that it may indemnify directors  
28 pursuant to this section except that subsection (12) of this section  
29 shall not apply to any person other than a director; and

30 (c) A corporation, in addition, shall have the power to indemnify  
31 an officer who is not a director, as well as employees and agents of  
32 the corporation who are not directors, to such further extent,  
33 consistent with law, as may be provided by its articles of  
34 incorporation, bylaws, general or specific action of its board of  
35 directors, or contract.

36 (11) A corporation shall have power to purchase and maintain

1 insurance on behalf of any person who is, or was a director, officer,  
2 employee, or agent of the corporation or is or was serving at the  
3 request of the corporation as an officer, employee or agent of  
4 another corporation, partnership, joint venture, trust, other  
5 enterprise, or employee benefit plan against any liability asserted  
6 against him and incurred by him in any such capacity or arising out  
7 of his status as such, whether or not the corporation would have the  
8 power to indemnify him against such liability under the provisions of  
9 this section.

10 (17) Any indemnification of a director in accordance with this  
11 section, including any payment or reimbursement of expenses, shall be  
12 reported to the shareholders with the notice of the next  
13 shareholders' meeting or prior thereto in a written report containing  
14 a brief description of the proceedings involving the director being  
15 indemnified and the nature and extent of such indemnification.

16 Sec. 703. Section 6, chapter 235, Laws of 1967 as amended by  
17 section 75, chapter 35, Laws of 1982 and RCW 24.01.025 are each  
18 amended to read as follows:

19 The articles of incorporation shall set forth:

20 (1) The name of the corporation.

21 (2) The period of duration, which may be perpetual or for a  
22 stated number of years.

23 (3) The purpose or purposes for which the corporation is  
24 organized.

25 (4) Any provisions, not inconsistent with law, which the  
26 incorporators elect to set forth in the articles of incorporation for  
27 the regulation of the internal affairs of the corporation, including  
28 ~~((any-provision-for))~~ provisions regarding:

29 (a) Distribution of assets on dissolution or final liquidation;

30 (b) The definition, limitation, and regulation of the powers of  
31 the corporation, the directors, and the members, if any;

32 (c) Eliminating or limiting the personal liability of a director  
33 to the corporation or its members, if any, for monetary damages for  
34 conduct as a director: PROVIDED, That such provision shall not  
35 eliminate or limit the liability of a director for acts or omissions  
36 that involve intentional misconduct by a director or a knowing

Sec. 703

1 violation of law by a director, or for any transaction from which the  
2 director will personally receive a benefit in money, property, or  
3 services to which the director is not legally entitled. No such  
4 provision may eliminate or limit the liability of a director for any  
5 act or omission occurring before the date when such provision becomes  
6 effective; and

7 (d) Any provision which under this title is required or permitted  
8 to be set forth in the bylaws.

9 (5) The address of its initial registered office, including  
10 street and number, and the name of its initial registered agent at  
11 such address.

12 (6) The number of directors constituting the initial board of  
13 directors, and the names and addresses of the persons who are to  
14 serve as the initial directors.

15 (7) The name and address of each incorporator.

16 (8) The name of any person or corporations to whom net assets are  
17 to be distributed in the event the corporation is dissolved.

18 It shall not be necessary to set forth in the articles of  
19 incorporation any of the corporate powers enumerated in this chapter.

20 Unless the articles of incorporation provide that a change in the  
21 number of directors shall be made only by amendment to the articles  
22 of incorporation, a change in the number of directors made by  
23 amendment to the bylaws shall be controlling. In all other cases,  
24 whenever a provision of the articles of incorporation is inconsistent  
25 with a bylaw, the provision of the articles of incorporation shall be  
26 controlling.

27 ~~((8)-The-name-of-any-persons-or-corporations-to-whom-net--assets~~  
28 ~~are-to-be-distributed-in-the-event-the-corporation-is-dissolvedr))~~

29 Sec. 704. Section 2, chapter 19, Laws of 1913 as last amended by  
30 section 171, chapter 35, Laws of 1982 and RCW 23.86.050 are each  
31 amended to read as follows:

32 Every association formed under this chapter shall prepare  
33 articles of association in writing, which shall set forth:

34 (1) The name of the association.

35 (2) The purpose for which it was formed.

36 (3) Its principal place of business.

1 (4) The term for which it is to exist which may be perpetual or  
2 for a stated number of years.

3 (5) The amount of capital stock, the number of shares and the par  
4 value of each share.

5 (6) Any provision, not inconsistent with law, which the  
6 incorporator elect to set forth in the articles of incorporation for  
7 the regulation of the internal affairs of the association, including  
8 provisions regarding:

9 (a) Eliminating or limiting the personal liability of a director  
10 to the association or its members for monetary damages for conduct as  
11 a director: PROVIDED, That such provision shall not eliminate or  
12 limit the liability of a director for acts or omissions that involve  
13 intentional misconduct by a director or a knowing violation of law by  
14 a director, or for any transaction from which the director will  
15 personally receive a benefit in money, property, or services to which  
16 the director is not legally entitled. No such provision may  
17 eliminate or limit the liability of a director for any act or  
18 omission occurring before the date when such provision becomes  
19 effective; and

20 (b) Any provision which under this title is required or permitted  
21 to be set forth in the bylaws.

22 Sec. 705. Section 7, chapter 115, Laws of 1921 as last amended  
23 by section 2, chapter 132, Laws of 1959 and RCW 24.32.070 are each  
24 amended to read as follows:

25 Each association formed under this chapter must prepare and file  
26 articles of incorporation, setting forth:

- 27 (1) The name of the association.  
28 (2) The purpose for which it is formed.  
29 (3) The place where its principal business will be transacted.  
30 (4) The term for which it is to exist, which may be perpetual.  
31 (5) The number of directors thereof, which must not be less than  
32 five and may be any number in excess thereof, and the term of office  
33 of such directors, which term shall not exceed three years as may be  
34 provided by the bylaws of the association.

35 (6) Any provision, not inconsistent with law, which the  
36 incorporators elect to set forth in the articles of incorporation for

Sec. 705

1 the regulation of the internal affairs of the association, including  
2 provisions regarding:

3 (a) Eliminating or limiting the personal liability of a director  
4 to the association or its members for monetary damages for conduct as  
5 a director: PROVIDED, That such provision shall not eliminate or  
6 limit the liability of a director for acts or omissions that involve  
7 intentional misconduct by a director or a knowing violation of law by  
8 a director, or for any transaction from which the director will  
9 personally receive a benefit in money, property, or services to which  
10 the director is not legally entitled. No such provision may  
11 eliminate or limit the liability of a director for any act or  
12 omission occurring before the date when such provision becomes  
13 effective; and

14 (b) Any provision which under this title is required or permitted  
15 to be set forth in the bylaws.

16 (7) If organized without capital stock, whether the property  
17 rights and interest of each member shall be equal or unequal; and if  
18 unequal, the articles shall set forth the general rule or rules  
19 applicable to all members by which the property rights and interests,  
20 respectively, of each member may and shall be determined and fixed;  
21 and the association shall have the power to admit new members who  
22 shall be entitled to share in the property of the association with  
23 the old members, in accordance with such general rule or rules. This  
24 provision of the articles of incorporation shall not be altered,  
25 amended, or repealed except by the written consent or the vote of  
26 two-thirds of the members voting upon such change after notice of the  
27 proposed change shall have been given to all members entitled to vote  
28 thereon, in the manner provided by the bylaws: PROVIDED, That if the  
29 total vote upon the proposed change shall be less than twenty-five  
30 percent of the total membership of the association, such change shall  
31 fail of adoption.

32 ~~((7))~~ (8) If organized with capital stock, the amount of such  
33 stock and the number of shares into which it is divided. The capital  
34 stock may be divided into preferred and common stock which stock may  
35 be of a fixed par value or nonpar value. If so divided, the articles  
36 of incorporation must contain a statement of the number of shares of

1 stock to which preference is granted and the number of shares of  
2 stock to which no preference is granted and the nature and extent of  
3 the preference and privileges granted to each.

4 ~~((9))~~ (9) The articles must be subscribed by the incorporators  
5 and acknowledged by three or more of such incorporators before an  
6 officer authorized by the law of this state to take and certify  
7 acknowledgments of deeds and conveyances; and shall be filed in  
8 accordance with the provisions of the general corporation law of this  
9 state; and when so filed the said articles of incorporation, or  
10 certified copies thereof, shall be received in all the courts of this  
11 state and other places, as prima facie evidence of the facts  
12 contained therein and of the due incorporation of such association.

13 Sec. 706. Section 17, chapter 19, Laws of 1913 and RCW 23.86.130  
14 are each amended to read as follows:

15 (1) No corporation or association organized or doing business for  
16 profit in this state shall be entitled to use the term "cooperative"  
17 as a part of its corporate or other business name or title, unless it  
18 has complied with the provisions of this chapter; and any corporation  
19 or association violating the provisions of this section may be  
20 enjoined from doing business under such name at the instance of any  
21 stockholder or any association legally organized hereunder.

22 (2) A member of the board of trustees or an officer of any  
23 association legally organized under this chapter shall have the same  
24 immunity from liability as is granted in RCW 4.24.264.

25 Sec. 707. Section 2, chapter 115, Laws of 1921 and RCW 24.32.020  
26 are each amended to read as follows:

27 Five or more persons engaged in the production of agricultural  
28 products may form a nonprofit, cooperative association, with or  
29 without capital stock, under the provisions of this chapter. A  
30 member of the board of directors or an officer of such a corporation  
31 shall have the same immunity from liability as is granted in RCW  
32 4.24.264.

33 Sec. 708. Section 5, chapter 120, Laws of 1969 ex. sess. as  
34 amended by section 120, chapter 35, Laws of 1982 and RCW 24.06.025  
35 are each amended to read as follows:

Sec. 708

1 The articles of incorporation shall set forth:

2 (1) The name of the corporation.

3 (2) The period of duration, which may be perpetual or for a  
4 stated number of years.

5 (3) The purpose or purposes for which the corporation is  
6 organized.

7 (4) The qualifications and the rights and responsibilities of the  
8 members and the manner of their election, appointment or admission to  
9 membership and termination of membership; and, if there is more than  
10 one class of members or if the members of any one class are not  
11 equal, the relative rights and responsibilities of each class or each  
12 member.

13 (5) If the corporation is to have capital stocks:

14 (a) The aggregate number of shares which the corporation shall  
15 have authority to issue; if such shares are to consist of one class  
16 only, the par value of each of such shares, or a statement that all  
17 of such shares are without par value; or, if such shares are to be  
18 divided into classes, the number of shares of each class, and a  
19 statement of the par value of the shares of each such class or that  
20 such shares are to be without par value;

21 (b) If the shares are to be divided into classes, the designation  
22 of each class and a statement of the preferences, limitations and  
23 relative rights in respect of the shares of each class;

24 (c) If the corporation is to issue the shares of any preferred or  
25 special class in series, then the designation of each series and a  
26 statement of the variations in the relative rights and preferences as  
27 between series insofar as the same are to be fixed in the articles of  
28 incorporation, and a statement of any authority to be vested in the  
29 board of directors to establish series and fix and determine the  
30 variations in the relative rights and preferences as between series;

31 (d) Any provision limiting or denying to shareholders the  
32 preemptive right to acquire additional shares of the corporation.

33 (6) If the corporation is to distribute surplus funds to its  
34 members, stockholders or other persons, provisions for determining  
35 the amount and time of the distribution.

36 (7) Provisions for distribution of assets on dissolution or final

1 liquidation.

2 (8) Whether a dissenting shareholder or member shall be limited  
3 to a return of less than the fair value of his shares or membership.

4 (9) Any provisions, not inconsistent with law, which the  
5 incorporators elect to set forth in the articles of incorporation for  
6 the regulation of the internal affairs of the corporation.

7 (10) The address of its initial registered office, including  
8 street and number, and the name of its initial registered agent at  
9 such address.

10 (11) The number of directors constituting the initial board of  
11 directors, and the names and addresses of the persons who are to  
12 serve as the initial directors.

13 (12) The name and address of each incorporator.

14 (13) Any provision, not inconsistent with law, which the  
15 incorporators elect to set forth in the articles of incorporation for  
16 the regulation of the internal affairs of the association, including  
17 provisions regarding:

18 (a) Eliminating or limiting the personal liability of a director  
19 to the association or its members for monetary damages for conduct as  
20 a director; PROVIDED, That such provision shall not eliminate or  
21 limit the liability of a director for acts or omissions that involve  
22 intentional misconduct by a director or a knowing violation of law by  
23 a director, or for any transaction from which the director will  
24 personally receive a benefit in money, property, or services to which  
25 the director is not legally entitled. No such provision may  
26 eliminate or limit the liability of a director for any act or  
27 omission occurring before the date when such provision becomes  
28 effective; and

29 (b) Any provision which under this title is required or permitted  
30 to be set forth in the bylaws.

31 It shall not be necessary to set forth in the articles of  
32 incorporation any of the corporate powers enumerated in this chapter.

33 Unless the articles of incorporation provide that a change in the  
34 number of directors shall be made only by amendment to the articles  
35 of incorporation, a change in the number of directors made by  
36 amendment to the bylaws shall be controlling. In all other cases,

Sec. 708

1 whenever a provision of the articles of incorporation is inconsistent  
2 with a bylaw, the provision of the articles of incorporation shall be  
3 controlling.

4 Sec. 709. Section 7, chapter 120, Laws of 1969 ex. sess. and RCW  
5 24.06.035 are each amended to read as follows:

6 A corporation subject to the provisions of this chapter shall not  
7 engage in any business, trade, a vocation or profession for profit;  
8 PROVIDED, That nothing contained herein shall be construed to forbid  
9 such a corporation from accumulating reserve, equity, surplus or  
10 other funds through subscriptions, fees, dues or assessments, or from  
11 charges made its members or other persons for services rendered or  
12 surplus or benefits furnished, or from distributing its surplus  
13 funds to its members, stockholders or other persons in accordance  
14 with the provisions of the articles of incorporation. A member of  
15 the board of directors or an officer of such a corporation shall have  
16 the same immunity from liability as is granted in RCW 4.24.264.

17 Sec. 710. Section 3, chapter 53, Laws of 1965 as last amended by  
18 section 1, chapter 117, Laws of 1986 and RCW 23A.04.010 are each  
19 amended to read as follows:

20 As used in this title, unless the context otherwise requires, the  
21 term:

22 (1) "Corporation" or "domestic corporation" means a corporation  
23 for profit subject to the provisions of this title, except a foreign  
24 corporation.

25 (2) "Foreign corporation" means a corporation for profit  
26 organized under laws other than the laws of this state for a purpose  
27 or purposes for which a corporation may be organized under this  
28 title.

29 (3) "Articles of incorporation" means the original or restated  
30 articles of incorporation or articles of consolidation and all  
31 amendments thereto including articles of merger.

32 (4) "Shares" means the units into which the proprietary interests  
33 in a corporation are divided.

34 (5) "Subscriber" means one who subscribes for one or more shares  
35 in a corporation, whether before or after incorporation.

1 (6) "Shareholder" means one who is a holder of record of one or  
2 more shares in a corporation. If the articles of incorporation or  
3 the bylaws so provide, the board of directors may adopt by resolution  
4 a procedure whereby a shareholder of the corporation may certify in  
5 writing to the corporation that all or a portion of the shares  
6 registered in the name of such shareholder are held for the account  
7 of a specified person or persons. The resolution shall set forth:

8 a) The classification of shareholder who may certify;

9 (b) The purpose or purposes for which the certification may be  
10 made;

11 (c) The form of certification and information to be contained  
12 therein;

13 (d) If the certification is with respect to a record date or  
14 closing of the stock transfer books within which the certification  
15 must be received by the corporation; and

16 (e) Such other provisions with respect to the procedure as are  
17 deemed necessary or desirable.

18 Upon receipt by the corporation of a certification complying with  
19 the procedure, the persons specified in the certification shall be  
20 deemed, for the purpose or purposes set forth in the certification,  
21 to be the holders of record of the number of shares specified in  
22 place of the shareholder making the certification.

23 (7) "Authorized shares" means the shares of all classes which the  
24 corporation is authorized to issue.

25 (8) "Duplicate originals" means two copies, original or  
26 otherwise, each with original signatures, or one original with  
27 original signatures and one copy thereof.

28 (9) "Conforms to law" as used in this title in connection with  
29 duties of the secretary of state in reviewing documents for filing  
30 under this title means the secretary of state has determined the  
31 document complies as to form with the applicable requirements of this  
32 title.

33 (10) "Effective date" means, in connection with a filing made by  
34 the secretary of state, the date which is shown by affixing a "filed"  
35 stamp on the documents. When a document is received for filing by  
36 the secretary of state in a form which complies with the requirements

Sec. 710

1 of this title and which would entitle the document to be filed  
2 immediately upon receipt, but the secretary of state's approval  
3 action occurs subsequent to the date of receipt, the secretary of  
4 state's filing date shall relate back to the date on which the  
5 secretary of state first received the document in acceptable form.  
6 An applicant may request a specific effective date no more than  
7 thirty days later than the date of receipt which might otherwise be  
8 applied as the effective date.

9 (11) "Executed by an officer of the corporation," or words of  
10 similar import, means that any document signed by such person shall  
11 be and is signed by that person under penalties of perjury and in an  
12 official and authorized capacity on behalf of the corporation or  
13 person submitting the document with the secretary of state.

14 (12) "An officer of the corporation" means, in connection with  
15 the execution of documents submitted for filing with the secretary of  
16 state, the president, a vice president, the secretary or the  
17 treasurer of the corporation.

18 (13) "Distribution" means a direct or indirect transfer of money  
19 or other property (except its own shares) or incurrence of  
20 indebtedness by a corporation to or for the benefit of its  
21 shareholders in respect of any of its shares. A distribution may be  
22 in the form of a dividend; a purchase, redemption, or other  
23 acquisition of shares; or otherwise.

24 (14) "Public company" means a corporation that has a class of  
25 shares registered with the federal securities and exchange commission  
26 pursuant to section 12 of the securities exchange act of 1934, or  
27 section 8 of the investment company act of 1940, or any successor  
28 statute, and that has more than three hundred holders of record of  
29 its shares.

30 PART VIII

31 CONSORTIUM

32 Sec. 801. Section 2, chapter 138, Laws of 1973 1st ex. sess. as  
33 amended by section 10, chapter 27, Laws of 1981 and RCW 4.22.020 are  
34 each amended to read as follows:

35 The contributory fault of one spouse shall not be imputed to the

10.05.005

§ 10.05.006

CORPORATIONS AND ASSOCIATIONS

§ 10.05.009

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(1) out of unreserved or unrestricted earned surplus of the corporation; or

(2) if there is no earned surplus, out of its net profits for the fiscal year in which the dividend is declared and the preceding fiscal year except when the corporation is insolvent as defined in AS 10.05.825; for purposes of this paragraph a corporation's debts include amounts it is required to distribute under 43 U.S.C. 1606(i) and 43 U.S.C. 1606(j); the directors may determine the net profits derived from the exploitation or liquidation of wasting assets without consideration of the depletion of those assets resulting from lapse of time, consumption, liquidation or exploitation of the assets; however, any dividends declared from those net profits shall be described, concurrently with distribution of the net profits to shareholders, as a distribution from wasting assets without consideration of the depletion of the assets; for the purposes of this paragraph wasting assets are timber resources and subsurface estate. (§ 2 ch 193 SLA 1972; am § 1 ch 29 SLA 1975; am §§ 1, 2 ch 68 SLA 1981)

Revisor's notes. — In § 2, ch. 193, SLA 1972, AS 10.05.005(a)(2)(B)(ii) contained an erroneous reference to "paragraphs (10) — (13) of this section." Those provisions appeared in an early draft of the bill on which this Act was based but were deleted in the final version. Thus the references to those paragraphs were deleted accordingly.

In 1981, minor changes were made in

(d) of this section to achieve a form generally consistent with that required in the Alaska Statutes.

Effect of amendments. — The 1991 amendment deleted "7(i)" preceding "and 9 of that" in subsection (a)(2)(B)(ii) and added subsection (d).

The 1982 amendment added subsections (e) and (f).

Sec. 10.05.006. Small business investment corporations. A corporation to provide small business investments through participation in the Federal Small Business Investment Act of 1958, 15 U.S.C. 661 — 697, may be created under and subject to this chapter except

(1) the number of incorporators may not be fewer than five;

(2) the number of directors may not be fewer than five. (§ 1 ch 112 SLA 1960)

Sec. 10.05.009. General powers. A corporation may

(1) have perpetual succession by its corporate name unless a limited period of duration is stated in its articles of incorporation;

(2) sue and be sued in its corporate name;

(3) adopt a corporate seal and alter it, and use it by having it or a facsimile of it impressed, affixed or reproduced;

(4) buy, take, receive, lease, or otherwise acquire, own, hold, improve, use and otherwise deal in, real or personal property or any interest therein, wherever situated;

(5) sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets;

(6) lend money to its employees other than its officers and directors, and otherwise assist its employees, officers and directors;

(7) buy, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in shares or other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals, or direct or indirect obligations of the United States or of any other government, state, territory, governmental districts or municipality or of any instrumentality thereof;

(8) make contracts and incur liabilities, borrow money at the rates of interest the corporation determines, issue notes, bonds, and other obligations, and secure its obligations by mortgage or pledge of all or any of its property, franchise and income;

(9) lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds loaned or invested;

(10) conduct business, carry on operations, and have offices and exercise the powers granted by this chapter in a state, territory, district, or possession of the United States, or in a foreign country;

(11) elect or appoint officers and agents of the corporation and define their duties and fix their compensation;

(12) make and alter bylaws not inconsistent with its articles of incorporation or with the laws of the state, for the administration and regulation of the affairs of the corporation;

(13) donate for the public welfare or for charitable, scientific or educational purposes, and in time of war donate in aid of war activities;

(14) transact lawful business in time of war in aid of the United States in the prosecution of the war;

(15) *[Repealed, § 2 ch 176 SLA 1970.]*

(16) pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock bonus plans, and other incentive plans for its directors, officers and employees;

(17) cease its corporate activities and surrender its corporate franchise;

(18) have and exercise the powers of a limited or general partner or a joint adventurer in association with one or more persons, corporations, partnerships or associations;

(19) have and exercise lawful powers necessary to carry out the purposes for which the corporation is organized. (§ 4 ch 126 SLA 1957; am § 2 ch 176 SLA 1970)

Collateral reference. — 19 Am. Jur. 2d, Corporations, § 952 et seq.; 36 Am. Jur. 2d, Foreign Corporations, § 125 et seq.

19 C.J.S., Corporations, § 933 et seq.; 20 C.J.S., Corporations, §§ 1868 — 1883.

Right of business corporation to use its funds or property for humanitarian purposes. 3 ALR 443.

Right of corporation to engage in business, trade or activity requiring license from public. 165 ALR 1098.

Power of business corporation to dor .te

to a charitable or similar institution. 39 ALR2d 1192.

Corporation's power to enter into partnership or joint venture; mining partnership. 60 ALR2d 917, 926.

Power of corporation to make political contribution or expenditure under state law. 79 ALR3d 491.

Derivative actions — limited partner: right of limited partner to maintain derivative action on behalf of partnership. 26 ALR4th 1111.

**Sec. 10.05.010. Indemnification of officers, directors, employees and agents; insurance.** (a) A corporation may indemnify a person who was or is a party or is threatened to be made a party to a threatened, pending or completed action or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorney fees), judgments, fines and amounts paid in settlement actually and reasonably incurred in connection with the action or proceeding if the person acted in good faith and in a manner the person 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 the conduct was unlawful. The termination of an action or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, does not, of itself, create a presumption that the person did not act in good faith and in a manner which the person 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 reasonable cause to believe that the conduct was unlawful.

(b) A corporation may indemnify a person who was or is a party or is threatened to be made a party to a threatened, pending or completed action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorney fees) actually and reasonably incurred in connection with the defense or settlement of the action if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation. However, indemnification may not be

made in respect of any claim, issue or matter as to which the person has been adjudged to be liable for negligence or misconduct in the performance of a duty to the corporation except to the extent that the court in which this action was brought determines upon application that, despite the adjudication of liability, in view of all the circumstances of the case the person is fairly and reasonably entitled to indemnity for the expenses which the court considers proper.

(c) To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of an action or proceeding referred to in (a) or (b) of this section, or in defense of any claim, issue or matter in such an action or proceeding, that person shall be indemnified against expenses (including attorney fees) actually and reasonably incurred in connection with it.

(d) Indemnification under (a) or (b) of this section (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee or agent is proper in the circumstances because that person has met the applicable standard of conduct set out in (a) and (b) of this section. This determination shall be made

(1) by the board of directors by a majority vote of a quorum consisting of directors who were not parties to the action or proceeding, or

(2) if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion, or

(3) by the stockholders.

(e) Expenses incurred in defending a civil or criminal action or proceeding may be paid by the corporation in advance of the final disposition of the action or proceeding as authorized by the board of directors in the specific case upon receipt of an undertaking by or on behalf of the director, officer, employee or agent to repay the amount unless it is ultimately determined that the person is entitled to be indemnified by the corporation as authorized in this section.

(f) The indemnification provided by this section is not exclusive of any other rights to which those seeking indemnification may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in an official capacity and as to action in another capacity while holding the office, and continues as to a person who has ceased to be a director, officer, employee or agent, and inures to the benefit of the heirs, executors and administrators of such a person.

(g) A corporation may purchase and maintain insurance on behalf of a person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability

asserted against him and incurred by the person in such a capacity, or arising out of the person's status as such, whether or not the corporation would have the power to indemnify the person against the liability under the provisions of this section. (§ 1 ch 176 SLA 1970)

**Sec. 10.05.012. Right of corporation to acquire and dispose of its shares.** A corporation may buy, take, receive, or otherwise acquire, hold, own, pledge, transfer or otherwise dispose of its own shares. Purchase by a corporation of its own shares, whether direct or indirect, may be made only to the extent that earned surplus is available for the purchase, and if the articles of incorporation permit or with the affirmative vote of the holders of at least two-thirds of all shares entitled to vote thereon, to the extent of capital surplus available therefor, and subject to the following additional limitations.

(1) A purchase may not be made when the corporation is insolvent or when the purchase would render the corporation insolvent.

(2) To the extent that earned surplus or capital surplus is the measure of the right of the corporation to purchase its shares, the surplus shall be restricted as long as the shares are held as treasury shares. Upon the disposition or cancellation of these treasury shares the restriction is removed pro tanto. (§ 5 ch 126 SLA 1957)

**Collateral references.** — 18 Am. Jur. 2d, Corporations, § 206 et seq.

18 C.J.S., Corporations, § 192 et seq.

Soliciting subscriptions to or selling corporate stock as doing business within state. 35 ALR 625.

Accounting by promoter for proceeds of sales of stock issued to him. 43 ALR 1363.

Bankruptcy or insolvency of corporation as affecting its executory contract for the sale of its own stock. 46 ALR 1172.

Responsibility of corporation for misstatements by officer or employee to induce or influence purchase of stock. 66 ALR 1450.

Liability of promoters for fraud or misrepresentation to persons subscribing for

shares after formation of corporation. 72 ALR 355.

Statutory requirements respecting issuance of corporate stock as applicable to foreign corporation. 8 ALR2d 1185.

Duty and liability of closely held corporation, its directors, officers, or majority stockholders, in acquiring stock of minority shareholder. 7 ALR3d 500.

Construction and operation of statute restricting corporation's right to purchase its own stock to purchase from surplus. 61 ALR3d 1049.

Restrictions on transfer of corporate stock as applicable to testamentary dispositions thereof. 61 ALR3d 1090.

**Sec. 10.05.015. Limitations on purchase of shares not applicable for certain purposes.** Notwithstanding the limitations contained in AS 10.05.012, a corporation may purchase or otherwise acquire its shares to

- (1) eliminate fractional shares;
- (2) collect or compromise indebtedness to the corporation;
- (3) pay a dissenting shareholder entitled to payment for shares under this chapter;

# IF YOU'RE SITTING ON A BOARD YOU COULD BE A SITTING DUCK.

Some practical solutions to  
the D&O liability problem from Peat Marwick.

*An interview with Larry D. Horner,  
Chairman and Chief Executive,  
Peat Marwick*

**Q** *Mr. Horner, is D&O liability  
a real problem or has it been  
manufactured?*

**A** It's a real problem. We just  
completed surveying 7,000  
CEO's, directors, and heads of  
organizations—public, private,  
and not-for-profit. We covered the  
business community and the  
response was overwhelming—  
D&O liability is a major concern.  
Nine out of ten people indicated  
that it is a crisis or may grow  
into one.

**Q** *An accounting firm seems an  
unlikely candidate to tackle  
the D&O liability issue. Why is  
Peat Marwick involved?*

**A** Because of our concern over  
how debilitating D&O  
liability could be to American  
businesses. The voice of the  
outside director is vital to every  
organization. With so much  
attention on the litigation  
explosion and its impact on the  
availability and cost of insurance,  
I think we're losing sight of the  
bigger picture: what is happening

to the quality of corporate  
governance. Directors feel like  
sitting ducks. More and more,  
outstanding candidates are  
turning down Board offers rather  
than risk the exposure. If this  
continues, we're all in big trouble.  
That's what prompted us to  
establish the CEO/Peat Marwick  
Panel\* on D&O Liability Reform  
in concert with several national  
organizations last fall.

**Q** *What short-term solutions are  
you proposing?*

**A** We're working in several  
areas. First, we believe the  
best elements of the recent  
reforms in Delaware, Indiana and  
Connecticut should serve as  
model state legislation. We're  
also asking Peat Marwick  
partners to work with local  
business leaders and form  
coalitions at the state level.  
Lastly, the Panel intends to  
investigate the need for a  
*Director's Charter* that clearly  
defines duties, ethics and the  
scope of Board members'  
responsibilities.

**Q** *Do you see a need for legal  
reforms, as well?*

**A** I've long felt that joint and  
several liability has been  
grossly abused. It's now primarily  
a tactic for chasing down the  
deepest pockets, rather than a  
means of redressing the party  
actually responsible for  
negligence. The majority of  
executives we surveyed also felt  
that reforming joint and several  
liability is necessary, as is  
capping liability awards and  
limiting contingency fees for  
attorneys.

**Q** *Can you recommend any  
immediate measures for  
Board members?*

**A** Yes. First, keep the  
information flowing from  
management to the Boardroom.  
Stay well-advised and don't  
hesitate to bring in outside  
consultants on the D&O liability  
problem. Form additional Board  
committees. And, most  
importantly, get involved with  
local business coalitions.  
Because, frankly, local initiatives  
are the principal way to bring  
about fundamental reform to a  
system that has let D&O liability  
become a national concern.



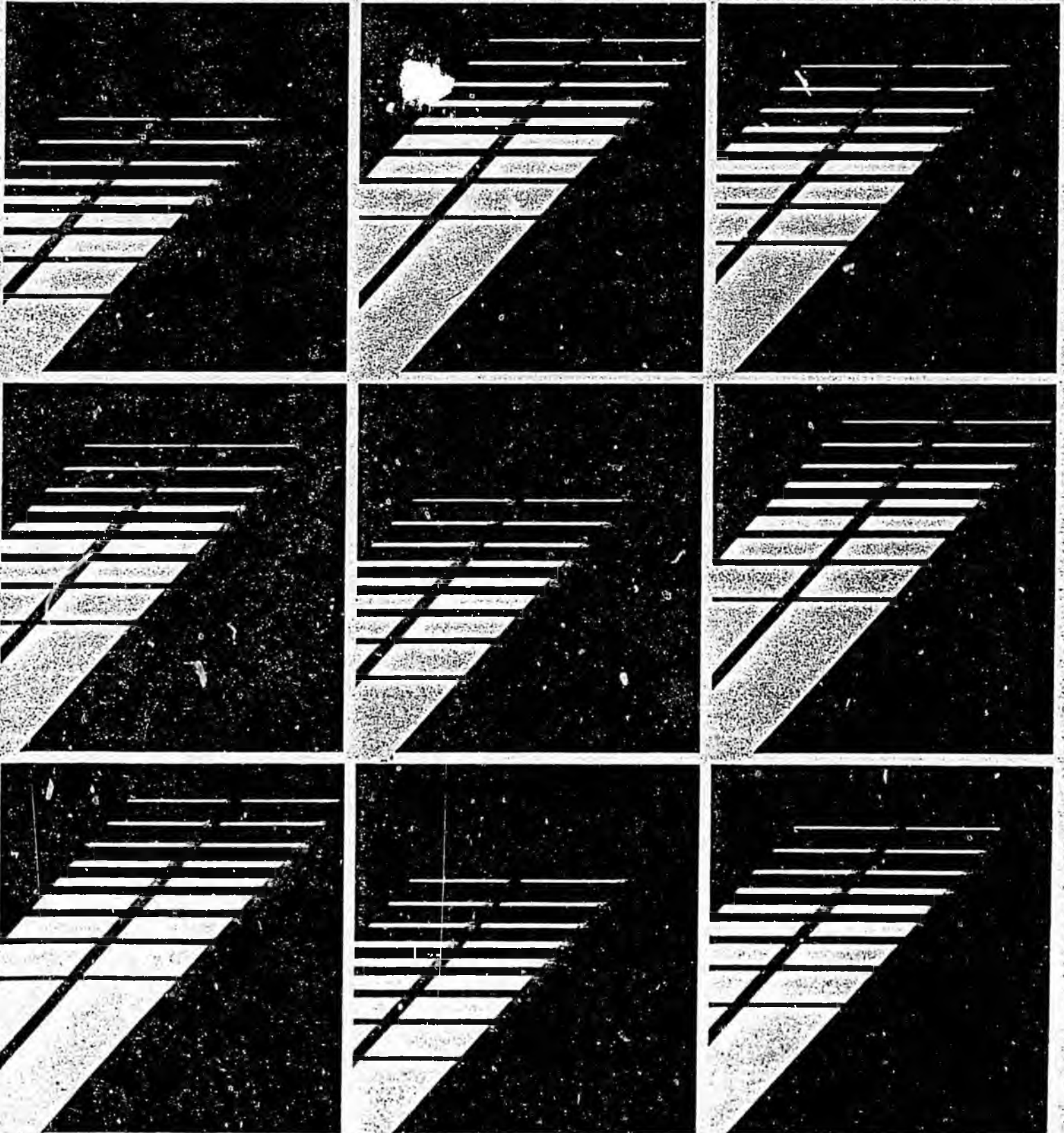
\*CEO/Peat Marwick Panel: 345 Park Avenue, New York, NY 10154.

Members include: National Association of Corporate Directors • American Association of Museums • American Symphony Orchestra League  
Association of Governing Boards of Universities and Colleges • Independent Sector • Public Risk and Insurance Management Association

**Issues Facing U.S.  
Corporate Directors**  
December 1986

 **Touche Ross**

**An opinion survey of directors of major U.S. corporations on the consequences of increased director's liability and other issues that affect the work of the board: the U.S. economy, foreign trade pressures, and the outlook on corporate America's future.**



**A**re directors of large U.S. corporations concerned about their ability to make the right decisions in their work on the board? What do they think about foreign trade pressures, intense merger and acquisition activity, and access to capital markets? As directors, how do they deal with increased personal liability? Do they foresee problems recruiting qualified board candidates in the future?

These and other issues critical to the future of business in America were explored in a nationwide survey of corporate directors conducted by Touche Ross in the fall of 1986. More than 1,100 directors participated in the survey; nearly three-quarters of them serve on boards of companies with annual sales (or the equivalent in assets) of \$1 billion dollars or more, and 81 percent have more than five years of board experience.

# Highlights

## Directors' Issues

- Almost one-third of the directors surveyed say they have considered retiring from their boards because of the increased liability to which they are exposed.
- Ninety-three percent of the directors polled believe increased liability will make it more difficult to recruit talented, experienced people to serve on boards in the future.
- More than 80 percent of the directors surveyed believe today's directors, in general, are more effective than they were twenty years ago.

## Corporate and Economic Issues

- Nearly half the directors surveyed believe merger and acquisition activity has hurt the U.S. economy. Nevertheless, when the survey was conducted in September and October of 1987, some 45 percent of the directors polled believed that merger and acquisition activity would remain at the same level, and 27 percent said it would increase, over the next twelve months.

- While half of the directors say foreign trade has adversely affected earnings of companies of which they are a board member, the large majority of all directors polled do *not* think Congress should pass legislation to protect U.S. business from foreign competition.

- Eighty-one percent of the directors polled do not believe that, over the next year, Third World debt will have an adverse effect on the balance sheets of companies where they serve on the board.

- Almost one-third of the directors surveyed think the bankruptcy rate for companies with sales of \$1 billion or more will increase in the coming year.

- Directors divide evenly in their opinion on whether corporate America's investment in capital equipment will increase, decrease, or continue at the same level in the next twelve months. However, 77 percent believe investment in capital *plant* will decrease or remain the same. The vast majority agree that corporate America will increase its investments in technology and in research and development in the next year.

# Directors' Issues

Most survey participants are highly experienced board directors who serve major U.S. corporations: 71 percent of the respondents serve on at least one board of a business whose annual sales equal or exceed \$1 billion; 76 percent serve on more than one board; and 58 percent have ten or more years of board experience.

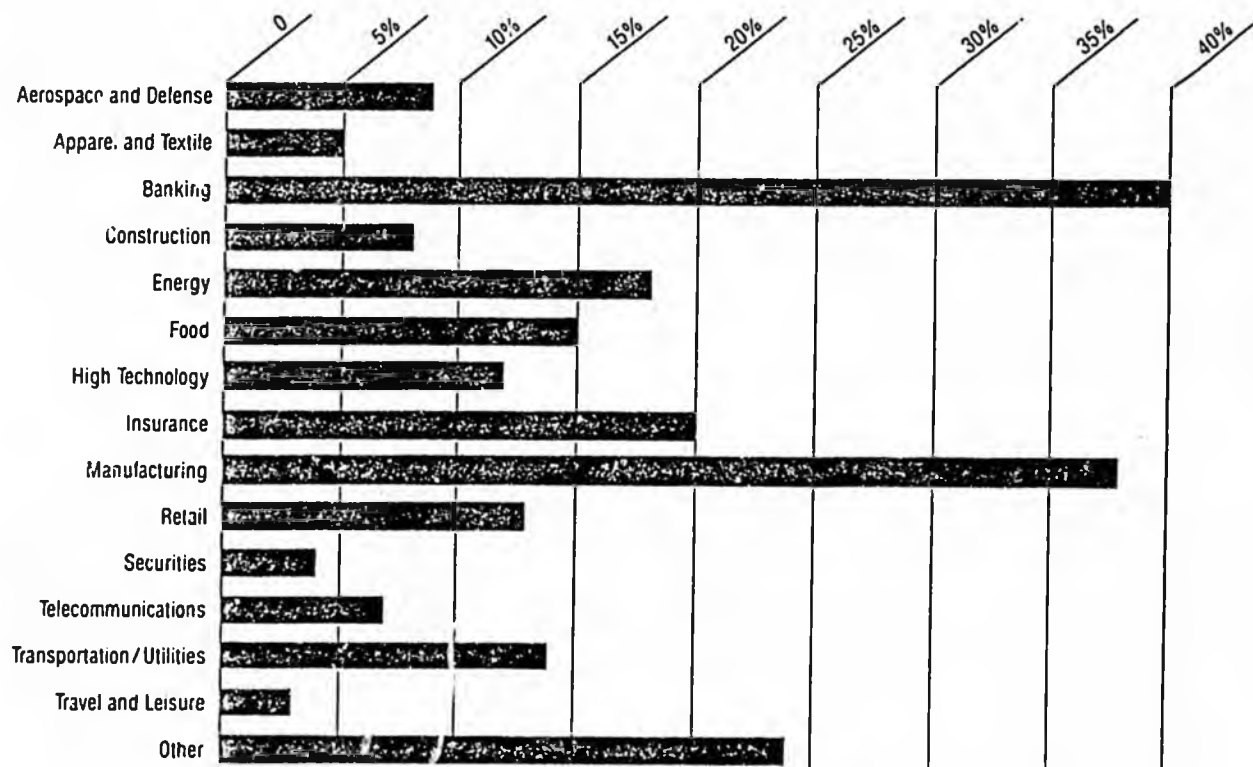
## Participants in the Survey

The directors surveyed serve on a wide diversity of boards of large businesses and industries: 71 percent serve on at least one board of a business that has annual sales of \$1 billion (or the equivalent in assets) or more; 41 percent serve on at least one board of a company that has annual sales of \$500 million to \$999 million; and 45 percent serve on at least one board of a business that has annual sales of under \$500 million.

Of the directors surveyed, 24 percent serve on one board only; 26 percent serve on two boards; 21 percent serve on three boards; 13 percent serve on four boards; and 16 percent serve on five or more boards. Thus, most participants in the survey have extensive board experience.

This fact is supported by the amount of time the respondents have served as directors: less than one-fifth of the respondents have been directors for less than five years; 23 percent have five to nine years of

## Industries Served by Survey Respondents



Note: Percentages total more than 100 percent because nearly three-quarters of the directors surveyed serve on more than one board.

experience; 23 percent have ten to fourteen years of experience; 15 percent have served as board members for fifteen to nineteen years; and 20 percent have served for twenty years or more. Eighty-one percent of the total respondents have at least five years of board experience, and 58 percent have served ten or more years. The majority of respondents, then, are widely experienced board directors who serve large U.S. businesses.

Nearly three-quarters of the respondents are officers of one or more companies where they serve on the board:

- 26% are Chief Executive Officers
- 9% are Chief Operating Officers
- 9% are Chief Financial Officers
- 6% are Executive Vice Presidents
- 9% are Senior Vice Presidents or Vice Presidents
- 4% are Chairmen
- 4% are Vice Chairmen
- 6% are Presidents, Legal Counsels, Secretaries, and other officers.

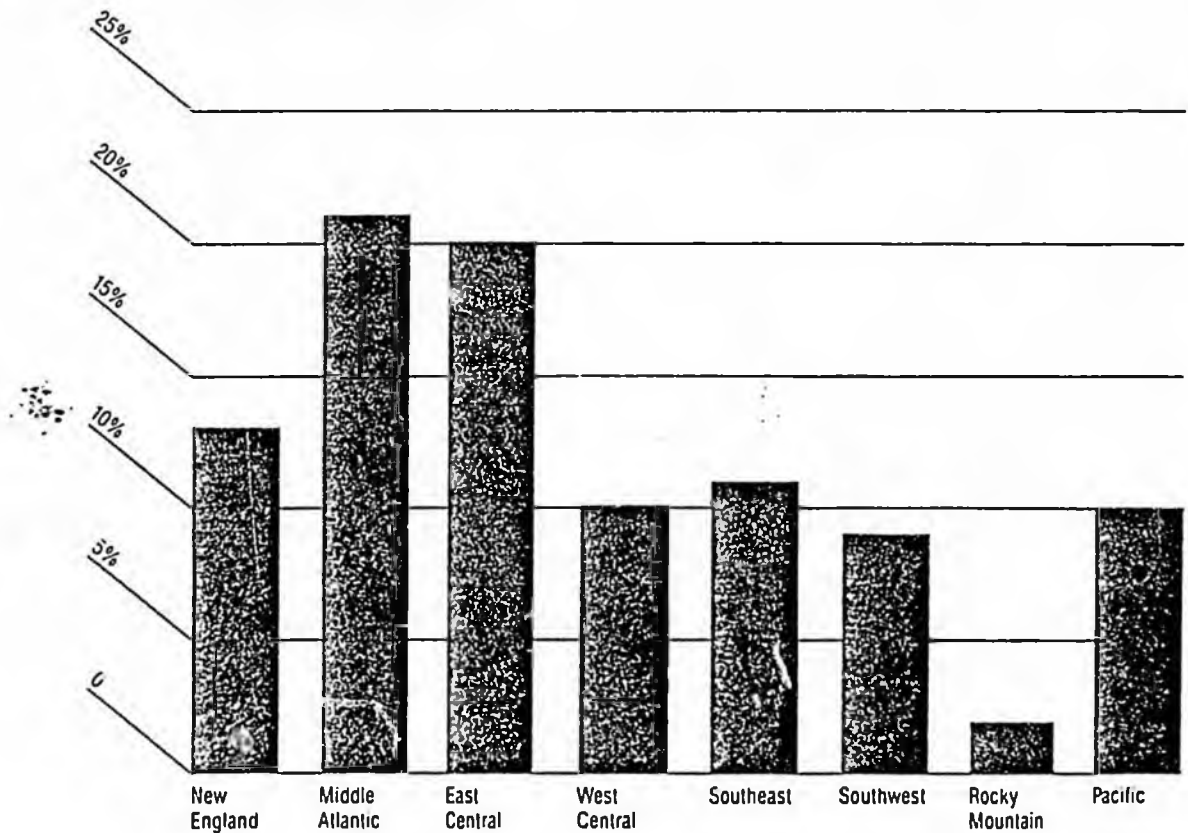
Eighty-eight percent of the outside directors were recruited by the chief executive officer; 7 percent by another officer of the company; 4 percent by an executive search firm; and 10 percent by others.

Twenty-three percent of the respondents are officers or retired officers of other companies, and 20 percent have special business experience or skills. Only 2 percent represent a special, external constituency.

Internal directors serving their board(s) tend to have the least board experience—both in number of years served and in number of boards served on. Predictably, the more years directors have served, the more likely they are to be officers or retired officers of another company, or to have special business-related experience or skills. However, directors who have served on a board for twenty years or more are *three times* more likely to be major stockholders of the company(ies) served than directors serving less than twenty years.

Nearly three-quarters of the directors surveyed are officers of one or more companies where they serve on the board. Of those who are outside directors, 88 percent were recruited by the chief executive officer.

**Regions of the United States in Which Survey Participants Live**



Some 93 percent of the directors surveyed believe that increased directors' liabilities will make it more difficult to recruit talented, experienced people in the future. The directors imply, then, that increased liability will create boards whose members will be less qualified or less effective than today's.

Ninety percent of the directors surveyed serve on board committees, and most serve on a number of these committees. Predictably, those who do not serve on committees have less than five years of board experience or serve on only one board. Directors who are officers of at least one company on whose board they serve are most likely to sit on the executive committee (64 percent), followed by the compensation committee (43 percent), the audit committee (40 percent), and the budget committee (11 percent). Thirteen percent of these directors serve on no board committees.

Outside directors—defined here as directors who are not officers of any company on whose board they serve—are most likely to serve on the audit committee (75 percent), followed by the compensation committee (63 percent), the executive committee (58 percent), and the budget committee (8 percent). Only 2 percent of these directors serve on no board committees.

Forty percent of the directors who are not officers of any company on whose board they serve sit on other committees, as do 25 percent of those directors who are officers of at least one company on whose board they serve. These committees include the nominating, contribution, social responsibility, public policy, and foundation committees.

### The Challenge of Increased Liability

One-third of the directors surveyed say they have considered retiring from one or more of their board seats because of the increased liabilities to which they are exposed. In fact, the longer that directors have served on boards, the more likely they are to think of retiring because of increased liabilities. Only 16 percent of all the directors polled who have less than five years of board experience think of retiring, while the percentage more than doubles for directors who have five or more years of experience.

While 41 percent of the directors who are not officers of any company where they serve on the board have considered retiring because of increased liability, 36 percent of CEOs also say they have considered doing

so. Some 36 percent of committee members, regardless of the committee(s) on which they serve, have considered retiring, while only 16 percent of non-committee members of the board have considered doing so. Thus, directors who have the least experience as measured by length of time served, and those who are not involved with board committees are the least concerned about increased liabilities.

Given the pace of change affecting the business community and the responsibilities of corporate directors, 35 percent feel only "somewhat confident" in exercising their responsibilities as a director and 4 percent feel "unsure." Overall, 62 percent of board members feel "confident." CEOs feel more confident than any other board members, with 66 percent saying so. Fifty-nine percent of CFOs express confidence in today's board environment, as do 60 percent of the other officers who serve on boards and 60 percent of those directors who are not officers of any companies where they serve on the board. The least confident in exercising their responsibilities are board members who serve on no board committees and who have, perhaps, the least "hands-on" experience.

Although the less-experienced directors worry the least about increased liabilities, it is not really a contradiction that they are the least confident in dealing with board matters. The survey results imply that, while they are aware that they lack knowledge of areas which are brought before the board, they may not be aware—precisely because they know less—of the extent to which increased directors' liabilities can affect them.

Interestingly, 90 percent of the outside directors surveyed who are not officers of *any* company where they serve on the board were recruited by the chief executive officer—yet only 28 percent believe they have great influence on the chief executive officer.

An overwhelming 93 percent of the directors surveyed believe that increased liability will make it more difficult to recruit talented, experienced people in the future. This percentage holds for all directors, regardless of length of board service, their involvement in committee work, and whether they are officers of any company on whose board they serve. Do the findings imply that increased liability will create boards whose members will be less qualified or less effective than current board members?

A great majority of the directors surveyed (83 percent) believe that today's directors are more effective than those of twenty years ago. Eighty-five percent of the directors serving on boards for twenty or more years (and who can, therefore, compare their earlier experience to their present experience), and 86 percent of the directors serving on three or more boards, find today's directors more effective than do those serving on fewer boards and with fewer years of experience.

#### Directors' Influence on Their Board(s)

When asked how much influence they have on their board(s), 39 percent of the respondents say their influence is great. Sixty percent claim moderate influence, and only 5 percent believe their influence is small. These responses and percentages hold true for both internal and outside directors.

Directors with less than five years of board experience and directors who sit on only one board feel they have the least influence. The more boards that directors serve on, the greater they believe their influence to be: 54 percent of directors serving on more than five boards say their influence is great, the largest percentage of all directors surveyed to say so. Directors who have served on a board(s) for twenty years or more are also likely (44 percent) to think they have great influence.

The directors' responses also reflect the particular board committees on which they serve. Fifty-two percent of directors serving on the budget committee believe their influence on the board is great, as do 47 percent of those who sit on the compensation committee, 43 percent of those on the executive committee, 38 percent of audit committee members, and 36 percent who serve on other committees. Nearly 20 percent of directors who do not serve on any committees say their influence is small.

#### Directors' Influence on the Chief Executive Officer

While 90 percent of the directors who are not officers of any company on whose board they serve were recruited by CEOs, only 28 percent believe they have great influence on the CEO(s). Directors serving on more than five boards feel they have the greatest influence (35 percent), followed by or including those who sit on board committees. Twenty-nine percent of the directors serving on compensation committees feel they have great influence on the CEO, followed by those serving on the audit committee (28 percent), the budget committee (27 percent), and the executive committee (24 percent).

(3) a specific description of the nature of the relationship between the surviving or controlling corporation and its alien affiliate. (§ 2 ch 145 SLA 1975; am § 4 ch 123 SLA 1980)

**Article 2. Formation of Corporations.**

<p><b>Section</b>                  252. Incorporators                  255. Articles of incorporation                  258. Filing of articles of incorporation and statement of codes</p>	<p><b>Section</b>                  261. Effect of issuance of certificate of incorporation                  267. Organization meeting of directors</p>
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**Collateral references.** — 18 Am. Jur. 2d, Corporations, § 24 et seq.  
 18 C.J.S., Corporations, § 23 et seq.

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**Sec. 10.05.252. Incorporators.** One or more natural persons at least 19 years of age may act as incorporators of a corporation by signing, verifying and delivering in duplicate to the commissioner articles of incorporation for the corporation. (§ 47 ch 126 SLA 1957; am § 4 ch 245 SLA 1970; am § 6 ch 170 SLA 1976)

**Sec. 10.05.255. Articles of incorporation.** (a) The articles of incorporation shall set forth

- (1) the name of the corporation;
- (2) the period of duration, which may be perpetual;
- (3) the purpose or purposes for which the corporation is organized;
- (4) the aggregate number of shares which the corporation may issue; if the shares consist of one class, the par value of each share, or a statement that all shares are without par value; or, if the shares are to be divided into classes, the number of shares of each class, and a statement of the par value of the shares of each class or that the shares are without par value;
- (5) if the shares are to be divided into classes, the designation of each class and a statement of the preferences, limitations and relative rights of the shares of each class;
- (6) if the corporation is to issue the shares of a preferred or special class in series, the designation of each series and a statement of the variations in the relative rights and preferences between series insofar as fixed in the articles of incorporation, and a statement of authority to be vested in the board of directors to establish series and fix and determine the variations in the relative rights and preferences between series;

(7) *[Repealed, § 7 ch 192 SLA 1972.]*

(8) any provision limiting or denying to shareholders the preemptive right to acquire additional or treasury shares of the corporation;

(9) any provision, not inconsistent with law, which the incorporators elect to set forth in the articles of incorporation for the regulation of the internal affairs of the corporation, including a provision which, under this chapter, is required or permitted to be set out in the bylaws;

(10) the address of its initial registered office, and the name of its initial registered agent at that address;

(11) the number of directors constituting the initial board of directors and the names and addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualify;

(12) the name and address of each incorporator;

(13) the name and address of each alien affiliate.

(b) It is not necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this chapter. (§ 48 ch 126 SLA 1957; am §§ 4, 5 ch 70 SLA 1964; am § 7 ch 192 SLA 1972; am § 3 ch 145 SLA 1975; am § 5 ch 123 SLA 1980)

**Collateral references.** — Conclusive-ness of charter as regards character, kind, or purposes of corporation. 119 ALR 1012.

**Sec. 10.05.258. Filing of articles of incorporation and statement of codes.** (a) Duplicate originals of the articles of incorporation shall be delivered to the commissioner. Upon finding that the articles of incorporation conform to law, the commissioner shall, when all fees prescribed by this chapter have been paid,

(1) endorse on each duplicate original the word "filed," and the date of the filing;

(2) file one duplicate original in the commissioner's office;

(3) issue a certificate of incorporation and affix the other duplicate original to it.

(b) The certificate of incorporation, together with the duplicate original of the article of incorporation affixed by the commissioner, shall be returned to the incorporators or their representative.

(c) An incorporator presenting articles of incorporation under this section shall deliver, with the articles, a separate statement of the codes, from the identification code established under AS 10.05.799, which most closely describe the activities in which the corporation will initially engage. (§ 49 ch 126 SLA 1957; am § 6 ch 123 SLA 1980)

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February 17, 1988

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FEB 17 1988

Senator Jalmar Kerttula  
P. O. Box V  
Juneau, Alaska 99811

Re: SB 343

Dear Senator Kerttula:

On Thursday, February 18, the Senate Judiciary Committee will revisit SB 343 -- a bill that would allow corporations, with shareholder approval, to limit their directors' liability for simple negligence. On behalf of Sealaska, I wanted to explain the purpose of an amendment to SB 343 that will be considered by the Committee in the form of a proposed Committee Substitute. That amendment would allow corporations formed under the Alaska Native Claims Settlement Act to amend their articles of incorporation with respect to directors' liability by a majority shareholders' vote, rather than the two-thirds vote otherwise required.

There are four sound public policy reasons for adopting the amendment. The proposal does not represent a "special deal" for Alaska Natives; rather, it recognizes that there are some fundamental differences between ANCSA corporations on the one hand, and general Alaska business corporations on the other, that must be addressed if the legislation is to achieve its intended goal. These considerations include:

1. Virtually all Alaska corporations have only a handful of shareholders. Indeed, in a typical situation the

only shareholders will be the directors themselves. As a result, obtaining a super-majority (or even unanimity) on this issue among shareholders would be an easy task. Typical of other regional corporations, however, Sealaska has 16,000 shareholders -- spread from southcentral Alaska to the lower 48. It is hard enough for corporations with such dispersed ownership to obtain a quorum; obtaining a two-thirds vote on any matter -- no matter how non-controversial -- is a virtual impossibility;

2. Normally, a corporation's directors hold large (and often controlling) blocks of shares in the company. As a result, they stand to realize substantial and direct profits from the corporation's business activities. This prospect of large personal gain compensates for the risk of liability that a director might suffer, and makes that potential for liability seem equitable. Native corporation directors, however, have no prospect of direct and substantial economic gain. They hold no more shares than any shareholder; and, as a result, directorship on a Native corporation is often viewed more as a form of community service than as an avenue of personal enrichment. The equitable symmetry of gain on the upside, and exposure on the downside, doesn't exist in the Native corporate context, and director liability legislation ought to recognize this substantial difference;

3. In the normal business setting, venturers voluntarily embark upon the corporate form in the expectation of gain. They voluntarily assume the risk, and they are usually familiar with the standard of care demanded of business men. Alaska's Natives, on the other hand, had the corporate form imposed upon them by Congress. They were told to administer their lands through a business organization with which -- particularly at the village level -- they were unfamiliar. Had the lands been administered through the Tribe, these same Native leaders would have performed essentially the same functions under the cloak of Tribal immunity. Moreover, they are not, by and large, familiar with the latest New York Court of Appeals cases defining permissible director conduct. It is perfectly proper for the state to be a bit sensitive in imposing personal liability for administering land entitlements through a form that is unfamiliar and, to a large extent, involuntarily; and

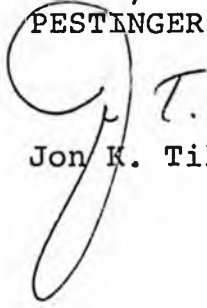
February 17, 1988  
Page 3

4. The purpose of the legislation is to encourage the formation of new corporations in Alaska. For new corporate ventures, a liability provision will be inserted in the initial articles of incorporation. Shareholders will, quite frankly, never read those articles. I will confess to never having reviewed the articles of incorporation of any company in which I have purchased stock. If, however, I receive a proxy solicitation from a company in which I own shares, asking me to accept limited director liability, I would probably give the matter some scrutiny. The point, of course, is that even majority shareholder approval for existing corporations will result in substantially broader scrutiny than that attendant the formation of new companies.

For these reasons, I believe the Judiciary Committee will be on firm footing in concluding that the sound philosophy behind SB 343 would be better served by acknowledging important differences between ANCSA and other business corporations. If I can be of any further assistance, or if you have any reservations about Sealaska's amendment, please do not hesitate to call.

Sincerely,

BIRCH, HORTON, BITTNER  
PESTINGER & ANDERSON

  
Jon K. Tillinghast

JKT/jrm

received  
2-9-88  
ask



M E M O R A N D U M

To: The Senate Judiciary Committee  
Attention: Frank Homan

From: Sealaska Corporation

Re: SB 343  
"An Act Relating to the Liability of Directors of  
Corporations."

Date: February 9, 1988

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By transmittal of February 8, 1988 Sealaska Corporation suggested language which would have amended AS 10.05.005 in order to facilitate application of the provisions of SB 343 to Native corporations. The following language would also amend section .005, but rather than permitting the provision to be enacted by the corporation's board of directors as a bylaw amendment, would require shareholder consent through amendment to the articles of incorporation. Because of the unique circumstances of Alaska Native corporations, however, the normal supermajority requirement for amending articles of incorporation would be reduced to a simple majority of the shares present and entitled to vote at a meeting, where a quorum is established. The suggested alternative language is as follows:

\* Section 3. AS 10.05.005 is amended by adding a new subsection to read:

(d) Notwithstanding the provisions of AS 10.05.255(c) and (d), and AS 10.05.276, a corporation organized under 43 U.S.C. 1601-1628 may include the provisions set forth in AS 10.05.255(c) by amending articles of incorporation as set

forth in AS 10.05.276 except that for such corporations the affirmative vote of a majority of the shares present at a regular or special meeting at which a quorum is present in person or by proxy shall be required to adopt such amendment.

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fact that most major banks are reporting their most profitable year in history for 1986."

#### LEGISLATIVE BRIEFS

**Arizona:** SB 1103, limiting the release by the state of information contained in annual reports filed by corporations with the state, has been introduced. The information may not be released "unless it is in statistical form that prevents identification of particular corporations." Further, the bill provides that the information may be used as evidence in judicial proceedings or certain hearings, may be released to the state department of revenue for tax purposes, or may be released to a state or federal agency upon written request.

- HB 2082, SB 1087, and SB 1096, providing that directors and officers of nonprofit corporations are immune from personal liability for actions taken in good faith within the scope of their authority, have been introduced. Further, a "customary level of corporate indemnification" must have been obtained under §10-10005.

**Georgia:** HB 219, permitting a corporation to limit or eliminate directors' personal liability for breaches of fiduciary duty through its articles of incorporation, has been introduced. A limiting provision may not restrict a director's liability for breach of the duty of loyalty or for acts not done in good faith or that involve intentional misconduct or a knowing violation of the law. The bill also would amend indemnification provisions for directors.

**Kansas:** SB 26, amending Kansas corporation law to permit shareholders to limit directors' liability through a charter amendment or provision in the original certificate of incorporation, has been introduced. The bill permits elimination of directors' personal liability for breaches of fiduciary duty of care, but not for breaches of the duty of loyalty, failure to act in good faith, intentional misconduct, knowingly violating a law, paying an illegal dividend or approving an illegal stock repurchase, or obtaining an improper personal benefit. The bill would also eliminate provisions in the corporate law prohibiting indemnification by a corporation of officers and directors who have been found liable for negligence or misconduct. Shareholders may not limit directors' liability retroactively.

- HB 2107, limiting liability of directors or officers of a charitable organization, has been introduced. The bill provides that directors or officers may not be individually liable or the board as a whole may not be liable in a civil damages action for acts or omissions "unless such conduct constitutes willful or wanton misconduct or intentionally tortious conduct, but only to the extent the directors and officers are not required to be insured by law or are not otherwise insured against such acts or omissions."

**Maryland:** HB 242, permitting corporations to adopt provisions in the articles of incorporation that permit limitations on directors' personal liability, has been

introduced. A director would only be liable if the person fails to perform the duties of a director in accordance with the statutory standard and the conduct amounts to willful misconduct or deliberate recklessness, or if the director received an improper benefit or voted for an illegal dividend.

- HB 233, which would permit only limited liability for directors or officers of a voluntary organization where the organization obtains insurance with certain minimum coverage, has been introduced.

**Minnesota:** SB 7, which would repeal current securities regulation provisions and basically adopt the Uniform Securities Act of 1985 as issued by the National Conference of Commissioners on Uniform State Laws, has been introduced.

- HB 141, which would make directors or trustees of organizations that are exempt from state income tax immune from most civil suits if the directors or trustees acted in good faith and were not reckless, has been introduced. The director or trustee also must have been acting within the scope of the person's responsibilities as director or trustee.

**Mississippi:** HCR 62 and SCR 550, calling for an amendment to the Mississippi Constitution of 1980 that would repeal provisions that give all stockholders the right to vote their shares cumulatively for a single candidate for the board of directors or to vote shares of stock for all directors to be elected, have been introduced. The current constitutional provision also permits the issuance of preferred stock without voting rights.

- HB 1050, amending provisions dealing with a corporate director's duties to the corporation, has been introduced. The bill would amend §79-3-91, Mississippi Code of 1972, to state that a director must discharge directorial duties in accordance with the director's good faith business judgment of the best interests of the corporation. Unless a director has special knowledge, a director is entitled to rely on information, reports, or statements prepared by other officers or employees that the director believes to be reliable and competent; legal counsel or public accountants, or a committee of the board of directors, if certain conditions are met. A director is not personally liable for actions taken as a director if the director performs the duties of the office in compliance with subsection 79-3-91.

- SB 2574, permitting a corporation to include provisions in its articles of incorporation limiting a director's personal liability for breaches of fiduciary duty, has been introduced.

- SB 2501, limiting the liability of charitable and nonprofit organizations and their directors in certain cases, has been introduced.

**Montana:** HB 182, which would impose escrow requirements on securities issues to a promoter while a corporation is in a promotional or developmental stage, has been introduced.

- SB 49, abolishing individual liability of officers and directors or nonprofit corporations except in in-

stances of willful or wanton misconduct, has been introduced.

Nebraska: LB 650, which would permit the Nebraska Director of Banking and Finance to impose a fine of up to \$25,000 for violations of the Nebraska Securities Act or rules or regulations under the Act, has been introduced. Failure to pay the fine and investigative costs would constitute a forfeiture of the violator's right to do business in the state under the Nebraska Securities Act.

• LB 425, permitting a corporation to amend its articles of incorporation to eliminate or limit the personal liability of a director to the corporation or its stockholders for breaches of fiduciary duty in certain cases, has been introduced.

Nevada: SB 52 and 58, permitting limitations on directors' liability in articles of incorporation, have been introduced. The limitation may not cover breaches of loyalty by a director.

New York: SB 830, which would provide for greater regulation of commodity contracts trading, has been introduced. The bill would provide a statutory definition of commodity and commodity contract, and would permit the attorney general to prosecute persons charged with commodity fraud where exclusive jurisdiction is not within the Commodity Futures Trading Commission. The bill also would give the attorney general authority to bring an action for either legal or injunctive relief in federal court to enjoin a fraudulent practice, or to enforce compliance with the Commodity Exchange Act or CFTC rules. For persons registered under the CEA other than floor brokers or registered futures associations, the attorney general may bring an action under the CEA in state court. The attorney general also is given certain investigative authority under the bill.

Ohio: HB 156 and SB 50, which would provide that authority conferred on corporations to grant options with conditions that preclude shareholders of a certain percentage of outstanding common shares from exercising the options applies only to companies that have shares listed on a national securities exchange or that are regularly quoted in an over-the-counter market by members of a national or affiliated securities association, have been introduced.

• HB 155, clarifying when shareholders may not authorize directors to amend a merger or consolidation agreement, has been introduced.

Oklahoma: HB 1038, permitting corporations to limit personal liability of directors through provisions in the articles of incorporation, has been introduced. Under the bill, a liability-limiting provision may not limit liability for breach of a director's duty of loyalty, for acts not in good faith or involving intentional misconduct or a knowing violation of the law, or for

transactions from which the director derived an improper personal benefit. The provision also may not excuse a director from liability under §1053 of Section 6, Chapter 292, O.S.L. 1986. The bill also would provide that a director's or officer's right to indemnification continues even though the person has ceased to be a director or officer, and that the right inures to the estate of a former director or officer.

Oregon: SB 145, adopting the Oregon Commodity Code, has been introduced. The bill would prohibit certain commodity contracts, grant the corporation commissioner authority to enforce the Act, and punish violations of the Act by a maximum of 10 years imprisonment and a \$100,000 fine.

South Dakota: SB 98, which would excuse directors and officers of tax-exempt, nonprofit corporations from personal liability unless there was willful or wanton misconduct, has been introduced.

Texas: HB 403, which would permit a corporation to amend its articles of incorporation to eliminate or limit a director's personal liability for breaches of fiduciary duty, has been introduced. The provision could not eliminate liability for breaches of the duty of loyalty, or for an act not done in good faith or that involved intentional misconduct.

#### REGULATORY BRIEFS

Florida: A trial court should have compelled parties in a securities law and fraud dispute to arbitrate their claims due to an arbitration clause in a franchise agreement between the parties, the Florida District Court of Appeal determines. Carol McCrory and Linda Kline brought a complaint with five causes of action against Doctors Associates, Inc. The complaint contained Florida securities law, franchise misrepresentation, common law fraud, and civil theft claims. The trial court granted a motion to compel arbitration under a franchise agreement only for the Florida securities law claim. The appeals court says that the trial court should have compelled arbitration of each count. Judge Monterey Campbell III relies on *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed*, 453 So.2d 858 (FlaDistCtApp 1984), in reversing, and ordering arbitration of all claims (*Doctors Associates, Inc. v. McCrory*, Case No. 86-1151, FlaDistCtApp, 1/21/87).

Maine: New rules governing investment adviser registration in Maine took effect Feb. 1. The Securities Division of the Maine Bureau of Banking proposed the rules last August, and the comment period closed Sept. 26, 1986. The rules cover applications for licensing, amendments to an adviser's licensing file, renewal applications, custody of clients' securities and funds, statements of financial condition, and recordkeeping by advisers.