

ALASKA LEGISLATURE SPECIAL COMMITTEE / SUBJECTS 86/2

917 SCOM32: AK GENERAL STOCK OWNERSHIP CORP. 1979-80 917

persuading the Division of Investment Management that the AGSOC should be exempt from operation of the ICA. All of these suggested changes have been prompted by specific comments of the staff. The alternative will be at best a partial exemption and some measure of SEC regulation of the AGSOC.

a) Conflict of Interest

The SEC's primary concern is whether granting an exemption from operation of those provisions of the ICA which outlaw certain transactions which could involve conflicts of interest or self-dealing will result in a failure to protect AGSOC shareholders.

Section 17 of the ICA makes unlawful (absent an exemption by Commission order) certain transactions between an investment company and "affiliated persons," broadly defined.^{*/} Under section 17(a) it is unlawful for an

^{*/} The term is defined in section 2(a)(3) of the ICA:

"'Affiliated person' of another person means

"(A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person;

"(B) any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person;

[Footnote continued on following page]

"affiliated" person to sell or buy property or most securities to or from the investment company or to enter into joint ventures with or borrow money from the company.^{*/}

[Footnote continued]

"(C) any person directly or indirectly controlling, controlled by, or under common control with, such other person;

"(D) any officer, director, partner, copartner, or employee of such other person;

"(E) if such other person is an investment company, any investment advisor thereof or any member of an advisory board thereof; and

"(F) if such other person is an unincorporated investment company not having a board of directors, the depositor thereof."

^{*/} Section 17(a) makes it unlawful for an "affiliated" person:

"(1) knowingly to sell any security or other property to such registered company or to any company controlled by such registered company, unless such sale involves solely

"(A) securities of which the buyer is the issuer,

"(B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities, or

"(C) securities deposited with the trustee of a unit investment trust or periodic payment plan by the depositor thereof;

"(2) knowingly to purchase from such registered company, or from any company controlled by such registered company, any security or any other property (except securities of which the seller is the issuer); or

[Footnote continued on following page]

The SEC staff has pointed out that various sections of the proposed AGSOC enabling legislation^{*/} could give rise to the kind of transactions which would be prohibited under section 17. For example, the Act (§§ 10.50.015(4), (5) and (7)) permits the AGSOC to buy and sell property and securities; the ICA, if applicable, would prohibit it from engaging in such a transaction with, for example, a person who is a director of the GSOC (or with a company on whose board their director also sits). The ICA might also prohibit the AGSOC from becoming a joint venturer with such a company, as contemplated in Act § 10.50.015(17), in certain circumstances.^{**/} Similarly, the Act § 10.50.015(6) permits

[Footnote continued]

"(3) to borrow money or other property from such registered company or from any company controlled by such registered company (unless the borrower is controlled by the lender)"

*/ References to "Act §" refer to section 1 of CSSS Senate Bill No. 170, introduced as amended April 27, 1979.

**/ Section 17(d) makes it "unlawful for any affiliated person of . . . a registered investment company . . . or any affiliated person of such a person . . . acting as principal to effect any transaction in which such registered company, or a company controlled by such registered company, is a joint or a joint and several participant with such person . . . for the purpose of limiting or preventing participation by such registered or controlled company on a basis different from or less advantageous than that of such other participant."

the AGSOC to lend money to its employees; since the ICA defines employees as "affiliated persons," such a loan would constitute a violation.

One option -- an option invited by the staff -- is to argue to the Commission why existing Alaska law on conflicts of interest adequately protects the public and why therefore there is no need for section 17 of the ICA to apply to AGSOC. Attached hereto as Attachment A is a draft of a letter we propose to send to the staff for its informal reaction. If we are not successful with this approach, it may be necessary to formulate certain modifications of the enabling legislation to include explicit prohibitions of transactions with persons who may have a conflict of interest.

b) Indemnification

The staff also commented on the scope of the AGSOC's power to indemnify provided by section 10.50.020 of the enabling legislation. The staff has indicated that these standards are acceptable to them as consistent with section 17(h) of the ICA, with the exception of the open-ended power granted in Act § 10.50.020(f), which widens the scope of possible indemnity to allow any corporate

choice. Although we realize that the provision was based on the American Bar Foundation's Model Business Corporation Act, it goes further than the ICA. We suggest strongly that Act § 10.50.020(f) be deleted from the legislation.

c) Miscellaneous

Below we discuss a series of miscellaneous changes to the legislation which have been suggested by our conversations with the staff. We request that you clear each of these changes in principle so that we may represent to the staff that they will be implemented if our exemption request is granted.

(i) Stock Options

The AGSOC is given the power to establish pension plans and other incentive plans for its directors, officers and employees. Act § 10.50.015(15). The staff has pointed out that section 18(d) of the ICA prohibits an investment company from granting stock options to its employees. We recommend that stock options be specifically excepted from Act § 10.50.015(15). The new section would read:

"(15) pay pensions and establish pension plans, pension trusts, profit-sharing plans, and other incentive plans for its directors, officers and employees, except that such pensions or plans shall not include the issuance of stock options;"

(ii) Later Issues

Under Act § 10.50.080, the AGSOC shareholders are permitted to set the price of shares to be sold in later issuances. The staff has pointed out that section 23(b) of the ICA requires that shares not be sold at an amount below the current net asset value of each share without the consent of a majority of the investment company's shareholders. Under Act § 10.50.150, one third of the AGSOC shareholders constitutes a quorum and, thus, one vote more than one sixth could set the price at less than net asset value. We recommend that you tighten the restriction in the AGSOC legislation to match the ICA. The second sentence of section 10.50.080 would be amended to read:

"The decision to issue shares without consideration or for consideration if that consideration is less than the current net asset value of such shares shall be made by the vote of a majority of the shareholders."

(iii) Payment Other Than Cash

The staff has also noted that Act § 10.50.085 allows payments for shares to be by transfer of property other than cash or in exchange for services. The ICA does not allow payment other than in cash (section 23(a)). We suggest conformance to the ICA in this minor matter. The

first sentence of Act § 10.50.085 would be amended to read:

"Consideration for the issuance of shares if required shall be paid in cash."

(iv) Interested Directors

Section 10(a) of the ICA provides that no investment company may have more than 60 percent of its Board of Directors be "interested persons". The ICA's definition of "interested" persons includes all affiliated persons and many others.^{*/} There is currently no similar restriction on who may serve on the Board of Directors of the AGSOC. In lieu of incorporating some sort of restriction along the lines of the ICA into the AGSOC legislation, we suggest that a provision along the lines of section 41 of the Model Business Corporation Act be added to the legislation. That section provides:

DIRECTOR CONFLICTS OF INTEREST

No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association or entity in which one or more of its directors are

^{*/} "Interested person", as defined in section 2(a)(19) of the ICA, includes (unless exempted by Commission order) members of the immediate family of affiliated persons, affiliates or other interested persons of the company's investment adviser, legal counsel for the company or any partner or employee of such counsel, and any registered broker or dealer or an affiliate of such a broker or dealer.

directors or officers or are financially interested, shall be either void or voidable because of such relationship or interest or because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction or because his or their votes are counted for such purpose, if:

(a) the fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested directors; or

(b) the fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve or ratify such contract or transaction by vote or written consent; or

(c) the contract or transaction is fair and reasonable to the corporation.

Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction.

We suggest the new provision follow Act § 10.50.200. This new provision will also strengthen our position with the SEC concerning the need for application of section 17 of the ICA to the AGSOC. See Attachment A.

(v) Replacing Directors

The ICA requires (section 16) that when a vacancy occurs in the Board of Directors of an investment company it may be filled only if after it is filled, two thirds of the Board has been elected by the shareholders. No such restriction exists in Act § 10.50.195, and we recommend adding such a provision. The first sentence of § 10.50.195 would then read:

"A vacancy occurring in the board of directors may be fulfilled by the affirmative vote of a majority of the remaining directors if immediately after filling any such vacancy at least two thirds of the directors then holding office shall have been elected by the shareholders at a shareholders' meeting."

(vi) Disqualification

The ICA places certain restrictions on who may serve as an officer, director, or employee of an investment company, forbidding (unless an exception is granted) persons convicted within 10 years of a securities related crime or subject to an injunction arising from past securities laws violations (section 9). The staff has indicated, and our research has confirmed, that this provision of the ICA is one for which exceptions are only very infrequently given. The enabling legislation contains no equivalent, and we suggest that a provision such as the following

be added, to follow § 10.50.260:

" INELIGIBILITY OF CERTAIN AFFILIATED
PERSONS AND UNDERWRITERS

"It shall be unlawful for any of the following persons to serve or act in the capacity of employee, officer, or director of a corporation:

"(1) any person who within ten years has been convicted of any felony or misdemeanor involving the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer, or investment adviser, or as an affiliated person, salesman, or employee of any investment company, bank, or insurance company; or

"(2) any person who, by reason of any misconduct, is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an underwriter, broker, dealer, or investment adviser, or as an affiliated person, salesman, or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of any security."

(vii) Public Utility Holding Company Act

Finally, as we have advised previously, the Public Utility Holding Company Act places very severe restrictions on a company owning in excess of 10 percent of (or otherwise controlling) a "public utility" as that term is defined in the Act. The staff has indicated that it

would be useful if a mechanism were worked into the legislation so that the directors would be advised of the possibility that an investment would fall within the terms of the Public Utility Holding Company Act, and either seek specific exemption from the SEC as permitted under section 3 of that Act, or comply with the Act's extremely rigid requirements. For this reason, we suggest a new section be added to follow Act § 10.50.015:

PROHIBITION. A corporation may not own, control or hold with power to vote ten percent or more of the outstanding voting securities of a public utility company or a public utility holding company (as those terms are defined in the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 et seq.), without first taking steps to come within the requirements of that Act, or seeking exemption from the Act's coverage from the Securities and Exchange Commission.

W. L. Wilmer & P. C. Pickering
WILMER & PICKERING

ATTACHMENT A

DRAFT
January 22, 1980

Houghton R. Hallock, Jr., Esq.
Division of Investment Management

Paul Royce, Esq.
Division of Investment Management

Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Re: Request for Exemption for Alaska
General Stock Ownership Corporation

Dear Sirs:

You have asked us to amplify our opinion as to why exemption of the AGSOC from the conflict of interest provisions of the Investment Company Act ("ICA") would not work to the detriment of the investing public. In addition, this letter responds to several other concerns you have expressed to us.

As we have stated previously (Memorandum to the Staff of the Securities and Exchange Commission, dated December 5, 1979), the AGSOC, while it may technically fit within the definition of an investment company, is not at all the sort of entity typically regulated under the ICA. It will not invest in portfolio securities, will not use traditional investment advisors or underwriters, and will not engage in more than occasional purchases or sales of securities. Thus, the traditional

abuses which section 17 of the ICA was created to outlaw -- such as conflicts of interest on the part of investment advisors, mutual backscratching and other self-dealing -- will not take place. Moreover, one obvious potential for abuse -- loans to AGSOC officers and directors -- is strictly forbidden by the Alaska legislation. (Act § 10.50.225).

The AGSOC is in many ways a political entity; its few investments and loan transactions will be highly visible and a subject of widespread public comment and debate. This scrutiny alone provides a strong disincentive for self-dealing. Certain provisions of the Alaska enabling legislation provide additional "sunshine" protections against conflict of interest situations. For example, shareholders have the right to examine AGSOC books and records (Act § 10.50.270), and the AGSOC must file an annual report to the Secretary of the Treasury. 24 U.S.C. § 6039B. Extensive publicity will undoubtedly surround the appointment of officers and directors. As for deterrence, these persons are subject to court-ordered removal for fraudulent or dishonest acts and criminal penalties for defrauding shareholders or creditors or making misleading statements. (Act §§ 10.50.290, 10.50.635, 10.50.630).

In addition, Alaska law creates strict fiduciary duties owed every corporation by its officers and directors.

Although we have discovered no Alaska statutes specifically dealing with conflicts of interest, the most complete statement of Alaska law on this subject is contained in the Supreme Court of Alaska's opinion in Alvest, Inc. v. Superior Oil Corp., 398 P.2d 213 (1965), a copy of which is attached hereto. Under the rule of law set forth in this case, corporate officers or directors are fiduciaries and cannot personally profit from a corporate opportunity even with the concurrence of the company's Board of Directors. (Op. at 216). Any such conflict could only be waived by the shareholders (id.), and it is not necessary to allege bad faith by an officer or director in an action against him for dereliction of his fiduciary duties and recovery of the opportunity diverted.

We have also secured agreement from our client that a new provision modeled on section 41 of the Model Business Corporation Act will be added to the proposed Alaska legislation. The new section will provide:

DIRECTOR CONFLICTS OF INTEREST

No contract or other transaction between a corporation and one or more of its directors or any other corporation, firm, association or entity in which one or more of its directors are

directors or officers or are financially interested, shall be either void or voidable because of such relationship or interest or because such director or directors are present at the meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction or because his or their votes are counted for such purpose, if:

(a) the fact of such relationship or interest is disclosed or known to the board of directors or committee which authorizes, approves or ratifies the contract or transaction by a vote or consent sufficient for the purpose without counting the votes or consents of such interested directors; or

(b) the fact of such relationship or interest is disclosed or known to the shareholders entitled to vote and they authorize, approve or ratify such contract or transaction by vote or written consent; or

(c) the contract or transaction is fair and reasonable to the corporation.

Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or a committee thereof which authorizes, approves or ratifies such contract or transaction.

We believe that such a provision is more suited to the AGSOC than are the complex "interested person" restrictions of section 10(a) of the ICA, and that this provision will

further assure that any transaction carrying the potential for abuse will be the subject of focus by a disinterested board.

Thus, persons associated with the AGSOC will have few opportunities to profit personally and even less chance to do so successfully. In light of these circumstances, we feel application of section 17 of the ICA is unnecessary in the case of the AGSOC.

* * * * *

After consultation with us, our client has agreed to make certain other changes in the state legislation to satisfy your concern that the protections offered by the ICA are adequately dealt with in the state AGSOC legislation. Below is a list of changes we propose to CSSS Senate Bill No. 170:

1. Add a new provision after § 10.50.015 as follows:

PROHIBITION. A corporation may not own, control or hold with power to vote ten percent or more of the outstanding voting securities of a public utility company or a public utility holding company (as those terms are defined in the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 et seq.), without first taking steps to come within the requirements of that Act, or seeking exemption from the Act's coverage from the Securities and Exchange Commission.

2. Act § 10.50.015(15) - Amend the section to read as follows:

"(15) pay pensions and establish pension plans, pension trusts, profit-sharing plans, and other incentive plans for its directors, officers and employees, except that such pensions or plans shall not include the issuance of stock options;"

3. Act § 10.50.020(f) - Delete.

4. Act § 10.50.080 - Amend the second sentence to read as follows:

"The decision to issue shares without consideration or for consideration if that consideration is less than the current net asset value of such shares shall be made by the vote of a majority of the shareholders."

5. Act § 10.50.085 - Amend the first sentence to read as follows:

"Consideration for the issuance of shares if required shall be paid in cash."

6. Act § 10.50.195 - Amend so that the first sentence reads:

"A vacancy occurring in the board of directors may be fulfilled by the affirmative vote of a majority of the remaining directors if immediately after filling any such vacancy at least two thirds of the directors then holding office shall have been elected by the shareholders at a shareholders' meeting."

7. Add new provision after § 10.50.260, as follows:

" INELIGIBILITY OF CERTAIN AFFILIATED
PERSONS AND UNDERWRITERS

"It shall be unlawful for any of the following persons to serve or act in the capacity of employee, officer, or director of a corporation:

"(1) any person who within ten years has been convicted of any felony or misdemeanor involving the purchase or sale of any security or arising out of such person's conduct as an underwriter, broker, dealer, or investment adviser, or as an affiliated person, salesman, or employee of any investment company, bank, or insurance company; or

"(2) any person who, by reason of any misconduct, is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an underwriter, broker, dealer, or investment adviser, or as an affiliated person, salesman, or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity or in connection with the purchase or sale of any security."

We hope this submission is helpful in your review of our exemption application. Please feel free to call on us should other questions arise.

Sincerely,

Samuel A. Stern

Appellant alleges that error was committed when evidence of the value of the property in dispute, supplied by the records and testimony of a tax assessor, was admitted.

As pointed out by appellant, there is a difference of opinion among the various courts¹⁶ as to whether such evidence should be admitted. The testimony of the tax assessor was that the taxing district regularly assessed at 100 per cent of value based upon a record of comparable property in the area within the preceding two years.

[9] Appellant has not shown how or why this testimony was unreliable with respect to the value of the property or how its admission prejudiced his case in any particular. The basis employed in arriving at the valuation was sound. The evidence had no negative value and should have been admitted. No error was committed.

The trial court, over objection, permitted counsel for appellee to question appellant in detail concerning his military record, the nature of his discharge, wounds received while in the service, the degree of disability thereby created, the amount of government pension received by appellant and appellee's inability to obtain employment because of his wounds and disability. Admission of this testimony is asserted as error.

Appellant's first objection was overruled, apparently on the ground that appellee's physical ability to earn money was material to the determination of the issues. Appellant's second objection was overruled on the ground that the evidence was necessary to carry out the intent of the parties.

[11] We hold that no error was committed. The financial condition of the parties in a suit of this nature is a relevant factor to be considered.¹⁷ So also

may his physical ability to earn be relevant and material.

[12] Appellant's allegation of error committed in admitting certain exhibits is not briefed sufficiently to be readily understandable and will not be considered.

The findings of fact, conclusions of law and judgment are set aside and the case remanded for retrial.



ALVEST, INC., Appellant,
v.
SUPERIOR OIL CORPORATION, Appellee.
No. 503.

Supreme Court of Alaska.

Jan. 21, 1965.

Proceeding on appeal from a judgment of the Superior Court, Third Judicial District, Ralph E. Moody, J., affirming decision of state division of lands cancelling award to corporation which had been awarded first priority at noncompetitive oil and gas lease drawing. The Supreme Court, Dimond, J., held that fact that two officers of corporation filed applications for themselves in noncompetitive oil and gas lease drawing conducted by state division of lands when corporation itself had filed application violated administrative regulation providing that each applicant shall have only one chance in any one drawing, and division of lands properly cancelled award to corporation which had been awarded first priority at drawing.

Judgment affirmed.

¹⁶ See 5 Wigmore, Evidence § 1640 (3d ed. 1940) for a discussion of the subject and tabulations of the holding of the various jurisdictions.

¹⁷ Enmons v. Enmons, 217 Miss. 504, 64 So.2d 753, 755 (1953).

1. Corporations ⇨307

Corporate officer or director stands in fiduciary relationship to his corporation.

2. Corporations ⇨310(1)

Out of fiduciary relationship between corporate officer or director and corporation arises duty of reasonably protecting interests of corporation.

3. Corporations ⇨315

It is inconsistent with and breach of duty of corporate officer to reasonably protect interests of corporation for officer or director to take advantage of business opportunity for his own personal profit when, applying ethical standards of what is fair and equitable in particular situation, opportunity should belong to corporation.

4. Corporations ⇨315

Where business opportunity is one in which corporation has legitimate interest, officer or director may not take opportunity for himself, and if he does, he will hold all resulting benefit and profit in his fiduciary capacity for use and benefit of corporation.

5. Corporations ⇨315

Whether business opportunity is corporate one or one within legitimate scope of individual interests of officer or director depends on facts and circumstances of each case.

6. Mines and Minerals ⇨5

Fact that two officers of corporation filed applications for themselves in non-competitive oil and gas lease drawing conducted by state division of lands when corporation itself had filed application violated administrative regulation providing that each applicant shall have only one chance in any one drawing, and division of lands properly cancelled award to corporation which had been awarded first priority at drawing.

7. Mines and Minerals ⇨5

Administrative regulation providing that each applicant in noncompetitive oil and gas lease drawing should have only one chance in any one drawing would not have precluded corporation from making success-

ful claim for lease or its benefits against corporate officers who filed applications for themselves had either been successful at drawing.

8. Corporations ⇨315

In absence of shareholder approval, business opportunity involving application by corporate officers, as individuals and for themselves, in noncompetitive oil and gas lease drawing conducted by state division of lands was not within legitimate scope of individual interests of officers where corporation itself had filed application.

9. Corporations ⇨315

Showing of bad faith is not essential to establish duty on part of officers or directors of corporation in connection with business opportunities which they wish to acquire for themselves, and fact that business opportunity is of such nature that under particular circumstances it should fairly belong to corporation is sufficient to establish duty on part of officer or director to acquire opportunity for corporation.

Clifford J. Groh and Ronald G. Benkert, Groh & Benkert, Anchorage, for appellant.

Paul F. Robison, Robison, McCaskey & Lewis, Anchorage, for appellee.

Before NESBETT, C. J., and DIMOND and AREND, JJ.

DIMOND, Justice.

Appellant was awarded first priority for an oil and gas lease at a non-competitive lease drawing conducted by the state Division of Lands. Appellee was given second priority. Later the Division of Lands cancelled the award to appellant and gave it to appellee for the reason that two of appellant's officers and directors, White and Mueller, had filed applications for themselves in the same drawing. The Division of Lands held that this action on the part of White and Mueller gave appellant more than one chance at the drawing in violation

of an administrative regulation provided:

"Each drawing such a man determine and only one chance."

The superior court of the Division of Lands allowed.

[1-4] A corporation stands in a fiduciary relationship to its shareholders. The duty of reasonable protection of the interests of the corporation with and a breach of duty of a corporate officer or director to acquire a business opportunity for himself when, applying ethical standards of what is fair and equitable in particular situation, the opportunity should belong to the corporation. Where one in which the corporation has a legitimate interest, the officer or director will hold all resulting benefit and profit in his fiduciary capacity for use and benefit of the corporation.

[5,6] Whether business opportunity is a corporate one or one within legitimate scope of individual interests of officer or director depends on facts and circumstances of each case. Appellant's chance at the lease drawing opportunity involved a definite and legitimate one similar application and the leasing.

1. 11 Alaska App. 1 (1955).
2. *Diedrick v. N.W. 2d* 913, 100 P.2d 100 (1940); *Durfee v. I. Mass.* 187, 194 (1948); *Lut. Pa.* 143, 53 (1939); *v. Loft, Inc.,* 310 (1939); *U.S. App. D.C.* (1935).

of an administrative regulation which provided:

"Each drawing shall be conducted in such a manner as the Director shall determine and each applicant shall have only one chance in any one drawing."¹

The superior court affirmed the decision of the Division of Lands and this appeal followed.

[1-4] A corporate officer or director stands in a fiduciary relationship to his corporation. Out of this relationship arises the duty of reasonably protecting the interests of the corporation. It is inconsistent with and a breach of such duty for an officer or director to take advantage of a business opportunity for his own personal profit when, applying ethical standards of what is fair and equitable in a particular situation, the opportunity should belong to the corporation. Where a business opportunity is one in which the corporation has a legitimate interest, the officer or director may not take the opportunity for himself. If he does, he will hold all resulting benefit and profit in his fiduciary capacity for the use and benefit of the corporation.²

[5,6] Whether a business opportunity is a corporate one or one within the legitimate scope of the individual interests of the officer or director depends upon the facts and circumstances of each case.³ Here appellant's chance to be the successful applicant at the lease drawing was a business opportunity in which appellant had expressed a definite interest. That interest was a legitimate one because appellant had made similar applications in previous drawings, and the leasing of oil and gas lands was

within the scope of appellant's corporate activities. This was a corporate opportunity which appellant's officers and directors, White and Mueller, had no right to seek for themselves. If either had been the successful applicant at the drawing he would have held the lease in a fiduciary capacity for the use and benefit of appellant. This means that appellant did not have only one chance at the drawing, but three—its own, represented by the corporate application filed on its behalf, plus two additional chances, represented by White's and Mueller's individual applications. Since appellant had more than one chance in the drawing, it was not a qualified applicant under section 507.31 of the administrative regulations. The Division of Lands was correct in holding that appellant was not entitled to the lease.

[7] Appellant argues that it had only one chance at the drawing, because the regulation would have precluded appellant from making a successful claim for the lease or its benefits against White or Mueller had either been successful at the drawing. This argument is untenable. The regulation deals with the element of chance. When a lease drawing has been concluded and the successful applicant known, the element of chance is gone. What had been chance has now become something certain. The regulation pertains only to the situation which exists while the element of chance is present, and not afterwards. The regulation would have no pertinency in an action by a corporation claiming that one of its officers or directors held a lease as constructive trustee for the corporation. What the rights would be as between those parties

1. 11 Alaska Adm.Code § 507.31 (1964).

2. *Diedrick v. Helm*, 217 Minn. 483, 14 N.W.2d 913, 919, 153 A.L.R. 649 (1944); *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 187, 80 N.E.2d 522, 527, 529 (1948); *Lutherland, Inc. v. Dahlen*, 357 Pa. 143, 53 A.2d 143, 147 (1947); *Guth v. Loft, Inc.*, 23 Del.Ch. 255, 5 A.2d 503, 510 (1939); *McKay v. Wahlenmaier*, 96 U.S.App.D.C. 313, 226 F.2d 35, 45-46 (1955).

3. *American Inv. Co. v. Lichtenstein*, 134 F.Supp. 857, 861 (E.D.Mo.1955); *Industrial Indem. Co. v. Golden State Co.*, 117 Cal.App.2d 519, 256 P.2d 677, 686-687 (Dist.Ct.App.1953); *Johnston v. Greene*, 35 Del.Ch. 479, 121 A.2d 919, 923 (1956); *Guth v. Loft, Inc.*, 23 Del.Ch. 255, 5 A.2d 503, 511-515 (1939); *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 187, 80 N.E.2d 522, 528-529 (1948); *Henn, Corporations* § 238, at 372 (1961).

would not be governed by the regulation. The regulation would be relevant after a drawing had been concluded only insofar as it was established that before the drawing took place an applicant had had more than one chance to be successful. If that is established, then the regulation can be invoked to disqualify such an applicant from securing the lease. That is what was done here.

[8] Appellant contends that it could not have claimed the benefits of the lease had it been awarded to White or Mueller, because a full disclosure of their actions in filing their individual applications had been made to the corporation, and because the filing of applications by appellant's officers and directors was consistent with corporate policy. There was evidence that the members of appellant's board of directors had generally approved the appropriateness of officers and directors filing on the same land that the corporation had filed on, although it was not established that this in fact had ever been done prior to the filings in this case. But there was no evidence that the shareholders of the corporation had consented to such a policy generally, or that in this particular instance they had approved White's and Mueller's actions in filing in competition with appellant. In the absence of such approval by the shareholders, the business opportunity in this case was not within the legitimate scope of the individual interests of appellant's officers and directors.⁴

[9] Appellant states that White and Mueller had at all times been open and above board and had acted in good faith in all their dealings here. That is apparently true. But it has no bearing on the decision of the issues in this case. A showing of bad faith is not essential to establish a duty on the part of officers or directors in connection with business opportunities which they wish to acquire for themselves.

4. In re Lerch's Estate, 300 Pa. 59, 159 A.2d 506, 513 (1960); Remillard Brick Co. v. Remillard-Dandini Co., 109 Cal. App.2d 405, 241 P.2d 66, 74-75 (1952).

The fact that a business opportunity is of such a nature that under the particular circumstances of the case it should fairly belong to the corporation is sufficient to establish a duty on the part of an officer or director to acquire the opportunity for the corporation.⁵

The judgment is affirmed.



**WRIGHT TRUCK AND TRACTOR
SERVICE, INC., Appellant,**

v.

STATE of Alaska, Appellee.

No. 525.

Supreme Court of Alaska.

Jan. 21, 1965.

Action on construction contract against the state. The Superior Court, First Judicial District, James A. von der Heydt, J., entered judgment for contractor for \$285,933.17 plus costs but disallowed claim for interest between date when sums became due and date of formal entry of judgment, and contractor appealed. The Supreme Court, Nesbitt, C. J., held that state was not liable for interest between date sums became due and date of entry of judgment, under statute providing in effect that judgment entered for plaintiff against state shall be for legal amount found due with interest only from date of judgment.

Affirmed.

1. States — 171

Legislature intended to preclude interest on all claims, not just tort claims, against state prior to judgment. Laws 1957,

5. Rosenblum v. Judson Engineering Corp., 99 N.H. 267, 109 A.2d 558, 563 (1954).

c. 170, § 1 et seq.; AS 09.3

2. States — 171

State was sums due under date sum entry of judgment 1957, c. 170, §§ 101, §§ 26.01-26.50, 300, 09.50.

Roger G. Con-
Juneau, for app-
Warren C.
Michael M. H.
Juneau, for app-

Before NESB-
and AREND, J.

NESBETT, C.

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ROGER M. WITTEN

December 5, 1979

1933 Act/2(3), 3a(11)
1934 Act/12(h), 3(a)(12)
1940 Act/6(c), 6(d)

Edward F. Greene
Director,
Division of Corporation Finance

Sydney H. Mendelsohn
Director,
Division of Investment Management

Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Re: Request for No Action and for Temporary
and Partial Exemptions for the Alaska
General Stock Ownership Corporation

Dear Sirs:

On behalf of the State of Alaska, we submit to each Division five copies of a memorandum which describes the General Stock Ownership Corporation ("GSOC"), a company soon to be created by Alaska under enabling federal tax legislation recently adopted by Congress. While the GSOC in many ways resembles a conventional corporation, there are significant differences -- the most striking being that one share of the company will be given without charge to each resident of Alaska.

We now request that the staff issue a no-action letter with respect to exemption of the Alaska GSOC under the 1933 Act. Moreover, in the enclosed memorandum, we have proposed desirable temporary and partial exemptions from the 1934 and 1940 Acts in light of protections for investors inherent in the planned structure of the Alaska GSOC. Since the Alaska enabling legislation has not yet been passed, there is still time to consider amendments to

meet any concern the staff may have in these areas. The state legislature hopes to consider the enabling legislation early in its next session, which begins in January.

Thank you for your attention to this matter. Please contact the undersigned if any additional information is needed or if conferring would be useful to you. On behalf of the State, your response at your early convenience is respectfully requested.

Sincerely,



Samuel A. Stern

Enclosures

bcc: ✓Mr. Staley (w/o attachments)
Mr. Gauche (w/o attachments)
Mr. Hogan (w/o attachments)

WILMER & PICKERING

1666 K STREET, N. W.

WASHINGTON, D. C. 20006

December 5, 1979

MEMORANDUM TO THE STAFF OF THE
SECURITIES AND EXCHANGE COMMISSION

RE: Proposals for Application of the Federal
Securities Laws to the Alaska General
Stock Ownership Corporation

The State of Alaska is in the process of creating a private corporation to be owned by all its residents. The entity is to be a "GSOC" -- a General Stock Ownership Corporation. Upon the company's formation, one share of its stock will be issued to each person resident in Alaska (presently approximately 400,000 persons). Pursuant to a recent amendment to the Internal Revenue Code, 26 U.S.C. §§ 1391-97 (Subchapter U), each state may create a GSOC which, if it meets the federal statutory definition, will receive certain favorable tax treatment previously available only to closely held "subchapter S" corporations. The purpose of the GSOC, as envisioned by the sponsors of the federal legislation and by the State of Alaska, is to afford all state residents the experience of participating in capitalism, while expanding the base of ownership of projects which generate profits from the development of the state's natural resources.^{1/}

^{1/} S. Rep. No. 1263, 95th Cong. 2d Sess. 107 (1978); 124 Cong. Rec. S 19,168-69 (daily ed. Oct. 14, 1978) (remarks of Senator Gravel).

Subchapter U gives a state legislature considerable flexibility in structuring its GSOC. While the extent to which various federal securities laws apply to the unique features of the GSOC is unclear, it is Alaska's intention to structure the GSOC in a way that provides its citizen-shareholders with all the relevant protections embodied in the securities laws. Hopefully, it would not then be necessary to burden this new entity with the full range of the Commission's procedural and substantive regulations during the critical stages of its development.

For reasons discussed in this Memorandum, we believe that the GSOC bill introduced at the last session of the Alaska legislature (S. 170) will provide complete protection to GSOC shareholders without unduly hampering the GSOC experiment in its initial phase. The State seeks the staff's concurrence in this view, and the staff's suggestions for amendments, if any, to the present bill so that the legislation may be enacted in a form satisfactory to the Commission without need for the consideration of amendments after enactment.

I. The Federal Legislation

Subchapter U provides for special tax treatment of GSOCs established in conformance with its terms.^{2/} The GSOC

^{2/} A copy of Subchapter U is attached as Exhibit A.

will not be subject to corporate tax; instead the shareholders will be taxed on their pro rata share of the corporation's taxable income whether or not distributed. 26 U.S.C. §§ 1392, 1393. Shareholders also receive investment tax credits which would otherwise accrue to the corporation. § 1393(b). A GSOC is required to distribute 90 percent of its taxable income each year to its shareholders, § 1396, but must withhold 25 percent of such distribution for the IRS on behalf of shareholders. § 3402(r).^{3/}

Subchapter U permits a state to establish a GSOC between December 31, 1978 and January 1, 1984 by a charter enacted by the state legislature or a state-wide referendum. § 1391(a)(2) and (3). For the GSOC to qualify for the special tax benefits of the Subchapter, its corporate charter must contain the following restrictions with respect to stock ownership and transferability:

1. only one class of stock may be issued (§ 1391(a)(4)(A));
2. shares may be issued only to "eligible individuals"^{4/} (§1391(a)(4)(B));

^{3/} A GSOC must maintain a segregated shareholder income account for such distributions. § 1394.

^{4/} An "eligible individual" is defined as a person who is a resident of the chartering state on a date specified in the state's enabling legislation and remains a resident between that date and the date of issuance of shares. § 1391(c).

3. at least one share of stock must be issued to each "eligible individual" who does not elect not to receive his share (§ 1391(a)(4)(C));
4. shares may not be transferred for a five-year period, other than by will or by the laws of descent, except where the shareholder ceases to be a resident of the state (§ 1391(a)(4)(D)(i));
5. shares may not be transferred to anyone other than a "resident individual" (§ 1391(a)(4)(D)(ii);^{5/} and
6. each individual's ownership is limited to ten shares (§ 1391(a)(4)(D)(iii)).

In addition, a GSOC may not hold a 20 percent or greater interest in any subsidiary,^{6/} may not acquire business properties from an unwilling seller through the use of the state's power of eminent domain^{7/} and is required to file an annual report with the Secretary of the Treasury summarizing its operations for the year.^{8/}

^{5/} This language excludes corporate ownership of GSOC shares.

^{6/} §§ 1391(a)(1), 1504.

^{7/} § 1391(a)(5).

^{8/} 26 U.S.C. § 6039B. In addition, a GSOC must file an informational tax return that, inter alia, identifies all shareholders and the distributions they have received. Id. Moreover, the staff of the Joint Committee on Taxation is required to report to Congress on the GSOC experiment within two years of the formation of the first GSOC and again by September 30, 1983. § 1391(e).

It is contemplated that a GSOC will acquire an interest in one or more business enterprises with borrowed funds; the acquired interests would be pledged to secure this debt, perhaps supplemented by state grants or guarantees. The cash flow from the acquired business interests will be used to service the debt and, to the extent of available earnings, pay dividends to the residents of the state who are its shareholders. In order to generate a sufficient cash flow, a GSOC is not likely to make portfolio investments, but will, instead, seek to participate directly as a joint venturer in specific projects. For example, while the Alaska GSOC's specific investments have not yet been identified, one possible investment might be a participating interest in an existing Alaskan pipeline in an arm's-length transaction with one of the consortium of companies that now own it. As a joint venturer, the GSOC's share of pre-tax income from the project would be sheltered under Subchapter U -- a considerable advantage over portfolio investments, where income would be limited to the issuer's after-tax distributions.

The details of the distribution of the GSOC's shares and the precise mechanisms by which the above restrictions are to be implemented have been left by Congress to be determined by each state's enabling legislation.

II. Alaska's Enabling Legislation

As far as we are aware, only one state has as yet prepared legislation to take advantage of Subchapter U. Attached as Exhibit B is a Bill which was introduced in the last session of the Alaska legislature.^{9/} Its sponsors are considering and will consider possible refinements, especially in response to the views of the SEC and IRS -- (a ruling as to the U.S. tax consequences of ownership of shares in the Alaska GSOC is currently being sought) -- but it is anticipated that the substance of S.170 will be reintroduced and enacted early in 1980.

S.170 contains the obligatory provisions required by Subchapter U,^{10/} and establishes an entity otherwise consistent with the general corporation law of Alaska.

^{9/} CSSS Senate Bill No. 170, introduced as amended April 27, 1979 (hereinafter "S.170"). Section 1 of S.170 constitutes the Alaska General Stock Ownership Act, which will herein be cited as "Act § _____."

^{10/} See Act §§ 10.50.320 (a). Of necessity, certain provisions of the Alaska legislation interpret rather than simply mirror the provisions of Subchapter U. See for example, the definitions of "eligible individual" and "resident", Act §§ 10.50.320(a)(6) and 10.50.645(11), and Alaska's decision as to what happens when a shareholder leaves Alaska, a point left open in Subchapter U. S.170, § 4(c).

III. The Securities Act of 1933

The Securities Act of 1933 ("the 33 Act") requires that a registration statement be filed, and a prospectus disclosing material information be delivered to potential investors, in connection with the offer or sale of securities. We seek the staff's concurrence in our opinion that the initial issuance of shares in the Alaska GSOC to all "eligible individuals" will not require registration under section 5 of the 33 Act.

A. No Sale is Involved.

We believe the issuance of GSOC shares will not involve a "sale" or "offer to sell" within the meaning of section 2(3) of the 33 Act. That section defines "sale" as "every . . . disposition of a security . . . for value" and defines "offer to sell" as "every attempt . . . to dispose of . . . a security . . . for value."

Subchapter U does not specify whether the initial issuance of shares in a state's GSOC must be with or without charge. However, the primary sponsor of the legislation (Senator Gravel) anticipated that shares would be issued without charge.^{11/} Although the current draft of the Alaska

^{11/} 124 Cong. Rec. S.19,168 (daily ed. Oct. 14, 1978).

enabling legislation contemplates the possibility of subsequent issues for value,^{12/} the initial issuance of shares in the Alaska GSOC will be free of charge to all "eligible individuals", and all stock so issued will be considered fully paid and nonassessable.^{13/}

Assuming that the shares are issued to "eligible individuals" free of charge, there has been no "value" moving from the individuals to the GSOC and no investment decision made on the part of the individuals receiving shares. A no-action letter issued in the case of corporations created under the Alaska Native Claims Settlement Act supports this conclusion. See The Native Alaska Federation of Natives, Inc. (Jan. 28, 1974).^{14/}

^{12/} Section 10.50.080 of the Act provides that:

"Shares may be issued without consideration or for consideration fixed by the shareholders before issuance. Consideration for shares shall be fixed by a vote of a majority of the shares voting on the issue."

This provision is intended to permit the Alaska GSOC to charge consideration for shares only in issuances subsequent to the initial issuance, as no shareholders will exist until then to fix the consideration.

^{13/} Of course, subsequent issuances of GSOC stock may well be for consideration; the present request for a no-action letter is not intended to encompass any such later issuances. See, e.g., Act § 10.50.085.

^{14/} While an Alaska resident has the right to decline receipt of his GSOC share, the availability of this option by

[Footnote continued next page]

In Part IV of this Memorandum we discuss application of the Securities Exchange Act of 1934 to the Alaska GSOC. In that discussion we propose dissemination of an annual report which should satisfy the disclosure principle of the 33 Act and allay any fears that granting our request for a no-action letter will result in uninformed shareholders. Compare the regulations with respect to filings by the Asian Development Bank authorized by 22 U.S.C. § 285h(a), (1978) Fed. Sec. L. Rep. (CCH) ¶ 2025. In any event, since the 33 Act is designed

[Footnote continued from preceding page]

no means renders the distribution of shares to the accepting Alaska residents, a disposition "for value." A decision to accept stock in GSOC does not entail the sacrifice of any right or claim or the making of any investment decision. For example, the SEC has long held that a dividend paid either in the form of stock or cash at the election of the shareholder is not a "sale" of the shares so distributed. Sec. Rel. No. 33-929 (July 29, 1936). The Commission's position has been that while a waiver of a vested right might constitute "value," simple election between two mutually exclusive, alternative rights, granted without consideration, does not involve the surrender of something of "value" sufficient to bring an optional stock/cash dividend within the statutory meaning of the word "sale." Id. Furthermore, the initial distribution of GSOC stock would appear to be even less a disposition "for value" than an optional stock/cash dividend since a person who elects to receive a share does not give up a right to receive cash or other property. And while it is true that a GSOC shareholder will have made a "decision" to retain his share, he will not have made an "investment" in the GSOC, which would require the giving up of "some tangible and definable consideration in return for an interest" in the corporation. Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 560 (1979) (discussing whether employee makes an "investment" for purposes of the securities laws in noncontributory, compulsory pension plan).

primarily to ensure disclosure sufficient to enable an investor to decide whether to invest his funds in the securities of an issuer, the test of disclosure required under the 33 Act and its regulations seems largely irrelevant to the initial free distribution of GSOC shares. We would appreciate your advising whether the staff would recommend that the Commission take no action with respect to the initial issuance of shares in the Alaska GSOC assuming that the shares are issued without charge.

B. The Transaction is Intrastate.

Even if the Alaska GSOC were to establish a subscription price for its shares, registration should not be required by virtue of the "intrastate offering" exemption provided in Section 3a(11) of the 33 Act for:

"[a]ny security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a . . . corporation, incorporated by and doing business within, such State or Territory."

The Alaska GSOC should have no difficulty meeting the requirements of this exemption. As a precaution, the legislative draftsmen are considering several changes in the draft legislation (such as legends on share certificates disclosing the various restraints on transfer) which will bring the Alaska GSOC squarely within non-exclusive Rule 147 (17

C.F.R. § 230.147). However, in the event certain technical requirements of the Rule are not satisfied, we would be prepared to submit for the staff's review the procedures the Alaska GSOC will adopt to assure that its intent to make an intrastate issue is carried out. While we realize that since the adoption of Rule 147 (S.E.C. Rel. No. 33-5420, January 7, 1974), no-action letters under section 3a(11) are not ordinarily forthcoming, we believe that staff assistance and review before an unregistered issuance of this magnitude by a unique entity would be in the public interest.

IV. The Securities Exchange Act of 1934

Subchapter U, as implemented in Alaska by S.170, will result in a novel entity. In many ways the Alaska GSOC can be seen as a conventional private corporation. Although it is primarily subject to control by the legislature at its formative stage, it is thereafter subject to governance of shareholders^{15/} and the board of directors.^{16/} Yet the GSOC is unique in other respects which are highly relevant to the purposes underlying the regulation of the Securities Exchange

^{15/} A vote of shareholders is required to amend the articles of incorporation, Act § 10.50.375, and to approve certain asset sales.

^{16/} The directors may create and amend the by-laws, Act § 10.50.125, and have other standard management powers of corporate directors.

Act of 1934 ("the 34 Act"). In short, the Alaska GSOC will be owned by over 400,000 citizens of Alaska who have made no equity investment and who each hold one share of the one class of stock issued by the GSOC.^{17/} There will be no corporate shareholders.^{18/} There can be no transfer of GSOC shares for five years from the date of issuance except by reason of death.^{19/} There can be no aggregation of shares as each resident is limited to ownership of ten shares, and for the first five years few residents will hold more than one or two shares.^{20/} Even after the initial five-year period there will remain severe restrictions on the transferability of GSOC shares which will make it difficult if not impossible for a trading market in these shares to develop.^{21/}

^{17/} Although the legislation provides that "at least one share" shall be issued to all eligible individuals, it is our understanding that Alaska plans to issue only one share to each qualifying person.

^{18/} 26 U.S.C. § 1391(a)(4)(D)(ii).

^{19/} 26 U.S.C. § 1391(a)(4)(D)(i); Act § 10.50.320 (a)(8)(A). The one exception is the case of the "eligible individual" who has received his share and then decides to leave Alaska. If he leaves Alaska within five years after date of issuance, the corporation must purchase his share (or shares) at book value. S.170, § 4(c)(1). (The corporation must also purchase at book value the share of an eligible individual who dies within five years and whose share passes by operation of law to a non-resident.)

^{20/} 26 U.S.C. § 1391(a)(4)(D)(iii); Act, § 10.50.320 (a)(8)(C). The only way a resident can hold more than his one original share during the first five years is if he inherits a share from another resident.

^{21/} Even after the five-year period shares may be transferred only to "resident individuals" of Alaska. 26

It is probable that the Alaska GSOC will at some time qualify for application of the 34 Act.^{22/} However, the Commission has authority under two separate sections to provide an exemption from the 34 Act by administrative action. Section 12(h) of the 34 Act provides in relevant part:

"The Commission may by rules and regulations, or upon application of an interested person, by order, after notice and opportunity for hearing, exempt in whole or in part any issuer or class of issuers from [the registration, reporting and proxy provisions of the 34 Act] . . . any security of which is required to be registered . . . upon such terms and conditions and for such period as it deems necessary or appropriate, if the Commission finds, by reason of the number of public investors, amount of trading interest in the securities, the nature and extent of the activities of the issuer, income

[Footnote continued from preceding page]

U.S.C. § 1391(a)(4)(D)(ii). It will not be possible for security brokers or dealers to make a market in Alaska GSOC shares if this section is interpreted to mean such entities cannot hold GSOC shares. Also, since an individual can own no more than ten shares, it may not be feasible to create a trading market funded through transfer fees in a manner comparable to those which exist for other private corporate securities.

^{22/} Assuming that our request for a no-action letter under the 33 Act is successful, later issuances may still require registration under the 33 Act, bringing the 34 Act into play. 34 Act, § 15(d). In addition, the Alaska GSOC may well reach \$1 million in assets soon after its initial distribution of shares. 34 Act, § 12(g). No express statutory exemption to the 34 Act appears applicable to GSOC securities.

or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors.

Section 3(a)(12) of the 34 Act also gives the Commission the discretion to declare the securities of a GSOC "exempted securities." Section 3(a)(12) provides that "exempted securities" include:

"such other securities (which may include, among others, unregistered securities, the market in which is predominantly intra-state) as the Commission may, by such rules and regulations as it deems consistent with the public interest and the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this title which by their terms do not apply to an 'exempted security' or to 'exempted securities.'"

We seek the staff's recommendation that the Commission exercise its discretion under sections 12(h) and 3(a)(12) to grant the Alaska GSOC a conditional and temporary exemption from operation of the 34 Act for the five-year period during which shares can generally not be transferred. We think such an exercise of discretion would be appropriate on the conditions set out below for the following reasons.

First, the anticipated market for GSOC shares will always be totally within Alaska because of the permanent

prohibition against transfer to a non-resident. The only non-Alaskans to receive shares will be those few individuals who inherit a share from an Alaskan. S.170, § 4(c). See also and compare Rule 3(a)12-2, 17 C.F.R. § 240.3a 12-2 (an exemption granted for securities guaranteed and managed by a state or political sub-division).

Moreover, while there is no trading market in GSOC shares, potential investors will not require the types of disclosure the 34 Act was designed to foster, that is, the periodic disclosure of financial and other information to aid the public in making a decision whether to buy or sell shares other than in an initial distribution. Given that there will be no opportunity to make any such investment decision for the first five years, we believe that blanket application of the 34 Act's requirements for initial and periodic reporting would be unduly expensive, burdensome and unnecessary. The Commission has recognized this principle in exempting an Indian tribal corporation, whose shares were not transferable for a period of time, from the requirements of the 34 Act "until 60 days prior to the date the certificates . . . become alienable." See, In the Matter of Menominee Enterprises, Inc., Menominee Common Stock and Voting Trust. Rel. No. 10725 (April 10, 1974).^{23/}

^{23/} The common stock of the corporation was actually issued to Trustees who in turn issued trust certificates to the

Nonetheless, it remains important that shareholders receive accurate and timely financial information to allow them to review the actions of GSOC management and thereby effectively exercise their rights to select the persons to control GSOC operations. The Commission also has an interest in reviewing these materials. Accordingly, Alaska GSOC is prepared as a condition of the temporary exemption requested to distribute and file an annual report to shareholders containing substantially all the information required in annual reports under the 34 Act.^{24/} Similarly, although the Alaska legislation restricts matters that may be considered at a

[Footnote continued from preceding page]

tribal members; the trust certificates were not transferable until January 1, 1976.

^{24/} This report would be in addition to the disclosure obligations mandated by S.170, which include each shareholder's right to examine the GSOC's books and records (Act § 10.50.270 et seq.); each shareholder's right to the GSOC's most recent financial statement (Act, § 10.50.285); the requirement that the GSOC file with the state administrator all annual reports, ballots and other materials which go to shareholders for his review and subject to his regulation concerning fairness, completeness, and non-discrimination (S.170, § 3). S.170 also makes false statements or statements with a tendency to mislead a misdemeanor by the responsible GSOC director, office or agent (Act, § 10.50.630).

In addition, Subchapter U requires the GSOC to file an informational tax return and an annual report with the Secretary of the Treasury "summarizing its operations for each year." (24 U.S.C. § 6039B.) The requirement of reports to Congress by the Joint Committee on Taxation (24 U.S.C. § 1391(e)) provides an added measure of scrutiny of GSOC operations.

shareholder's meeting to a specific agenda, requires direct shareholder voting, and does not permit voting by proxy (Act § 10.50.155), the GSOC would distribute information to shareholders regarding director candidates and other matters to be voted upon at shareholder meetings, as would be required by § 14(c) of the 34 Act and implementing regulations.

Moreover, although we believe that there is a question whether the antifraud provisions of the 34 Act would apply to these reports and to other activities of the Alaska GSOC due to the absence of any purchase or sale of securities,^{25/} the Alaska GSOC is prepared to accept that the

^{25/} While the SEC has on occasion taken the position that the term "sale" for purposes of the antifraud provisions of the Securities Acts encompasses transactions that are not "sales" for the purposes of the registration and reporting requirements of those Acts, the propriety of such a "bifurcated definition of a sale" is by no means certain. Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 567, n.2 (1979); see also id. at 556-557, n.8. The agency itself has stated that its inconsistent interpretations of the term "sale" have resulted in "anomalous applications of the securities laws." Rel. No. 5316 (Oct. 6, 1972) (notice of adoption of Rule 145 requiring certain "business combinations" [e.g., mergers, reorganizations, etc.] be treated as "sales" for purposes of registration requirements of the 1933 Act). Not surprisingly, courts have reached divergent conclusions as to whether the term "sale" should be given the same meaning in each of the various parts of the securities laws in which it appears. Compare Lawrence v. SEC, 398 F.2d 276 (1st Cir. 1968) and Gurvitz v. Bregman & Co., 379 F. Supp. 1283 (S.D.N.Y. 1974) with Dasho v. Susquehanna Corp., 380 F.2d 262 (7th Cir. 1967). In any event, it does seem clear that the term "sale," even as used in the antifraud provisions of the securities laws, does not include transfers made without consideration. See, e.g., Shaw v. Dreyfus, 172 F.2d 140 (2nd Cir. 1949); Turncale v. Blumberg, 80 F. Supp. 387 (S.D.N.Y.

exemption it requests should not apply to relieve it of whatever application of the antifraud provisions of the 34 Act would otherwise obtain.

We believe that the legislative treatment of the Regional Corporations created by the Alaska Native Claims Settlement Act (43 U.S.C. §§ 1601 et seq.) provides a useful model for the type of limited exemption we seek. Under that Act, Congress disbursed federal funds to native peoples of Alaska in settlement of outstanding aboriginal land claims, and authorized the creation under Alaska law of a number of Regional Corporations to administer the funds and oversee land investment on behalf of native residents. The Act, as amended, provides for total exemption of the Corporations from the 34 Act during the period that shares cannot be traded, but also accomplishes in large measure the disclosure function of the 34 Act by requiring that the Corporations send an annual report to shareholders. 43 U.S.C. § 1625.^{26/} The original legislation,

[Footnote continued from preceding page]

1948). 1 L. Loss Securities Laws 1082-1084 (2d ed. 1961). As discussed at pp. 7-8, supra, the initial issuance of shares will be made without payment of consideration of any type by the citizens of Alaska and, therefore, the distribution of these shares would not seem to provide an occasion for applying the antifraud provisions of the securities laws to the Alaska GSOC.

^{26/} Section 1625 provides:

[Footnote continued next page]

passed in 1971, did not address the question of the applicability of the federal securities laws and regulations to the Regional Corporations, but provided for an annual independent audit of each corporation, the results of which were to be transmitted to each shareholder, to the Secretary of the Interior, and to appropriate committees of Congress. As a result, the various Corporations were forced to seek individual administrative relief from the SEC. In 1975, the Act was amended to provide for total exemption of the Regional Corporations from operation of the 33 Act, the 34 Act and the Investment Company Act of 1940, for the years during which

[Footnote continued from preceding page]

"Any corporation organized pursuant to this chapter shall be exempt from the provisions of the Investment Company Act of 1940 (54 Stat. 789), the Securities Act of 1933 (48 Stat. 74), and the Securities Exchange Act of 1934 (48 Stat. 881), as amended, through December 31, 1991. Nothing in this section, however, shall be construed to mean that any such corporation shall or shall not, after such date, be subject to the provisions of such Acts. Any such corporation which, but for this section, would be subject to the provisions of the Securities Exchange Act of 1934 shall transmit to its stockholders each year a report containing substantially all the information required to be included in an annual report to stockholders by a corporation which is subject to the provisions of such Act."

shares in the Regional Corporations could not be transferred except by divorce, separation or death.^{27/} We believe that our proposed disclosures, which follow the line Congress took in the Alaska Native Claims Settlement Act, will promote all relevant purposes of the 34 Act while dispensing with those requirements that, with respect to the Alaska GSOC, would simply create unnecessary burdens without compensating benefits for shareholders.

As a model of the type of disclosure we recommend we attach as Exhibit C the regulations designed for the Asian Development Bank, set out in Rel. No. 33-4889 (December 18, 1967).^{28/}

^{27/} One reason Congress noted for its decision was that the lack of sophistication of most native residents of Alaska made an elaborate prospectus as required by SEC rules less likely to be useful than the SEC suggested. Congress also was moved by the assurance that no trading in the shares would occur, and decided that application of the 34 Act was unnecessary while the stock could not be transferred. However, in the interest of disclosure to the public of relevant information about the Corporations, Congress required an annual report to shareholders containing substantially all information required in the annual reports under the 34 Act. H. Rep. No. 94-729, 94th Cong., 1st Sess. at 17-20 (1975). While the Alaska Native Claims Settlement Act does not require submission of the Annual Report to the SEC, the Alaska GSOC would of course be willing to file with the SEC as a condition of the requested exemption.

^{28/} The Asian Development Bank Act "deemed" the securities of the Bank to be exempt within the meaning of section 3(a)(2) of the 33 Act as well as section 3(a)(12) of the 34 Act, but also provided for periodic filings with the Commission. 2 U.S.C. § 285h(a). Similar treatment is given

The 34 Act's rules that provide for the registration and regulation of brokers, dealers and transfer agents involved in the trading of non-exempt securities may well become applicable at the end of the five-year period when transfer of shares between Alaska residents is allowed. Alaska hopes to use the five-year period to consider the most suitable way to create and monitor trading activities, and hopes to have the continuing opportunity to engage in discussions with the SEC staff in working out in advance whatever problems can be anticipated. For example, it may be possible to use GSOC employees to facilitate transfers between buyers and the GSOC and sellers and the GSOC, at a price set at the pro rata share of the GSOC's current asset value, without matching buyers and sellers and thereby "making" a market.^{29/} Or the Alaska GSOC may at some stage decide to create some sort of unique shareholder voting method using the state's ballot process or some other type of public pronouncement.

[Footnote continued from preceding page]

securities of the World Bank. (1978) 2 Fed. Sec. L. Rep. (CCH) ¶ 21,200.

^{29/} Cf. proposed rule 3a4-1, as proposed in Sec. Rel. No. 34-13195 (January 21, 1977) (persons associated with an issuer are deemed not to be brokers solely for performing "the ministerial and clerical work of effecting any transaction" if other tests of the rule are met).

V. Investment Company Act of 1940

The Investment Company Act of 1940 ("the 40 Act") provides for the registration and regulation of companies whose business is principally investing in the securities of other companies. Assuming that the Alaska GSOC intends to invest in projects which would be considered "securities," it appears that it will come within the definition of "investment company" in section 3(a) of the 40 Act. None of the 40 Act's specific exemptions appear to apply to the Alaska GSOC.

Section 6(c) of the 40 Act provides in general terms that the Commission may exempt a company from the Act where "such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title." In addition, section 6(d) provides that the Commission shall, under certain conditions, exempt closed-end investment companies that do not sell shares for more than \$100,000 and whose securities are not sold or offered outside the state in which the issuer is organized. Section 6(d), like section 6(c), conditions any exemption on its not being "contrary to the public interest or inconsistent with the protection of investors." Since the Alaska GSOC

issues its securities without charge, solely to Alaska residents, it meets all the technical tests for section 6(d).^{30/} Accordingly, if the Commission finds that an exemption is in the public interest and does not jeopardize investors, section 6(c) authorizes, and section 6(d) requires, the Commission to exempt the Alaska GSOC from the 40 Act.

While the Alaska GSOC may fall within the formal definition of an investment company, its unique character and function place it far outside that class of companies which Congress deemed to be in need of SEC regulation. Most of the 40 Act's regulatory provisions were designed to protect investors from the schemes of incompetent or unscrupulous promoters of investment companies. But the Alaska GSOC is not the invention of private promoters seeking to profit from either the sale to investors of shares in an investment company or the sale to the investment company of securities that it may also be marketing. Rather, it is the creation of the State of Alaska which, under the auspices of unique federal tax legislation, is engaging in an experiment in public ownership

^{30/} The Alaska GSOC appears to be a closed-end management company under the definitions of sections 4 and 5 of the 40 Act since shares in the GSOC cannot be redeemed by a resident in exchange for "approximately his proportionate share of the issuer's current net assets" so as to create a "redeemable security" within the meaning of § 2(a)(32) of the 1940 Act.

of Alaskan business. Compliance with the Act's particular requirements should not be necessary to protect the State's citizens from abuses of an experiment of their own creation and for their own benefit.

Section 1(b) of the 40 Act lists the specific abuses that Congress intended to eliminate. It is readily apparent that, while Alaska's legislation does not, in each case, take the same approach as the 40 Act, the GSOC is designed to minimize such abuses. As we now show, GSOC investors will be adequately protected against each of the eight types of abuses specified in section 1(b):

"(1) when investors purchase, pay for, exchange, receive dividends upon, vote, refrain from voting, sell, or surrender securities issued by investment companies without adequate, accurate, and explicit information, fairly presented, concerning the character of such securities and the circumstances, policies, and financial responsibility of such companies and their management."

Since, at least during the first five years, Alaska's citizens will not be buying, selling or otherwise making investment decisions regarding their GSOC securities, there is little need for the type of information supplied in a registration statement pursuant to Section 8 of the 40 Act. In any event, the annual report that we have agreed to provide as

a condition to exemption from the 34 Act should be more than sufficient to meet the information needs of the citizen shareholders.

"(2) when investment companies are organized, operated, managed or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the interest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other investment companies or other persons engaged in other lines of business rather than in the interest of all classes of such companies' security holders;"

The 40 Act protects against these abuses both by attempting to prevent control of an investment company either by its "interested persons" or by its investment adviser or principal underwriter, and by prohibiting an investment company from entering into conflict-of-interest transactions with its investment adviser or other interested or "affiliated" persons without SEC approval. Thus, Section 10 of the 40 Act requires that no more than 60 percent of the board of directors of a registered investment company consist of "interested" persons, and that no investment banker serve as director, officer or employee of the company unless the majority of the Board consists of persons who are neither investment bankers nor affiliated with investment bankers.

It has been noted that

"[t]hese limitations on the composition of the board of directors help to insure that someone in a position of power will serve a 'watchdog' function on behalf of investment company shareholders, especially in situations involving the possible conflicts of interest of external investment advisers."^{31/}

The unique public nature of the GSOC experiment should ensure that "watchdogs" will be present, regardless of whether such watchdogs are included on the Board of Directors or in the company's management. Initial selection of the GSOC's directors must be approved by a majority of the Governor, the Speaker of the Alaska House of Representatives and the President of the Senate. Subsequent elections -- as well as GSOC operations -- should receive sufficient public attention and press coverage to protect against apparent conflicts of interest. In any event, it is highly unlikely that the composition of the GSOC Board of Directors will not comply with the terms of Section 10 of the 40 Act, and the bylaws of the GSOC will undoubtedly provide fully adequate protections against any such danger.

^{31/} A. Rosenblat and M. Lybecker, Some Thoughts on the Federal Securities Laws Regulating External Investment Management Arrangements and the ALI Federal Securities Code Project, 124 U. Pa. L. Rev. 587, 597 (1976).

Section 15 of the 40 Act regulates the relationship between an investment company and its investment advisers and underwriters, and, with Section 17, seeks to protect shareholders from self-dealing between the company and such persons. However, as discussed above, the GSOC will not be investing in portfolio securities and is not expected to employ investment advisers or underwriters. Unlike the typical investment company, the GSOC will not be buying and selling securities in high volume, nor will it be entering into numerous business transactions. Its investments and loan transactions will be few and highly visible, and shareholders will not need the protections of Section 15 or Section 17 to prevent conflict-of-interest transactions.

"(3) when investment companies issue securities containing inequitable or discriminatory provisions, or fail to protect the preferences and the privileges of the holders of their outstanding securities;"

Section 18 of the 40 Act protects against these abuses by requiring that every share of stock issued by a registered company be voting stock with voting rights equal to all other shares, and by prohibiting the issuance of senior securities exempt by closed-end funds with a specified high level of asset coverage. These provisions are unnecessary in the case of the GSOC, since subchapter U itself provides that a GSOC may issue only one class of stock.

"(4) when the control of investment companies is unduly concentrated through pyramiding or inequitable methods of control, or is inequitably distributed, or when investment companies are managed by irresponsible persons."

Control of the GSOC cannot become concentrated, since GSOC stock will be distributed to all Alaska citizens, trading will be prohibited for five years, and no shareholders will be permitted to own more than 10 shares. Thus, the 40 Act safeguards against pyramiding, and other provisions designed to protect against concentration of control are unnecessary.

Moreover, the GSOC legislation provides adequate protection against irresponsible management, though not always by the same means as the 40 Act. As noted above, it is probable that the GSOC will have a substantial proportion of outside directors as safeguards against mismanagement. The GSOC legislation, like Section 17(h) of the 40 Act, does not permit indemnification of the company's officers and directors for grossly negligent or irresponsible actions. While the GSOC has no provision similar to section 17(f) governing custody of its portfolio securities, it is expected, for reasons described above, that the GSOC will not invest in portfolio securities, so that such a provision is unnecessary. Moreover, the Alaska legislation contains a unique protection of against mismanagement that does not apply to ordinary investment

companies. The proposed Act establishes a GSOC "loan guarantee fund," which will be used to guarantee loans made to the GSOC to cover its initial start-up costs. The statute provides that "[i]n guaranteeing a loan, the commissioner of revenue shall review the loan for the purposes of ascertaining the general soundness of the proposed loan and guarding against fraud and misrepresentation." (S. 170, § 4(d).) This unique provision, along with the other safeguards described above, should -- at least during the initial start-up period -- afford protections equivalent to those provided by the 40 Act against fraudulent or irresponsible management.

"(5) when investment companies, in keeping their accounts, in maintaining reserves, and in computing their earnings and the asset value of their outstanding securities, employ unsound or misleading methods, or are not subjected to adequate independent scrutiny."

The special nature of the GSOC should relieve it from the particular accounting requirements of the 40 Act. As noted above, subchapter U requires a GSOC to file an annual report with the Secretary of the Treasury summarizing its operations for that year. Any accounting requirements imposed by the Secretary of the Treasury -- along with the review of the GSOC which will, by statute, be conducted for Congress by the Joint Committee on Taxation -- should subject the GSOC's accounts to more than adequate independent scrutiny.

"(6) when investment companies are reorganized, become inactive, or change the character of their business, or when the control or management thereof is transferred, without the consent of their security holders;"

Subchapter U and the Alaska enabling legislation together provide for shareholder participation in the selection of directors, in corporate decisions regarding reorganization, and in amending the corporation's articles of incorporation with regard to its corporate purposes. There is no provision similar to Section 13 of the 40 Act, which requires shareholder approval of changes in an investment company's investment policies. But, unlike the typical mutual fund or investment company, the GSOC does not, initially, offer investors an opportunity to invest in a specific investment approach. While the GSOC may, in time, develop identifiable investment policies and goals, the experimental nature of the venture is not presently amenable to provisions requiring either immediate identification of such policies or shareholder approval of changes in such policies.^{32/} At least during the initial

^{32/} In this respect, the Alaska GSOC is similar to the Regional Corporations formed pursuant to the Alaska Native Claims Settlement Act. Congress specifically exempted those corporations from the 40 Act coverage during the initial period when their shares were non-transferable because, inter alia, "It is too early for those fledgling corporations to know even what their investment policies and legal and accounting problems may be to make registration practicable for them under the Investment Company Act." H. R. Rep. No. 94-729, 94th Cong., 1st Sess. 17.

five-year period, when citizens are not making investment decisions with regard to the purchase or sale of GSOC shares, there is no need to impose the Act's requirements on the GSOC's investment policies.

"(7) when investment companies by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character of their junior securities;"

As noted above, the GSOC is not permitted to issue more than one class of securities, so that the 40 Act's protections against these abuses need not be imposed upon the GSOC.

"(8) when investment companies operate without adequate assets or reserves."

During the GSOC's initial five years, Alaska's citizen-shareholders bear virtually no risk of GSOC insolvency insofar as they have simply been issued stock and have neither bought nor sold shares in the market. Should the GSOC experiment fail, the citizens would, of course, share the costs of funds expended by the State to establish the company and to guarantee loans, but this loss is attributable to their status as taxpaying citizens, and not as investors. Thus, at least during these initial years, there is no need to encumber the GSOC with rules regulating its capital structure -- many of

which, in any event, apply only to companies issuing more than one class of securities.

* * *

In short, the 40 Act is designed to protect against abuses which either are not likely to be associated with a GSOC or are adequately protected against by the GSOC's own structure and enabling legislation. In these circumstances, exempting the GSOC from the 40 Act's requirements would be wholly consistent with the protection of investors -- and thus with the provisions of sections 6(c) and (d) of the Act. Moreover, such an exemption would clearly be in the public interest, as required by the Act, insofar as it relieves the GSOC of burdensome and unnecessary regulation, and affords the GSOC the flexibility that it will require in its initial years to determine how best to pursue this social experiment.

We hope that the Commission will exempt the Alaska GSOC from operation of the 40 Act, at least for the first five years of its existence. We would, as discussed above, expect that any such exemption be made conditional upon compliance with the modified 34 Act disclosures that we have proposed. And we propose that the question of 40 Act regulation -- like the question of the 34 Act coverage -- be revisited after the end of the initial five-year period.

* * *

On behalf of the proposed Alaska GSOC, we thank the staff for its consideration of this matter. We would be pleased to meet to discuss any of the issues involved at your early convenience.

Wilmer & Pickering
WILMER & PICKERING

Internal Revenue Code, 26 U.S.C. §§ 1391-1397

SUBCHAPTER U—GENERAL STOCK OWNERSHIP
CORPORATIONS

Sec. 1391.	Definitions.	Sec. 1395.	Adjustments to basis of stock of shareholders.
1392.	Election by general stock ownership corporation.	1396.	Minimum distribution.
1393.	Corporation taxable income taxed to shareholders.	1397.	Special rules applicable to earnings and profits of an electing general stock ownership plan.
1394.	Rules applicable to distributions of electing general stock ownership corporations.		

§ 1391. Definitions

(a) **General stock ownership corporation.**—For purposes of this subchapter, the term "general stock ownership corporation" (hereinafter referred to as a "GSOC") means a domestic corporation which—

(1) is not a member of an affiliated group (as defined in section 1504), and

(2) is chartered and organized after December 31, 1978, and before January 1, 1984;

(3) is chartered by an act of a State legislature or as a result of a State-wide referendum;

(4) has a charter providing—

(A) for the issuance of only 1 class of stocks,

(B) for the issuance of shares only to eligible individuals (as defined in subsection (c));

(C) for the issuance of at least one share to each eligible individual, unless such eligible individual elects within one year after the date of issuance not to receive such share;

(D) that no share of stock shall be transferable—

(i) by a shareholder other than by will or the laws of descent and distribution until after the expiration of 5 years from the date such stock is issued by the GSOC except where the shareholder ceases to be a resident of the State;

(ii) to any person other than a resident individual of the chartering State;

(iii) to any individual who, after the transfer, would own more than 10 shares of the GSOC;

(E) that such corporation shall qualify as a GSOC under the Internal Revenue Code;

(5) is empowered to invest in properties (but not in properties acquired by it or for its benefit through the right of eminent domain).

For purposes of this subsection, section 1504(a) shall be applied by substituting "20 percent" for "80 percent" wherever it appears.

(b) **Electing GSOC.**—For purposes of this subchapter, the term "electing GSOC" means a GSOC which files an election under section 1392 which, under section 1392, is in effect for such taxable year.

(c) **Eligible individuals.**—For purposes of subsection (a), the term "eligible individual" means an individual who is, as of a date specified in the State's enabling legislation for the GSOC, a resident of the chartering State and who remains a resident of such State between that date and the date of issuance.

(d) **Treated as private corporation.**—For purposes of this title, a GSOC shall be treated as a private corporation and not as a governmental unit.

(e) **Study of general stock ownership corporations.**—The staff of the Joint Committee on Taxation shall prepare a report on the operation and effects of this subchapter relating to GSOC's. An interim report shall be filed within two years after the first GSOC is formed and a final report shall be filed by September 30, 1983.

Added Pub.L. 95-600, Title VI, § 601(a), Nov. 6, 1978, 92 Stat. 2892.

References in Text. This title, referred to in subsec. (d), probably means Title VI of Pub.L. 95-600, which enacted this subchapter, section 6039B of this title, amended sections 172, 1018, and 3402 of this title, and enacted provision set out as a note under this section.

Effective Date. Section 601(d) of Pub. L. 95-600 provided that: "The amendments made by this section [enacting

this subchapter, section 6039B of this title, and amending sections 172, 1018, and 3402 of this title] shall apply with respect to corporations chartered after December 31, 1978, and before January 1, 1984."

Legislative History. For legislative history and purpose of Pub.L. 95-600, see 1978 U.S.Code Cong. and Adm.News, p. 6761.

§ 1392. Election by GSOC

(a) **Eligibility.**—Except as provided in section 1393, any GSOC may elect, in accordance with the provisions of this section, not to be subject to the taxes imposed by this chapter.

(b) **Effect.**—If a GSOC makes an election under subsection (a) then—

(1) with respect to the taxable years of the GSOC for which such election is in effect, such corporation shall not be subject to the taxes imposed by this chapter and, with respect to such taxable years and all succeeding taxable years, the provisions of section 1396 shall apply to such GSOC, and

(2) with respect to each such taxable year, the provisions of sections 1393, 1394, and 1395 shall apply to the shareholders of such GSOC.

(c) **Where and how made.**—An election under subsection (a) may be made by a GSOC at such time and in such manner as the Secretary shall prescribe by regulations.

(d) **Years for which effective.**—An election under subsection (a) shall be effective for the taxable year of the GSOC for which it is made and for all succeeding taxable years of the GSOC, unless it is terminated under subsection (f).

(e) **Taxable year.**—The taxable year of a GSOC shall end on October 31 unless the Secretary consents to a different taxable year.

(f) **Termination.**—The election of a GSOC under subsection (a) shall terminate for any taxable year during which it ceases to be a GSOC and for all succeeding taxable years. The election of a GSOC under subsection (a) may be terminated at any other time with the consent of the Secretary, effective for the first taxable year with respect to which the Secretary consents and for all succeeding taxable years.

Added Pub.L. 95-600, Title VI, § 601(a), Nov. 6, 1978, 92 Stat. 2893.

Legislative History. For legislative history and purpose of Pub.L. 95-600, see 1978 U.S.Code Cong. and Adm.News, p. 6761.

§ 1393. GSOC taxable income taxed to shareholders

(a) **General rule.**—The taxable income of an electing GSOC for any taxable year shall be included in the gross income of the shareholders of such GSOC in the manner and to the extent set forth in this subsection.

(1) **Amount included in gross income.**—Each shareholder of an electing GSOC on any day of a taxable year of such GSOC shall include in his gross income for the taxable year with or within which the taxable year of the GSOC ends the amount he would have received if, on each day of such taxable year, there had been distributed pro rata to its shareholders by such GSOC an amount equal to the taxable income of the GSOC for its taxable year divided by the number of days in the GSOC's taxable year.

(2) **Taxable income defined.**—For purposes of this section, the term "taxable income" of a GSOC shall be determined without regard to the deductions allowed by part VIII of subchapter B (other than deductions allowed by section 248, relating to organizational expenditures).

(b) **Special rule for investment credit.**—The investment credit of an electing GSOC for any taxable year shall be allowed as a credit to the shareholders of such corporation in the manner and to the extent set forth in this subsection.

(1) **Credit.**—There shall be apportioned among the shareholders a credit equal to the amount each shareholder would have received if, on each day of such taxable year, there had been distributed pro rata to the shareholders the electing GSOC's net investment credit divided by the number of days in the GSOC's taxable year.

(2) **Net investment credit.**—For purposes of this paragraph the term "net investment credit" means the investment credit of the electing GSOC for its taxable year less any tax from recomputing a prior year's investment credit in accordance with section 47.

(3) **Recapture.**—There shall be apportioned among the shareholders of a GSOC, in the manner described in paragraph (1), an additional tax equal to the excess of any tax resulting from recomputing a prior year's investment credit in accordance with section 47 over the investment credit of the GSOC for its taxable year.

Added Pub.L. 95-600, Title VI, § 601(a), Nov. 6, 1978, 92 Stat. 2894.

Legislative History. For legislative history 1978 U.S. Code Cong. and Adm. News, p. 6761 and purpose of Pub.L. 95-600, see 6761.

§ 1394. Rules applicable to distributions of an electing GSOCs

(a) **Shareholder income account.**—An electing GSOC shall establish and maintain a shareholder income account which account shall be—

(1) increased at the close of the GSOC's taxable year by an amount equal to the GSOC's taxable income for such year, and

(2) decreased, but not below zero, on the first day of the GSOC's taxable year by the amount of any GSOC distribution to the shareholders of such GSOC made or treated as made during the prior taxable year.

(b) **Taxation of distributions.**—Distributions by an electing GSOC shall be treated as—

(1) a distribution of previously taxed income to the extent such distribution does not exceed the balance of the shareholder income account as of the close of the taxable year of the GSOC, and

(2) a distribution to which section 301(a) applies but only to the extent such distribution exceeds the balance of the shareholder income account as of the close of the taxable year of the GSOC.

(c) **Distributions not treated as a dividend.**—Any amounts includible in the gross income of any individual by reason of ownership of stock in a GSOC shall not be considered as a dividend for purposes of section 116.

(d) **Regulations.**—The Secretary shall have authority to prescribe by regulation, rules for treatment of distributions in respect of shares of stock of the GSOC that have been transferred during the taxable year.

Added Pub.L. 95-600, Title VI, § 601(a), Nov. 6, 1978, 92 Stat. 2895.

Legislative History. For legislative history 1978 U.S. Code Cong. and Adm. News, p. 6761 and purpose of Pub.L. 95-600, see 6761.

§ 1395. Adjustment to basis of stock of shareholders

The basis of a shareholder's stock in an electing GSOC shall be increased by the amount includible in the gross income of such shareholder under section 1393, but only to the extent to which such amount is actually included in the gross income of such shareholder.

Added Pub.L. 95-600, Title VI, § 601(a), Nov. 6, 1978, 92 Stat. 2895.

Legislative History. For legislative history 1978 U.S. Code Cong. and Adm. News, p. 6761 and purpose of Pub.L. 95-600, see 6761.

§ 1396. Minimum distributions

(a) **General rule.**—A GSOC shall distribute at least 90 percent of its taxable income for any taxable year by January 31 following the close of such taxable year. Any distribution made on or before January 31 shall be treated as made as of the close of the preceding taxable year.

(b) **Imposition of tax in case of failure to make minimum distributions.**—If a GSOC fails to make the minimum distribution requirements described in subsection (a), there is hereby imposed a tax equal to 20 percent of the excess of the amount required to be distributed over the amount actually distributed.

Added Pub.L. 95-600, Title VI, § 601(a), Nov. 6, 1978, 92 Stat. 2895.

Legislative History. For legislative 1978 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 95-600, see 6761.

§ 1397. Special rules applicable to an electing GSOC

(a) **General rule.**—The current earnings and profits of an electing GSOC as of the close of its taxable year shall not include the amount of taxable income for such year which is required to be included in the gross income of the shareholders of such GSOC under section 1393(a).

(b) **Special rule for audit adjustments.**—

(1) **Taxable income.**—Taxable income of an electing GSOC shall, in the year of final determination, be increased or decreased, as the case might be, by any adjustment to taxable income for a prior taxable year.

(2) **Investment credit.**—The net investment credit of an electing GSOC shall, in the year of final determination, be increased or decreased, as the case might be, by any adjustment to the net investment credit for a prior taxable year.

(3) **Method of making adjustments.**—An electing GSOC shall include in gross income for the year of an adjustment the amount described in paragraph (1) and shall take into account the adjustment described in paragraph (2), and shall be liable for payment of interest in the amount that would have been payable by the GSOC under section 6601 (relating to interest on underpayment, nonpayment or extensions of time for payment, of tax) or receivable by the GSOC under section 6611 (relating to interest on overpayments) if such GSOC had been a corporation other than an electing GSOC.

Added Pub.L. 95-600, Title VI, § 601(a), Nov. 6, 1978, 92 Stat. 2895.

Legislative History. For legislative 1978 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 95-600, see 6761.

For RELEASE Monday, December 18, 1967

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C.

ASIAN DEVELOPMENT BANK ACT
Release No. 1
SECURITIES ACT OF 1933
Release No. 4889
SECURITIES EXCHANGE ACT OF 1934
Release No. 8209
TRUST INDENTURE ACT OF 1939
Release No. 242

ADOPTION OF REGULATION AD

The Securities and Exchange Commission today adopted rules and regulations specifying the periodic and other reports to be filed with it by the Asian Development Bank. This action is taken pursuant to Section 11(a) of the Asian Development Bank Act.

Section 11 of the above-mentioned Act exempts from registration under both the Securities Act of 1933 and the Securities Exchange Act of 1934 securities issued in connection with the raising of funds for inclusion in the Bank's ordinary capital resources and securities guaranteed as to both principal and interest by the Bank. However, the Bank is required to file with the Commission such annual and other reports with respect to such securities as the Commission shall determine to be appropriate in view of the special character of the Bank and its operations and necessary in the public interest or for the protection of investors. It would appear that an exemption is available under the Trust Indenture Act of 1939.

The new rules and regulations adopted today require the Bank to file with the Commission substantially the same information, documents and reports as would be required if the Bank had securities registered under the Securities Exchange Act of 1934. The Bank is also required to file a report with the Commission not less than seven days prior to the date on which any of its primary obligations are sold to the public in the United States, or such shorter period as the Commission may authorize. This report and the periodic reports to be filed will make available at the Commission information quite similar to the information which would be required in a registration statement under the Securities Act of 1933.

The Commission is informed by the Bank that no public offering of securities guaranteed by the Bank is presently contemplated. Accordingly, the new rules, insofar as they require the reporting of the proposed public sale of securities, are limited to the sale of primary obligations of the Bank. Rules with respect to reporting the proposed sale of securities guaranteed by the Bank will be adopted by the Commission when the need therefor arises.

The new regulation, which is designated Regulation AD, was adopted pursuant to Section 11(a) of the Asian Development Bank Act, the Commission finding such action appropriate in view of the special character of the Asian Development Bank and its operations and necessary in the public interest and for the protection of investors. The text of the regulation follows.

REGULATION AD

Rule 1. Applicability of Regulation.

Regulation AD prescribes the reports to be filed with the Securities and Exchange Commission by the Asian Development Bank pursuant to Section 11(a) of the Asian Development Bank Act.

Rule 2. Periodic Reports.

(a) Within 60 days after the end of each of its fiscal quarters, the Bank shall file with the Commission the following information:

- (1) Information as to any purchases or sales by the Bank of its primary obligations during such quarter.
- (2) Copies of the Bank's regular quarterly financial statement.
- (3) Copies of any material modifications or amendments during such quarter of any exhibits (other than (i) constituent documents defining the rights of holders of securities of other issuers guaranteed by the Bank, and (ii) loans and guaranty agreements to which the Bank is a party) previously filed with the Commission under any statute.

(b) Copies of each annual report of the Bank to its Board of Governors shall be filed with the Commission within 10 days after the submission of such report to the Board of Governors.

Rule 3. Reports with Respect to Proposed Distribution of Primary Obligations.

The Bank shall file with the Commission, not less than seven days prior to the date on which it proposes to sell any of its primary obligations in connection with a distribution of such obligations in the United States, or such shorter period as the Commission may authorize, a report containing the information and documents specified in Schedule A below. The term "sell" as used in this rule and in Schedule A means the making of a completed sale or a firm commitment to sell.

Rule 4. Preparation and Filing of Reports.

(a) Every report required by this regulation shall be filed under cover of a letter of transmittal which shall state the nature of the report and indicate the particular rule and subdivision thereof pursuant to which the report is filed. At least the original of every such letter shall be signed on behalf of the Bank by a duly authorized officer thereof.

(b) Two copies of every report, including the letter of transmittal, exhibits and other papers and documents comprising a part of the report, shall be filed with the Commission.

(c) The report shall be in the English language. If any exhibit or other paper or document filed with the report is in a foreign language, it shall be accompanied by a translation into the English language.

(d) Reports pursuant to Rule 3 may be filed in the form of a prospectus to the extent that such prospectus contains the information specified in Schedule A.

SCHEDULE A

This schedule specifies the information and documents to be furnished in a report pursuant to Rule 3 with respect to a proposed distribution of primary obligations of the Bank. Information not available at the time of filing the report shall be filed as promptly thereafter as possible.

Item 1. Description of Obligations.

As to each issue of primary obligations of the Bank which is to be distributed, furnish the following information:

- (a) The title and date of the issue.
- (b) The interest rate and interest payment dates.
- (c) The maturity date or, if serial, the plan of serial maturities. If the maturity of the obligation may be accelerated, state the circumstances under which it may be so accelerated.
- (d) A brief outline of (1) any redemption provisions and (2) any amortization, sinking fund or retirement provisions, stating the annual amount, if any, which the Bank will be under obligation to apply for the satisfaction of such provisions.
- (e) If secured by any lien, the kind and priority thereof, and the nature of the property subject to the lien; if any other indebtedness is secured by an equal or prior lien on the same property, state the nature of such other liens.
- (f) If any obligations issued or to be issued by the Bank will, as to the payment of interest or principal, rank prior to the obligations to be distributed, describe the nature and extent of such priority.
- (g) Outline briefly any provisions of the governing instruments under which the terms of the obligations to be distributed may be amended or modified by the holders thereof or otherwise.
- (h) Outline briefly any other material provisions of the governing instruments pertaining to the rights of the holders of the obligations to be distributed or pertaining to the duties of the Bank with respect thereto.
- (i) The name and address of the fiscal or paying agent of the Bank, if any.

Item 2. Distribution of Obligations.

- (a) Outline briefly the plan of distribution of the obligations and state the amount of the participation of each principal underwriter, if any.
- (b) Describe any arrangements known to the Bank or to any principal underwriter named above designed to stabilize the market for the obligations for the account of the Bank or the principal underwriters as a group and indicate whether any transactions have already been effected to accomplish that purpose.
- (c) Describe any arrangements for withholding commissions, or otherwise, to hold each underwriter or dealer responsible for the distribution of his participation.

Item 3. Distribution Spread.

The following information shall be given, in substantially the tabular form indicated, as to all obligations which are to be offered for cash (estimate, if necessary):

	Price to the Public	Selling Discounts and Commissions	Proceeds to the Bank
Per Unit	_____	_____	_____
Total	_____	_____	_____

Item 4. Discounts and Commissions to Sub-Underwriters and Dealers.

State briefly the discounts and commissions to be allowed or paid to dealers. If any dealers are to act in the capacity of sub-underwriters and are to be allowed or paid any additional discounts or commissions for acting in such capacity, a general statement to that effect will suffice, without giving the additional amounts to be so paid.

Item 5. Other Expenses of Distribution.

Furnish a reasonably itemized statement of all expenses of the Bank in connection with the issuance and distribution of the obligations, except underwriters' or dealers' discounts and commissions.

Instruction. Insofar as practicable, the itemization shall include transfer agents' fees, cost of printing and engraving, and legal and accounting fees. The information may be given as subject to future contingencies. If the amounts of any items are not known, estimates, designated as such, shall be given.

Item 6. Application of Proceeds.

Make a reasonably itemized statement of the purposes, so far as determinable, for which the net proceeds to the Bank from the obligations are to be used, and state the approximate amount to be used for each such purpose.

Item 7. Exhibits to be Furnished.

The following documents shall be attached to or otherwise furnished as a part of the report:

- (a) Copies of the constituent instruments defining the rights evidenced by the obligations.
- (b) Copies of an opinion of counsel, in the English language, as to the legality of the obligations.
- (c) Copies of all material contracts pertaining to the issuance or distributions of the obligations, to which the Bank or any principal underwriter of the obligations is or is to be a party, except selling group agreements.
- (d) Copies of any prospectus or other sales literature to be provided by the Bank or any of the principal underwriters for general use in connection with the initial distribution of the obligations to the public.

* * * * *

Because of the limited applicability of Regulation AD, on which the views and comments of the Bank have been received and considered, the Commission finds that notice and procedure pursuant to the Administrative Procedure Act are unnecessary.

The foregoing action of the Commission shall become effective upon publication, December 18, 1967.

By the Commission.

Orval L. DuBois
Secretary

Original sponsors: Colletta, Stimson,
and Fahrenkamp

Offered: 4/27/79
Referred: Rules

1 IN THE SENATE

BY THE FINANCE COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 170

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 ELEVENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to general stock ownership corpora-
7 tions and creating the Alaska General Stock Ownership
8 Corporation; changing Rule 23.1, Rules of Civil Proce-
9 dure; and providing for an effective date."

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

11 * Section 1. AS 10 is amended by adding a new chapter to read:

12 CHAPTER 50. GENERAL STOCK OWNERSHIP CORPORATIONS.

13 ARTICLE 1. SUBSTANTIVE PROVISIONS.

14 Sec. 10.50.005. PURPOSES. A general stock ownership corporation
15 may be organized under this chapter for any lawful purpose unless limited
16 by the chartering legislation of a corporation.

17 Sec. 10.50.010. GENERAL STOCK OWNERSHIP CORPORATIONS. (a) A
18 corporation organized under this chapter is a general stock ownership
19 corporation and shall be formed in accordance with subchapter U, chapter
20 1 of the Internal Revenue Code of 1954, as amended (26 U.S.C. secs.
21 1391 - 1397), and with this chapter. A corporation is subject to the
22 provisions of this chapter and subchapter U, chapter 1 of the Internal
23 Revenue Code of 1954, as amended (26 U.S.C. sec. 1391 - 1397).

24 (b) A corporation is not an agency, instrumentality, or political
25 subdivision of the state for any purpose.

26 Sec. 10.50.015. GENERAL POWERS. A corporation may

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

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

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

3 (4) buy, lease, or otherwise acquire, own, hold, improve, use
4 and otherwise deal in, real or personal property or any interest in
5 property, except that the corporation may not invest in property ac-
6 quired by it, or for its benefit, through the right of eminent domain;

7 (5) sell or otherwise dispose of all or any part of its
8 property and assets;

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

11 (7) buy or otherwise acquire, own, hold, vote, use, sell,
12 mortgage, lend, pledge, or otherwise dispose of, and otherwise use and
13 deal in shares or other interests in, or obligations of, other corpora-
14 tions, associations, partnerships or individuals, or in direct or in-
15 direct obligations of the United States or of any other government,
16 state, territory, or municipality or of any instrumentality of them;

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

21 (9) lend money for its corporate purposes, invest and rein-
22 vest its funds, and take and hold real and personal property as security
23 for the payment of funds loaned or invested;

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

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

29 (12) make and alter bylaws not inconsistent with its articles

1 of incorporation or with the laws of the state, for the administration
2 and regulation of the affairs of the corporation;

3 (13) donate for the public welfare or for charitable, scienti-
4 fic or educational purposes, and in time of war donate in aid of war
5 activities;

6 (14) transact lawful business in time of war in aid of the
7 United State in the prosecution of the war;

8 (15) pay pensions and establish pension plans, pension trusts,
9 profit-sharing plans, and other incentive plans for its directors,
10 officers and employees;

11 (16) cease its corporate activities and surrender its corporate
12 franchise;

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

16 (18) have and exercise lawful powers necessary to carry out
17 the purposes for which the corporation is organized.

18 Sec. 10.50.020. INDEMNIFICATION OF OFFICERS, DIRECTORS, EMPLOYEES
19 AND AGENTS; INSURANCE. (a) A corporation may indemnify a person who
20 was or is a party or is threatened to be made a party to a threatened,
21 pending, or completed action or proceeding, whether civil, criminal,
22 administrative, or investigative, other than an action by or in the
23 right of the corporation, by reason of the fact that he is or was a
24 director, officer, employee or agent of the corporation, or is or was
25 serving at the request of the corporation as a director, officer,
26 employee or agent of another corporation, partnership, joint venture,
27 trust or other enterprise. Indemnification may be against expenses
28 including attorney fees, judgments, fines, and amounts paid in settle-
29 ment actually and reasonably incurred by him in connection with the

1 action or proceeding if he acted in good faith and in a manner he
2 reasonably believed to be in or not opposed to the best interests of the
3 corporation, and, with respect to a criminal action or proceeding, had
4 no reasonable cause to believe his conduct was unlawful. The termina-
5 tion of an action or proceeding by judgment, order, settlement, convic-
6 tion, or upon a plea of nolo contendere or its equivalent, does not, of
7 itself, create a presumption that the person did not act in good faith
8 and in a manner which he reasonably believed to be in or not opposed to
9 the best interests of the corporation, and, with respect to a criminal
10 action or proceeding, had reasonable cause to believe that his conduct
11 was unlawful.

12 (b) A corporation may indemnify a person who was or is a party or
13 is threatened to be made a party to a threatened, pending or completed
14 action by or in the right of the corporation to procure a judgment in
15 its favor by reason of the fact that he is or was a director, officer,
16 employee, or agent of the corporation, or is or was serving at the re-
17 quest of the corporation as a director, officer, employee, or agent of
18 another corporation, partnership, joint venture, trust or other enter-
19 prise. Indemnification may be against expenses, including attorney
20 fees, actually and reasonably incurred by him in connection with the
21 defense or settlement of the action if he acted in good faith and in a
22 manner he reasonably believed to be in or not opposed to the best inter-
23 ests of the corporation. However, indemnification may not be made for
24 any claim, issue or matter as to which the person has been adjudged to
25 be liable for negligence or misconduct in the performance of his duty to
26 the corporation except to the extent that the court in which the action
27 was brought determines upon application that, despite the adjudication
28 of liability, in view of all the circumstances of the case the person is
29 fairly and reasonably entitled to indemnity for the expenses which the

1 court considers proper.

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

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

14 (1) by the board of directors by a majority vote of a quorum
15 consisting of directors who were not parties to the action or proceed-
16 ing, or

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

20 (3) by the stockholders.

21 (e) Expenses incurred in defending a civil or criminal action or
22 proceeding may be paid by the corporation in advance of the final dis-
23 position of the action or proceeding as authorized by the board of
24 directors in the specific case upon receipt of an undertaking by or on
25 behalf of the director, officer, employee or agent to repay the amount
26 unless it is ultimately determined that he is entitled to be indemini-
27 fied by the corporation as authorized in this section.

28 (f) The indemnification provided by this section is not exclusive
29 of any other rights to which a person seeking indemnification may be

1 entitled under any bylaw, agreement, vote of stockholders or disinter-
2 ested directors or otherwise, both as to action in his official capacity
3 and as to action in another capacity while holding the office, and
4 continues as to a person who has ceased to be a director, officer,
5 employee or agent, and inures to the benefit of the heirs, executors and
6 administrators of that person.

7 (g) A corporation may purchase and maintain insurance on behalf of
8 a person who is or was a director, officer, employee or agent of the
9 corporation, or is or was serving at the request of the corporation as a
10 director, officer, employee or agent of another corporation, partner-
11 ship, joint venture, trust or other enterprise against any liability
12 asserted against him and incurred by him in such a capacity, or arising
13 out of his status as such, whether or not the corporation would have the
14 power to indemnify him against the liability under the provisions of
15 this section.

16 Sec. 10.50.030. DEFENSE OF ULTRA VIRES. No act of a corporation
17 and no conveyance or transfer of real or personal property to or by a
18 corporation is invalid because the corporation did not have capacity or
19 power to perform the act or to convey or receive the property. However,
20 lack of capacity or power may be asserted as follows.

21 (1) The assertion may be made in a proceeding by a share-
22 holder against the corporation to enjoin the performance of any act or
23 the transfer of real or personal property by or to the corporation. If
24 the unauthorized act or transfer sought to be enjoined is being or to be
25 performed or made under a contract to which the corporation is a party,
26 the court may, if the parties to the contract are parties to the pro-
27 ceeding and if the court considers it equitable, set aside and enjoin
28 the performance of the contract, and in so doing may allow compensation
29 to the corporation or to the other parties to the contract for the loss

1 or damage sustained by either of them resulting from the action of the
2 court in setting aside and enjoining the performance of the contract.
3 The court may not award anticipated profits to be derived from the
4 performance of the contract as a loss or damage sustained.

5 (2) The assertion may be made in a proceeding by the corpora-
6 tion, whether acting directly or through a receiver, trustee, or other
7 legal representative, or through shareholders in a representative suit,
8 against the incumbent or former officers or directors of the corpora-
9 tion.

10 (3) The assertion may be made in a proceeding by the attorney
11 general to dissolve the corporation, or to enjoin the corporation from
12 the transaction of unauthorized business.

13 Sec. 10.50.035. CORPORATE NAME. The corporate name shall contain
14 the words "general stock ownership corporation" or an abbreviation of
15 these words. It may not contain a word or phrase which indicates or
16 implies that it is organized for a purpose other than the purpose con-
17 tained in the articles of incorporation. It may not be the same as, or
18 deceptively similar to, the name of a domestic corporation existing
19 under the laws of the state or a foreign corporation authorized to
20 transact business in the state, or a name which has been reserved or
21 registered as provided in this chapter.

22 Sec. 10.50.040. RESERVATION OF CORPORATE NAME. (a) The exclusive
23 right to the use of a corporate name may be reserved by

24 (1) a person intending to organize a corporation under this
25 chapter;

26 (2) a corporation intending to change its name.

27 (b) Reservation of a corporate name is made by filing an applica-
28 tion with the commissioner. If the commissioner finds that the name is
29 available for corporate use, and not a reserved or registered business

1 name as set out in AS 10.35.010 - 10.35.090, he shall reserve it for the
2 exclusive use of the applicant for a period of two years. A reservation
3 of corporate name may be renewed for one year.

4 (c) The holder of a reserved corporate name may transfer the right
5 to the exclusive use of the corporate name to another person by filing a
6 notice of transfer with the commissioner, signed by the holder and
7 specifying the name and address of the transferee.

8 Sec. 10.50.045. FOREIGN GENERAL STOCK OWNERSHIP CORPORATIONS.
9 Corporations organized under the laws of another state shall be governed
10 according to AS 10.05.

11 Sec. 10.50.050. REGISTERED OFFICE AND REGISTERED AGENT. A corpor-
12 ation shall continuously maintain in the state a registered office which
13 may be, but need not be, the same as its place of business, and a regis-
14 tered agent. The registered agent may be either an individual resident
15 of the state whose business office is the same as the registered office,
16 or a corporation organized under AS 10.05 whose business office is the
17 same as the registered office.

18 Sec. 10.50.055. FILING LIST OF REGISTERED CORPORATIONS WITH SUPER-
19 IOR COURT. The commissioner shall file a list of the name of each
20 corporation, the address of the registered office, and the name and
21 address of the registered agent with each clerk of the superior court.
22 The commissioner shall provide a periodic supplement to the list indi-
23 cating additions, deletions and changes at least once every six months.
24 The commissioner shall make the list available to the public for a fee
25 prescribed by him.

26 Sec. 10.50.060. CHANGE OF REGISTERED OFFICE OR AGENT. (a) A
27 corporation may change its registered office, agent, or both, by filing
28 with the department a verified statement signed by the president or
29 vice-president setting out

- 1 (1) the name of the corporation;
- 2 (2) the address of its registered office;
- 3 (3) the address of its new registered office if the regis-
- 4 tered office is to be changed;
- 5 (4) the name of its registered agent;
- 6 (5) the name of its new registered agent, if its registered
- 7 agent is to be changed;
- 8 (6) that the change is authorized by resolution of its board
- 9 of directors.

10 (b) If the commissioner finds that the verified statement complies
11 with this chapter, he shall file it in his office. The change becomes
12 effective when the statement is filed.

13 Sec. 10.50.065. REGISTRATION OF REGISTERED AGENT. (a) If the
14 registered agent of a corporation changes the location of his office
15 from one address to another within a city or town, or from one city or
16 town in the state to another, he may change the registered office for
17 each corporation for whom he is acting as registered agent by filing in
18 the office of the commissioner a statement setting out

- 19 (1) the name of the agent;
- 20 (2) the address of his office before change;
- 21 (3) the address to which the office is changed; and
- 22 (4) a list of corporations for whom he is furnishing a regis-
- 23 tered office.

24 (b) The statement in (a) of this section must be executed by the
25 registered agent in his individual name and, if the agent is a corpora-
26 tion it must be executed by its president or a vice-president and veri-
27 fied by him. The statement must be delivered to the commissioner and if
28 he finds that the statement complies with this chapter, he shall file it
29 in his office. The change becomes effective when the statement is

1 filed.

2 (c) A registered agent may resign by filing a written notice,
3 executed in duplicate, with the commissioner. The written notice of
4 resignation shall set out the latest address of the principal office of
5 the corporation and the names, addresses and titles of the most recent
6 officers of the corporation known by the agent. The commissioner shall
7 immediately mail a copy of the notice to the corporation at its princi-
8 pal office. The appointment of the agent terminates 30 days after
9 receipt of the notice by the commissioner.

10 Sec. 10.50.070. SERVICE OF PROCESS ON CORPORATION. (a) The
11 registered agent of a corporation is an agent upon whom process, notice
12 or demand required or permitted by law to be served upon the corporation
13 may be served.

14 (b) When a corporation fails to appoint or maintain a registered
15 agent in the state, or when its registered agent cannot, with reasonable
16 diligence, be found at the registered office, the commissioner is an
17 agent of the corporation upon whom the process, notice, or demand may be
18 served. Service is made upon the commissioner as agent by leaving with
19 him, or with a clerk having charge of the corporation department of his
20 office, duplicate copies of the process, notice or demand. When pro-
21 cess, notice or demand is served on the commissioner, he shall immedi-
22 ately forward a copy of it by registered mail to the corporation at its
23 registered office. Service on the commissioner is returnable in not
24 less than 30 days.

25 (c) The commissioner shall keep a record of processes, notices and
26 demands served upon him showing the time of service and his action with
27 reference to the service. This chapter does not limit or affect the
28 right to serve process, notice or demand required or permitted by law to
29 be served upon a corporation in any other manner permitted by law.

1 Sec. 10.50.075. CREATION AND ISSUANCE OF SHARES. A corporation
2 may create and issue the number of shares stated in its articles of
3 incorporation and as provided in AS 10.50.320(a)(5) - (7). The shares
4 shall be without par value.

5 Sec. 10.50.080. CONSIDERATION FOR SHARES. (a) Shares may be
6 issued without consideration or for consideration fixed by the share-
7 holders before the issuance. Consideration for shares shall be fixed by
8 a vote of a majority of the shares voting on the issue.

9 (c) Treasury shares may be disposed of by the corporation for
10 consideration not more than the book value of the shares.

11 Sec. 10.50.085. PAYMENT FOR SHARES. (a) Consideration for the
12 issuance of shares if required may be paid, in whole or in part, in
13 money, in other property, tangible or intangible, or in labor or ser-
14 vices actually performed for the corporation. When payment of the
15 consideration for shares is received by the corporation, the shares are
16 considered fully paid and nonassessable.

17 (b) A promissory note or future service does not constitute pay-
18 ment or part payment for shares of a corporation.

19 Sec. 10.50.090. JUDGMENT OF BOARD OR SHAREHOLDER AS TO VALUE OF
20 CONSIDERATION CONCLUSIVE. In the absence of fraud in the transaction,
21 the judgment of the board of directors or the shareholders as to the
22 value of the consideration received for shares is conclusive.

23 Sec. 10.50.095. EXPENSES OF ORGANIZATION, REORGANIZATION AND
24 FINANCING. The reasonable charges and expenses of organization or
25 reorganization of a corporation, and the reasonable expenses of and
26 compensation for the sale or underwriting of its shares, may be paid or
27 allowed by the corporation out of the consideration received by it in
28 payment for its shares without rendering the shares not fully paid and
29 nonassessable.

1 Sec. 10.50.100. CERTIFICATES REPRESENTING SHARES. The shares of a
2 corporation shall be represented by certificates signed by the president
3 or vice-president and the secretary or an assistant secretary of the
4 corporation, and may be sealed with the seal of the corporation or a
5 facsimile of the seal. The signatures of the president or vice-presi-
6 dent and the secretary or assistant secretary on a certificate may be
7 facsimiles if the certificate is countersigned by a transfer agent, or
8 registered by a registrar, other than the corporation itself or an
9 employee of the corporation. If an officer who has signed or whose
10 facsimile signature has been placed on a certificate ceases to be an
11 officer before the certificate is issued, it may be issued by the cor-
12 poration with the same effect as if he were an officer at the date of
13 its issue.

14 Sec. 10.50.105. INFORMATION REQUIRED TO BE STATED ON CERTIFICATE.
15 Each certificate representing shares shall state on the face

- 16 (1) that the corporation is organized under the laws of the
17 state;
18 (2) the name of the person to whom issued;
19 (3) the number of shares which the certificate represents;
20 (4) a statement that the shares are without par value.

21 Sec. 10.50.110. FULL PAYMENT REQUIRED FOR CERTIFICATE. A certi-
22 ficate may not be issued for a share until the share is fully paid if
23 consideration is required.

24 Sec. 10.50.115. ISSUANCE OF FRACTIONAL SHARES. (a) A corporation
25 may issue a certificate for a fractional share.

26 (b) A certificate for a fractional share entitles the holder to
27 exercise voting rights, to receive dividends, and to participate in the
28 assets of the corporation in the event of liquidation.

29 Sec. 10.50.120. LIABILITY OF SUBSCRIBERS AND SHAREHOLDERS. (a) A

1 holder of or subscriber to shares of a corporation is under no obliga-
2 tion to the corporation or its creditors with respect to the shares
3 other than the obligation to pay to the corporation the full considera-
4 tion for which the shares were issued or to be issued.

5 (b) An assignee or transferee of shares or of a subscription for
6 shares in good faith and without knowledge or notice that the full
7 consideration has not been paid is not personally liable to the corpora-
8 tion or its creditors for any unpaid portion of the consideration.

9 (c) An executor, administrator, conservator, guardian, trustee,
10 assignee for the benefit of creditors, or receiver is not personally
11 liable to the corporation as a holder of or subscriber to shares of a
12 corporation but the estate and funds held by him are liable.

13 (d) A pledgee or other holder of shares as collateral security is
14 not personally liable as a shareholder.

15 Sec. 10.50.125. BYLAWS. The board of directors shall adopt the
16 initial bylaws of a corporation in accordance with AS 10.50.335. The
17 power to alter, amend or repeal the bylaws or to adopt new bylaws is
18 vested in the board of directors and the shareholders. The bylaws may
19 contain provisions for the regulation and management of the affairs of
20 the corporation consistent with law and the articles of incorporation.

21 Sec. 10.50.130. MEETINGS OF SHAREHOLDERS. (a) Meetings of share-
22 holders shall be held in the state, as may be provided in the bylaws.
23 The board of directors shall designate the place of the meeting.

24 (b) An annual meeting of the shareholders shall be held at the
25 time provided in the bylaws. Failure to hold the annual meeting at the
26 designated time does not work a forfeiture or dissolution of the corpora-
27 tion.

28 (c) Special meetings of the shareholders may be called by the
29 president, by the board of directors, by the holders of not less than

1 1,000 shares, or by the other officers or persons provided in the
2 articles of incorporation or the bylaws.

3 (d) The shareholders of a corporation may participate in a meeting
4 of the shareholders by communicating simultaneously with the other
5 shareholders from places designated in the notice of meeting by means of
6 conference telephones or other communications equipment, so long as all
7 shareholders participating in the meeting can hear one another.

8 Sec. 10.50.135. NOTICE OF SHAREHOLDERS' MEETINGS. (a) Beginning
9 not less than 150 days before a meeting of shareholders, the corporation
10 shall notify the shareholders of the time and manner in which (1) nomi-
11 nations for the board of directors of the corporation may be made and
12 (2) issues may be placed on the corporation ballot for consideration by
13 the shareholders. Notice shall be by publication in newspapers in all
14 regions of the state and shall appear at least weekly for not less than
15 four weeks.

16 (b) Written or printed notice stating the place, day and hour of
17 the meeting and, in case of a special meeting, the purpose for which the
18 meeting is called, shall be delivered not less than 60 nor more than 90
19 days before the date of the meeting, either personally or by mail, by or
20 at the direction of the president, the secretary, or the officer or
21 persons calling the meeting, to each shareholder of record entitled to
22 vote at the meeting. If mailed, the notice is considered delivered when
23 deposited in the United States mail addressed to the shareholder at his
24 address as it appears on the stock transfer books of the corporation,
25 with postage prepaid.

26 Sec. 10.50.140. CLOSING OF TRANSFER BOOKS AND FIXING RECORD DATE.

27 (a) To determine the shareholders entitled to notice of or to vote at a
28 meeting of shareholders or an adjournment of a meeting, or entitled to
29 receive payment of a dividend, or in order to make a determination of

1 shareholders for any other proper purpose, the board of directors of a
2 corporation may provide that the stock transfer books shall be closed
3 for a stated period not exceeding 90 days. If the stock transfer books
4 are closed to determine shareholders entitled to notice of or to vote at
5 a meeting of shareholders, they shall be closed for at least 60 days
6 immediately preceding the meeting.

7 (b) Instead of closing the stock transfer books, the bylaws, or in
8 the absence of an applicable bylaw the board of directors, may fix in
9 advance a date as the record date for the determination of shareholders.
10 This record date shall be not more than 90 days and, in case of a meeting
11 of shareholders, not less than 60 days before the date on which the
12 particular action requiring the determination of shareholders is to be
13 taken. If the stock transfer books are not closed and no record date is
14 fixed for the determination of shareholders entitled to notice of or to
15 vote at a meeting of shareholders, or shareholders entitled to receive
16 payment of a dividend, the date on which notice of the meeting is mailed
17 or the date on which the resolution of the board of directors declaring
18 the dividend is adopted is, as the case may be, the record date for the
19 determination of shareholders. When a determination of shareholders
20 entitled to vote at a meeting of shareholders is made, the determination
21 applies to an adjournment of the meeting except when the determination
22 has been made through the closing of the stock transfer books and the
23 stated period of closing has expired.

24 Sec. 10.50.145. VOTING LIST. (a) At least 60 days before each
25 meeting of shareholders, the officer or agent having charge of the stock
26 transfer books for shares of a corporation shall make a list of the
27 shareholders entitled to vote at the meeting or an adjournment of the
28 meeting, arranged in alphabetical order, with the address of and the
29 number of shares held by each. The list shall be kept on file at the

1 registered office of the corporation and is subject to inspection by a
2 shareholder at any time during usual business hours for a period of 60
3 days before the meeting. The list shall also be produced and kept open
4 at the time and place of the meeting and shall be subject to the inspec-
5 tion of a shareholder during the meeting. The original stock transfer
6 books are prima facie evidence as to who are the shareholders entitled
7 to examine the list or transfer books or to vote at a meeting of share-
8 holders.

9 (b) Failure to comply with the requirements of this section does
10 not affect the validity of the action taken at the meeting.

11 Sec. 10.50.150. QUORUM OF SHAREHOLDERS. One-third of the shares
12 entitled to vote, represented in person or by ballots, constitutes a
13 quorum at a meeting of shareholders. Each outstanding share is entitled
14 to one vote on each matter submitted to a vote at a meeting of share-
15 holders. If a quorum is present, the affirmative vote of the majority
16 of the shares represented at the meeting and entitled to vote on the
17 subject matter is the act of the shareholders, unless the vote of a
18 great number is required by this chapter or the articles of incorpora-
19 tion or the bylaws.

20 Sec. 10.50.155. PROXY VOTING PROHIBITED. A shareholder may not
21 vote by proxy.

22 Sec. 10.50.160. VOTING FOR DIRECTORS. At an election for directors
23 every shareholder entitled to vote may vote the number of shares owned
24 by him for as many persons as there are directors to be elected and for
25 whose election he has a right to vote. Shareholders may not cumulate
26 their votes.

27 Sec. 10.50.165. VOTING OF SHARES IN THE NAME OF ANOTHER. (a)
28 Shares held by an administrator, executor, guardian or conservator may
29 be voted by him, either in person or by ballot, without a transfer of

1 the shares into his name.

2 (b) Shares standing in the name of a receiver may be voted by him,
3 and shares held by or under the control of a receiver may be voted by
4 him without the transfer of the shares into his name if authority to do
5 so is contained in an appropriate order of the court by which the
6 receiver was appointed.

7 Sec. 10.50.170. VOTING OF PLEDGED SHARES. A shareholder whose
8 shares are pledged may vote the shares until they have been transferred
9 into the name of the pledgee, and thereafter the pledgee may vote the
10 shares so transferred.

11 Sec. 10.50.175. CORPORATION BALLOT. (a) The corporation shall
12 prepare one ballot for each meeting of the shareholders. The ballot
13 shall be mailed to the shareholders with the notice of meeting. Candi-
14 dates for the board of directors and proposals for shareholder consider-
15 ation shall be included in the ballot as provided in this section.

16 (b) A candidate for director shall be nominated by

17 (1) a resolution adopted by the board of directors; or

18 (2) a petition signed by at least 1,000 shareholders and
19 filed with the secretary of the corporation at least 120 days before the
20 meeting at which the election is to be held.

21 (c) A proposal for amendment of the bylaws or other proper corpor-
22 ate purpose shall be included on the ballot if authorized by

23 (1) a resolution adopted by the board of directors setting
24 out the proposal and directing that it be submitted to a vote at the
25 meeting of shareholders; or

26 (2) a petition, setting out the proposal and directing that
27 it be submitted to a vote at the next meeting of shareholders, signed by
28 at least 1,000 shareholders and filed with the secretary of the corpora-
29 tion at least 120 days before the next meeting of shareholders.

1 (d) A written or printed notice setting out the candidates' quali-
2 fications for office and the proposals to be put to a vote of the share-
3 holders and any materials in opposition to the proposals shall be given
4 to each shareholder of record entitled to vote within the time and in
5 the manner provided in this chapter for the giving of notice of meetings
6 of shareholders.

7 Sec. 10.50.180. BOARD OF DIRECTORS. (a) The business and affairs
8 of a corporation shall be managed by a board of directors. At least
9 three-quarters of the board of directors, including the chairman of the
10 board of directors, must be residents of the state. The articles of
11 incorporation or bylaws may prescribe other qualifications for direc-
12 tors. The compensation of directors shall be fixed by the bylaws.

13 (b) A director is entitled to attend any meeting of a committee of
14 the board of directors whether or not he is a member of the committee.
15 A director is entitled to inspect all records of any committee of the
16 board of directors.

17 (c) An officer or employee of the corporation may not serve as a
18 member of the board of directors.

19 Sec. 10.50.185. NUMBER OF DIRECTORS. (a) The number of directors
20 of a corporation shall be at least three. The number of directors shall
21 be fixed by the bylaws, except that the number constituting the initial
22 board of directors shall be fixed by the chartering legislation.

23 (b) The number of directors may be increased or decreased by
24 amendment to the bylaws, but a decrease may not shorten the term of an
25 incumbent director.

26 (c) In the absence of a bylaw fixing the number of directors, the
27 number shall be the same as that stated in the chartering legislation.

28 (d) The board of directors shall be divided into two classes, each
29 class to be as nearly equal in number as possible, with the term of

1 office of directors of the first class to expire at the first annual
2 meeting of shareholders after their election, that of the second class
3 to expire at the second annual meeting after their election. At each
4 annual meeting after the classification the number of directors equal to
5 the number of the class whose term expires at the time of the meeting
6 shall be elected to hold office until the second succeeding annual
7 meeting if there are two classes. No classification of directors is
8 effective prior to the first annual meeting of shareholders.

9 Sec. 10.50.190. ELECTION OF DIRECTORS. At the first annual meet-
10 ing of shareholders and at each annual meeting thereafter the share-
11 holders shall elect directors. Each director holds office for the term
12 for which he is elected and until his successor is elected and quali-
13 fied.

14 Sec. 10.50.195. VACANCIES. A vacancy occurring in the board of
15 directors may be filled by the affirmative vote of a majority of the
16 remaining directors though the majority is less than a quorum of the
17 board. A director elected by the board of directors to fill a vacancy
18 shall serve until the next annual meeting. The shareholders shall elect
19 a director for the unexpired term, if any, of the director's position to
20 which the board elected his predecessor. A directorship to be filled by
21 reason of an increase in the number of directors shall be filled by
22 election at an annual meeting or at a special meeting of shareholders
23 called for that purpose. In no case may a vacancy continue for longer
24 than six months or until the next annual meeting, whichever occurs
25 first.

26 Sec. 10.50.200. QUORUM OF DIRECTORS. A majority of the number of
27 directors fixed by the bylaws, or in the absence of a bylaw fixing the
28 number of directors, then of the number stated in the articles of incor-
29 poration, constitutes a quorum for the transaction of business unless a