ALASKA LEGISLATURE COMMITTEE FILES 1983 - 1984 8672
2641 SLC SB 246 (FILE 1) - (FILE 2)
2641

Many states grant a close corporation shareholder the right to petition for dissolution. However, in states such as California and Illinois, the right to petition is conditioned on the existence of corporate deadlock or the failure of any agreed remedies, such as arbitration. In addition to the normal grounds for involuntary dissolution, both California §1800(b) and New Jersey §14A:12-7(1)(c) give corporations with few shareholders additional grounds to ask for dissolution. California provides that if a corporation has fewer than 35 shareholders, dissolution may be granted if it is "necessary for the protection of rights or interests of the complaining shareholder . . ." New Jersey allows dissolution, or the appointment of a provisional or custodial director, upon a showing of mismanagement, abuse of authority, fraudulent behavior, or oppressive or unfair conduct by the corporation's directors if the corporation has 25 or fewer shareholders.

Other states, such as Maryland §4-603, provide for a "buy out" of the disgruntled shareholder in lieu of dissolution. Finally, some states allow the articles to give specific individuals the ability to dissolve the corporation at will. Ill. §1213.

Many states provide for the appointment of provisional directors. Cal. §308; Del. §353; Kansas §17-7213; N.J. 14A:12-7(3); Pa. §1384; Tex. Art. 2.30-4. A provisional director is a temporary addition to the corporation's existing board. He or she serves to break a corporate deadlock. As soon as the problem is resolved, the tenure of the provisional

director ends. A custodial director, on the other hand, has much broader powers. Generally, a custodian may assume duties of a corporate officer and manage the day-to-day corporate business. He or she may disregard the board and run the corporation on independent judgment. The custodian answers only to the court. Five states have adopted this drastic remedy: Ariz. §10.214A (called a conservator--scope of powers set by court); Del. §352; Kansas §17-7212; N.J. 14A12-7(4); and Pa. §1383.

Delaware, Kansas, and Pennsylvania utilize the custodian remedy upon deadlock and when the corporation is managed by the shareholders or when the petitioning shareholder has a right to dissolve the corporation under the articles. New Jersey's custodian is available to any corporation, subject to court order. It is basically an equitable receiver. Arizona's conservator is court-appointed when it is found that deadlock threatens to impair the conduct of the business.

6. Changes in Basic Structure

All states that treat the close corporation separately make provision for the merger or transformation into a public corporation. The main issue here is the type of approval necessary to convert the corporation's status.

Most states require a two-thirds vote of the shareholders, unless the articles provide for a higher requirement. Del. §346; Cal. §§158(c) (conversion), 1111 (merger); Ill. §1207; Kansas §17-7206; Pa. §1376. Arizona §10-211 and Maryland §4-203 require, however, unanimous shareholder approval to change status.

C. Legislative Agenda for Statutory Concessions to the Close Corporation

Should the Commission decide that specific concessions to closely held entities are desirable, then several legislative choices need to be made. Initially, the Commission must decide upon the method for defining a "close corporation." The Commission must next determine the application of agency law to the close corporation. As yet, no jurisdiction has addressed this problem. Such silence is an invitation to litigation. Finally, the Commission must decide the substantive breadth of any proposed statute.

1. The definitional criteria: As indicated in the survey of close corporations statutes in other jurisdictions, there is a major split respecting the criteria to be used in defining the close corporation. Many states, including California and Delaware, have opted for a numerical ceiling as the defining factor. The numbers range from a low of ten shareholders in California to a high of thirty-five permitted under the recent Texas Act. A second group of states focus upon the marketability of the corporation's stock as a defining factor. Close corporation status is available to those entities whc shares are not listed on a "national exchange" (New York, New Jersey, and South Carolina) or whose shares are "not generally traded on public markets" (North Carolina). Adoption of this approach would open the concessions to virtually every corporation organized under the laws of Alaska. As a third option, the Commission could follow the example of Maryland and simply leave the election

of close corporate status to the incorporators with no definitional requirements.

Recommendations of the drafter: There is a sense in which the motivation for statutory concessions impinges upon the selection of definitional criteria. If the major social issue is the "locked in" syndrome deplored by Professor Bradley, the absence of public trading in the shares becomes a rational criteria. Before the Commission should take this step, it may wish to consider that the pragmatic consequence is the likely availability of these statutory concessions to every business in Alaska. The social costs detailed in the anti-concessions arguments would be high indeed.

The drafter suggests that the Commission opt for a numerical limitation as the definitional factor. Further, the drafter recommends that the number be set at 15. The attraction of this figure is coordination with the Sub-chapter S election which, ironically, permits the close corporation to be taxed as if it were a prtnership. In the view of the drafter, such a limitation has the further advantage of minimizing the social costs involved in the proliferation of these fragile entities. It also permits increased certainty for the counseling lawyer.

2. The impact upon the law of agency: It has come as a surprise to the drafter that none of the existing statutory concessions to closely held entities has dealt with the inevitable complications which will be encountered with the law of agency. A brief summary of the classical law will illustrate the potential problem.

If a business is conducted as a sole proprietorship, the proprietor may choose to deal with third parties through the use of agents. The creation of this principal/agent relationship is consensual and conscious. A third party dealing with an individual who purports to be an agent for a disclosed principal has a duty to determine the bona fides of this claim as well as the extent of the agent's authority. If the agent has exceeded the authority defined (expressly or by implication) by his principal, the principal escapes liability on the unauthorized transaction. However, if the principal is guilty of acts or omissions which would cause a third party to reasonably be deceived into believing in the authority of the agent, such a betrayed principal is liable to the innocent third party on a theory of apparent authority.

What happens if the third party deals with a business conducted by more than one individual in a partnership form? The Uniform Partnership Act decrees that every partner is an agent of the firm. Further, the act of every partner apparently carrying on business of the partnership in the usual way binds the firm even though it is done without the authority of the other partners. The only exception is for a third party who has actual knowledge of the partner's lack of authority. It will at once be seen that the risks of internal disagreement inherent in this association of enterprisers is, by operation of the partnership act, turned against the firm. It is deemed unreasonable to place third parties at peril that a particular partner is, in fact, acting without the concurrence of a majority of the firm.

What if the business is a corporation? Here the problem is crucial, for a corporation, unlike a general or limited partnership, is a distinct legal entity. Who may bind such a "principal"? In order to answer this question, the law relied upon the pyramid corporate structure. The Board of Directors is regarded as the principal in that it is to make the determinations upon which transactions are authorized. Yet corporate officers are deemed to be agents, for they have the routine contact with third parties. In general, the president of the corporation is deemed a plenary agent with certain powers of agency inherent in the occupation of that office. Notwithstanding, a third party on notice that she is dealing with a corporate officer stands at peril of determining the bona fides of that relationship and the sufficiency of the officer's real authority from the board to cover the contemplated transaction.

Comes now the "close corporation" with the touted functional identity between shareholders, directors and officers. How is the law of agency to divide the risk of the "faithless or imposter agent" as between the enterprisers and third parties?

Recommendations of the drafter: The oft asserted desire of proponents of the concession theory to "incorporate partnerships" suggests to the drafter that the provisions of the Uniform Partnership Act provide a useful key to the application of agency law. Further, the drafter would like to suggest that many problems can be prevented in the market-

place if the statute commands that in all transactions a close corporation be forced to identify its status by the use of ". . . A Close Corporation" or "C.C." as part of its name. To alert third parties as to the nature of the beast is to set the stage for inquiry and care which the law demands. If the close corporation is thus identified, the problem of unauthorized transactions should be minimized while concepts akin to the UPA §§3, 9, 12, 13 and 14 are recommended to apportion the unavoidable balance of the risk to the enterprisers who are gaining the privilege of close incorporation.

3. Substantive Breadth of Close Corporate Legislation: The nature and extent of the concessions given to close corporations determines the impact of the statute; in short, a close corporation statute may be judged by the exemptions it creates. Historically, states have made concessions in three areas: management structure, share transfer restrictions, and dispute resolution.

a. Management structure: Every state which has acted in this area to date has made concessions to the alleged need for relaxation of the pyramid model of corporate organization. The rationale is the asserted human identity of the persons otherwise forced to play the role of shareholders, directors, and officers. The typical exemptions are two: the statutes are amended to permit sterilization or elimination of the board (so that there is direct shareholder management) or the members of the board are subjected to control by shareholder agreements.

Whether the board is eliminated or subjected to control by shareholders, the heart of the "new order" is the role of the agreement. Several important legislative choices immediately arise. Must the agreement be the product of unanimous consent or may a majority faction of the shareholders act in this extraordinary manner? How "formal" ought the agreement be? Here the choices range from New York's requirement that the agreement be the product of unanimous consent and enshrined in the articles of incorporation. Other jurisdictions deviate from the New York approach by failing to require that the unanimous agreement be placed in the articles. They would honor the terms of a less formally expressed agreement. Delaware stands at the opposite extreme requiring neither unanimity nor formal expression in the articles. Thus, unless the shareholders of a Delaware close corporation elect to eliminate the board and run the company directly, they may control election to the board and the apportionment of offices by an agreement among a bare majority of the shareholders.

In favor of the Delaware approach is the minimized risk of paralysis which is the constant threat to any requirement of unanimous consent. The danger of the Delaware approach is setting the stage for a "gang up" on a locked-in majority.

Recommendation of the drafter: On balance, the drafter favors the New York requirement that the shareholder agreement be placed in the articles of incorporation. It is felt that this formalism will have both a strong cautionary impact upon

the parties as well as an evidentiary convenience should a court ever be called upon to intervene. As a price tag for this concession from the pyramid model, the drafter favors the language found in many statutes to the effect that the fiduciary duties of care and loyalty which the act imposed upon officers and directors devolve upon shareholders to the extent that, by terms of agreement or conduct, they have usurped these roles.

b. Stock transfer restrictions: By their nature, close corporations tend to be highly personal associations. Because of this, many participants desire to have firm control over the transfer of ownership rights. Most close corporate legislation contains concessions to this desire. Indeed, Delaware and Illinois require such restrictions as a pre-condition for close corporate status.

Recommendation of the drafter: Transfer restrictions such as those found in the California Corporations Code appear both reasonable in nature and functional in operation. Should the Commission take this path, these provisions are recommended.

c. Special dispute resolution procedures: A social cost of concessions to the close corporation is the high probability that such creatures will wind up in a "legal emergency room." Due to the highly personal nature of the close association and the frequent use of shareholder agreements requiring unanimous consent, the potential for corporate deadlock is transformed into a probability. The vexing fact is that small matters or even petty personal differences may

cause deadlock in what is otherwise a profitable concern. Increasingly, concession states are experimenting with remedial devices. New Jersey and California take a pessimistic view, reacting to the probable deadlock by relaxing the grounds under which a disgruntled faction may seek involuntary dissolution. Both jurisdictions join Delaware and Texas in providing for appointment of a "provisional director" to resolve a single issue dispute. If the rift is deeper or more pervasive, New Jersey, Pennsylvania and Delaware provide for a custodial director; a modern day equivalent of an equitable receiver who, instead of liquidating the business, attempts to preserve it despite the battling owners.

The legislative decisions presented by this panoply of remedies involve cost/effectiveness balancing. Each successive remedy has the potential to increase litigation and to enmesh the time and attention of a court with the evolving problems of a going concern. Every other litigant on the docket of a trial court must suffer delay and inconvenience as the inevitable price for this exertion. Balanced against these costs are the interests of society in preservation of going concerns which function as employers, competitors and sources of goods and services in the marketplace.

Recommendation of the drafter: New Jersey has given its courts of general jurisdiction the full range of remedial devices to deal with the problem of deadlock for all corporations. Its only special concession is in giving small corporations more expansive grounds for dissolution. The

inherent disadvantages in such a step include increased litigation and increased potential for judicial interference in business matters. An alternative would involve extensive use of private arbitration. Arizona and Maryland have created great incentives to use this remedy. As a price tag for close corporate status, the act could require that the enterprisers agree to mandatory arbitration of any disputes arising under their agreement.

Appendix A

I. States with Separate Close Corporation Articles or Other Groupings

State	Statutory Provisions	Year of Enactment
1. Arizona	§§10-201 to 10-218	1976
2. Delaware	Tit. 8, §§ 341-56	1953
3. Florida	Repealed 1975	1963
4. Illinois*	Chap. 32, §§ 1201-16	1977
5. Kansas	§§ 17-7201 to 17-7216	1972
6. Maryland*	§§ 4-101 to 4-603	1967, revised 1975
7. Pennsylvania	Tit. 15, §§ 1371-86	1968
8. Texas*	BCL Art. 2.30-1 to 2.30-5	1973, revised 1975

II. States with Scattered Provisions Relating to Close Corporations (references are to provisions defining the close corporation)

State	Statutory Provision	Year of Enactment
1. California	Cal. Corp. Code § 158	1975
2. Maine	Tit. 13-A, § 102(5)	1973
3. Michigan	MSA § 21.200(101), (103)	1972
4. New Jersey*	Tit. 14A:5-21(3)(b)	1972

III. States Which Define the Close Corporation for One Specific Purpose

State	Statutory Provision	Year of Enactment
1. Florida	§ 607.107	1973 (shareholder agreements)
2. New York	BCl § 620(c)	1946 (shareholder management)
3. North Carolina*	§ 55-73	1955 (shareholder agreements)
4. South Carolina	§ 33-11-220	1962 (shareholder agreements)

IV. States Which Use the Number of Shareholders as a Defining Factor

State	Number Used	Other restrictions
1. Arizona	Initially, 10	Articles provision
2. California	10	Articles provision
3. Delaware	30	Articles provision No public offering of stock
4. Kansas	30	Articles provision No public offering of stock
5. Maine	20	
6. Pennsylvania	30	Articles provision No public offering of stock
7. Texas	35	Articles provision No public offering of stock Unanimous shareholder election

*Denotes Model Act State

Appendix A (cont.)

V. States Which Use the Marketability of the Corporation's Stock as a Defining Factor

State	General Language	Other Restrictions
1. Florida (both old and new)	"not generally traded on public markets"	
2. New Jersey	"not listed on nat'l sec. exch."	
3. New York	"not listed on nat'l sec. exch."	
4. North Carolina	"not generally traded on pub. mkts"	unanimous s/h election
5. South Carolina	"not listed on nat'l sec. exch."	unanimous s/h election

VI. States Which Use Shareholder Election as a Defining Factor

State	Other Restrictions
1. Maryland	None
2. Illinois	Must use one of five statutory means of transfer restriction
3. Arizona	Cannot have more than 10 initial stockholders
4. Texas	No more than 35 shareholders; no public offering of stock
5. North Carolina	Stock cannot be listed on nat'l sec. exch.
6. South Carolina	Stock cannot be listed on nat'l sec. exch.

DELANEY, WILES, HAYES, REITMAN & BRUBAKER, INC.
ATTORNEYS AT LAW
SUITE 400
1007 WEST 3rd AVENUE
ANCHORAGE, ALASKA 99501-1990
TELEPHONE 279-3581
TELECOPIER 277-1331
AREA CODE 907
TELEX 25-477

JAMES J. DELANEY
EUGENE F. WILES
GEORGE N. HAYES
STANLEY H. REITMAN
JOHN K. BRUBAKER
RAYMOND E. PLUMMER, JR.
DANIEL A. GERETY
ROBERT L. EASTAUGH
STEPHEN M. ELLIS
CLAY A. YOUNG

KAREN L. HUNT
WILLIAM E. MOSELEY
MARC D. BOND
J. MICHAEL MOXNESS
J. D. CELLARS
GREGORY J. MOTYKA
JAMES B. FRIDERICI

March 30, 1984

Senator Joseph P. Josephson
Alaska Senate
Capitol, Room 508/510
Juneau, Alaska 99811

Re: SB 246
An Act Revising the
Corporate Code

Dear Senator Josephson:

Enclosed is a copy of the report dated March 30, 1984 made by the Task Force of the Business Law Section of the Alaska Bar Association to the Judiciary plus Labor and Commerce Committees of the Alaska House as agreed to during the course of the public hearing in Anchorage by such Committees on February 24, 1984.

This is the report described in my March 12, 1984 letter to you and your responsive March 16, 1984 communication.

Very truly yours,

Stanley H. Reitman

SHR:jf

cc: Alaska Code Revision Commission
John W. Abbott, Chairman
L. S. Kurtz, Jr., Esq.
Judge Thomas B. Stewart
Alaska Bar Association
Paul D. Kelly, Esq.

EXHIBIT D

RECEIVED MAR 3 0 1984

LAW OFFICES
STRACHAN, KELLY & PATTERSON

JOHN B. STRACHAN
PAUL D. KELLY
JOHN B. PATTERSON

880 H STREET
SUITE 201
ANCHORAGE, ALASKA 99501
(907) 279-2322
(907) 338-6777

March 30, 1984

Honorable Charlie Bussell
House Labor and Commerce Committee
Pouch V
Juneau, Alaska 99811

Re: Report of the Task Force of the Business Law Section of the Alaska Bar Association regarding HB 343 and SB 246, Corporate Code Revision.

Dear Representative Bussell:

Enclosed please find the report of the Task Group of the Business Law Section of the Alaska Bar Association. The report is the result of significant efforts by members of the task group who took time out of their busy practices to serve without compensation in providing their expertise on a subject of great importance to the Alaska business community. Each member on the task group has significant experience as a business law practioner.

Admittedly, the accompanying report is a brief review of a lengthy piece of legislation. The drafters have attempted to highlight certain areas of concern and hope that this report will aid the legislature. Listed below are the members who participated in the task group and their addresses and phone numbers. Please feel free to contact the group if we can be of any further assistance.

Very truly yours,

Paul D. Kelly

Paul D. Kelly
Chairman,
Business Law Section
of the Alaska Bar Association

PDK/oj
enclosure

LAW OFFICES
STRACHAN, KELLY & PATTERSON

JOHN R. STRACHAN
PAUL D. KELLY
JOHN B. PATTERSON

880 H STREET
SUITE 201
ANCHORAGE, ALASKA 99501
(907) 279-2322
(907) 338-6777

March 30, 1984

Honorable John J. Cowdery
House Labor and Commerce Committee
Pouch V
Juneau, Alaska 99811

Re: Report of the Task Force of the Business Law Section of the Alaska Bar Association regarding HB 343 and SB 246, Corporate Code Revision.

Dear Representative Cowdery:

Enclosed please find the report of the Task Group of the Business Law Section of the Alaska Bar Association. The report is the result of significant efforts by members of the task group who took time out of their busy practices to serve without compensation in providing their expertise on a subject of great importance to the Alaska business community. Each member on the task group has significant experience as a business law practioner.

Admittedly, the accompanying report is a brief review of a lengthy piece of legislation. The drafters have attempted to highlight certain areas of concern and hope that this report will aid the legislature. Listed below are the members who participated in the task group and their addresses and phone numbers. Please feel free to contact the group if we can be of any further assistance.

Very truly yours,

Paul D. Kelly

Paul D. Kelly
Chairman,
Business Law Section
of the Alaska Bar Association

PDK/pj
enclosure

Members of the Task Force

David Bendell	Bendell, Bendell, Simon & Platt 4796 Business Park Blvd. Suite 4 Anchorage, Alaska 99503 (907) 562-3343
Richard Block	Alaska National Insurance 7001 Jewel Lake Road Anchorage, Alaska 99502 (907) 248-2642
Julius Brecht	Holland, Trefry & Brecht 3003 Minnesota Drive Anchorage, Alaska 99503 (907) 272-4471
Brian Brundin	Hughes, Thorsness Gantz Powell & Brundin 509 W. Third Avenue Anchorage, Alaska 99501 (907) 274-7522
Mark Copeland	Copeland, Landye Bennett & Wolfe 420 L Street Anchorage, Alaska 99501 (907) 276-5152
Ken Eggers	Groh, Eggers & Price 550 W. 7th Avenue Anchorage, Alaska 99501 (907) 272-6474
Bruce Frenzel	ARCO Law Department 711 W. 8th Avenue Anchorage, Alaska 99501 (907) 265-6102

Ray Gardner and
John Norman

Hartig Rhodes Norman
Mahoney & Edwards
717 K Street
Anchorage, Alaska 99501
(907) 274-3576

Stan Reitman

Delaney Wiles Hayes Reitman
& Brubaker
1007 W. Third Avenue
Anchorage, Alaska 99501
(907) 279-3581

Richard Rosston

Ely, Guess & Rudd
510 L Street
Anchorage, Alaska 99501
(907) 276-5121

ALASKA BAR ASSOCIATION

P.O. BOX 279, ANCHORAGE, ALASKA 99510, (907) 272-7469

BUSINESS LAW SECTION

March 30, 1984

Honorable Charlie Bussell
House Labor and Commerce Committee
Pouch V
Juneau, Alaska 99811

Re: Report of the Task Force of the Business Law Section of the Alaska Bar Association regarding HB 343 and SB 246, Corporate Code Revision.

Dear Sir:

Enclosed is a review by the Task Force of the Business Law Section of the Alaska Bar Association of Senate Bill 246 and House Bill 343, the Corporate Code Revision.

The Review represents a time-limited study of the bills and was performed for the limited purpose of bringing to your attention some of the possible legal and economic consequences to the business community and the Alaska public that could arise if the bill were adopted in its present form. We urge you, then to consider this only as such and not an exhaustive section by section analysis of proposed amendments or a scholarly attempt at opposition or rebuttal to the work product of the Code Revision Commission.

In our deliberations, we met, both in subcommittees and as a whole Task Force with John Abbott, Chairman of the Code Revision Commission. At some of those meetings, Jerry Kurtz, another member of the Commission, was also present. At these meetings there was candid exchanges of views on the bills. In addition, we were advised that Professor Dan Fessler was available to meet with us, although at a date too late to assist us with this report given the time constraints put on our work by your Committees.

Individual sections of the bills are commented upon in the attached review, but considering the bills as a whole, we would make the following observations:

ALASKA BAR ASSOCIATION

P.O. BOX 279, ANCHORAGE, ALASKA 99510, (907) 272-7469

BUSINESS LAW
SECTION

March 30, 1984

Honorable John J. Cowdery
House Labor and Commerce Committee
Pouch V
Juneau, Alaska 99811

Re: Report of the Task Force of the Business Law Section of the Alaska Bar Association regarding HB 343 and SB 246, Corporate Code Revision.

Dear Sir.

Enclosed is a review by the Task Force of the Business Law Section of the Alaska Bar Association of Senate Bill 246 and House Bill 343, the Corporate Code Revision.

The Review represents a time-limited study of the bills and was performed for the limited purpose of bringing to your attention some of the possible legal and economic consequences to the business community and the Alaska public that could arise if the bill were adopted in its present form. We urge you, then to consider this only as such and not an exhaustive section by section analysis of proposed amendments or a scholarly attempt at opposition or rebuttal to the work product of the Code Revision Commission.

In our deliberations, we met, both in subcommittees and as a whole Task Force with John Abbott, Chairman of the Code Revision Commission. At some of those meetings, Jerry Kurtz, another member of the Commission, was also present. At these meetings there was candid exchanges of views on the bills. In addition, we were advised that Professor Dan Fessler was available to meet with us, although at a date too late to assist us with this report given the time constraints put on our work by your Committees.

Individual sections of the bills are commented upon in the attached review, but considering the bills as a whole, we would make the following observations:

1. Any major revision of a comprehensive body of law, such as the Corporate Code should include as one of its objectives, making the practice of law and business operations under the Code easier and more explicit.

We believe the proposed bill goes a long way to make the law more explicit than our current Code in many aspects, but not necessarily easier under which to practice or conduct business. For an Alaskan practioner, far more work needs to be done in carefully drafting Articles, By-laws and other documents than is currently the case. While it may be the intent to encourage the preventive practice of law and reduce remedial litigation, in the vast majority of cases, we think it will merely raise the cost of going into business in the corporate form.

For the out-of-state practioner, the problem is compounded, because as more states adopt the revised Model Act, Alaska's unique departures will require special time and study to assure compliance.

2. The Bills contain very material departures from current law in substantive rights and liabilities among corporate management, shareholders, creditors, secondary acquirers of shares and third parties doing business with Alaskan and even foreign corporations in Alaska.

We have two concerns about these departures. First, some substantive changes, such as the proposed limitations on distributions and the proposed direct liability of Officers and Directors to creditors are significant barriers to stimulation of commercial activity in the state and ought not to be adopted as this state's public policy. Second, we believe that passing a law this session with a July 1, 1984, effective date that contains such significant changes will prove to be an unwarranted shock on the practicing bar, the affected business community and the public.

3. Many provisions of the current Alaska Corporations Code merit attention and any thorough revision of the Code should analyze these special provisions to test their current value. Many of these provisions such as registration of controlling out-of-state shareholders and disclosure of alien ownership, are ripe for elimination.

We found numerous occasions in the bills and the accompanying comments where these provisions were restated in the revision without explanations to their continuing value.

4. In March, 1983, a final exposure draft of the revised Model Business Corporation Act drafted after much careful study, under the auspices of the American Bar Association was released. The revised Model Act is the product of top legal and business professionals from across the nation.

We recognize that Professor Fessler has drawn liberally, in his proposals to the Code Revision Commission version, from the Model Business Corporation Act before its 1983 revision. Submitted herewith for your reference is a copy of the March 1983 Model Act draft. The final version is due to be published in the summer of 1984, with minor changes.

Some members of the Task Force have reviewed the revised Model Act and the accompanying commentary had the benefit of nationwide consideration by practioners and academicians and, to the extent adopted in other states, will enhance interstate corporate commerce. In our opinion if a comprehensive revision is deemed necessary, the revised Model Act is the appropriate vehicle for Alaska to utilize.

Furthermore, we urge consideration of the Model Act because its adoption in many states will provide a body of decisional law upon which Alaskans may draw for guidance in interpreting the Act, something a very unique Act would not have available. In addition, an extensive legal commentary accompanies the Model Act aiding the reader in a clear understanding of the provisions. Finally, as is the case with the old Model Act, the draftmen of the revised Model Act will provide model bylaws and official corporate forms to assist the public. This should significantly reduce legal costs.

We hope that this rather hurried review is useful to your committees in your own deliberations on the bills.

It is our view that there are numerous questions about specific provisions in the that the Committees should require more study.

Since the HB 343 carries such important consequences and there has been no showing of urgency to change the law, nothing is lost by deferring action on a new comprehensive code for Alaska until next session. By so doing, the legislature could accomplish the following:

a. give the Legislature, Code Revision Commission, and the public a meaningful opportunity to fully consider the revised Model Act;

b. give all sectors of the business community an opportunity to consider and propose specific amendments;

c. explain to the non-lawyer business community the Legislature's interest in revising the Code and seek an expression of support or concern from affected economic sectors.

The Task Force is willing to continue working with your Committees and with the Code Revision Commission towards a bill that is the best possible statute for Alaskans.

Yours cordially,

Richard Block
Task Group Chairman

RB/pj
enclosures

ARTICLES 1. CORPORATE PURPOSES AND POWERS

By: Richard Block, David Bendell and Mark Copeland

A.S. 10.06.005. Purposes. This section assumes that banks and insurance companies have within their respective regulatory statutes comprehensive provisions dealing with incorporation. As to banks, there may be some justification for that assumption, but correlative changes to the banking law would have to be adopted to assure no conflict or gap. As to stock insurance companies, there is a statutory provision for special differences between the general corporation code and the incorporation provisions affecting insurance companies, but A.S. 21.69 does not provide a comprehensive scheme for all corporate matters, certainly not as comprehensive as the proposed code. Either the Code should be made applicable to insurance companies or the Insurance Code modified to make it a more comprehensive statutory scheme for regulating corporate affairs.

A.S. 10.06.010. General Powers. The Code would not prohibit loans to officers and directors which is a change from current Alaska law. We detect as a main theme in the Code, a tendency to require financial legitimization of the corporation, i.e. a tendency to require preservation of its financial substance for the protection of creditors and stockholders. This permission to make loans to officers and directors tends to defeat that objective.

Elsewhere in the code is specific authority for the corporation to indemnify officers and directors. If the "cookbook" approach is intended, would it not be appropriate to list authority to indemnify as one of the corporation's enumerated powers?

A.S. 10.06.015. Ultra Vires. This is a worthy protection for Alaskans in dealing with foreign corporations. Though we are not familiar with any assertions of "Ultra Vires" by foreign corporations in Alaska to annul a contract made here, the public policy approach of this section is welcome.

ARTICLE 2. NAME AND SERVICE OF PROCESS

By: Richard Block, Daivd Bendell and Mark Copeland

A.S. 10.06.105. Corporate Name. Prohibition of use of the words "city", "borough" or "village" would outlaw a number of currently valid trade names in Alaska such as "Village Inn" and "City Electric". The determination of deceptive similarity should be left to the Director of the Corporation Division as it is now, without numerous statutory restrictions.

A.S. 10.06.105(c). Prohibition of the word "Limited" by other than a corporation would preclude its use in Alaska by a limited partnership.

A.S. 10.06.135-145. Procedure for Registration of Corporate Name. These sections establish a procedure for reservation of name and registration of name which is more complex and more demanding than current procedures.

A.S. 10.06.155. Registration of Agent by Nonresident Agent. This section is indeed a recodification of a 1983 amendment to existing Alaska law, but is believed to be an unnecessary burden on corporations with out-of-state investors. If the basic concept of corporate existence is a valid one, there should be no valid reason for preserving a means of reaching its controlling shareholders.

A.S. 10.06.175. Service of Process on Corporation. This imposes a larger burden on plaintiffs to seek out a more direct link to the corporation for affecting service of process than the Director of Division of Corporations. Generally this is regarded as a beneficial change.

ARTICLE 3. FORMATION OF CORPORATIONS

By: Richard Block, David Bendell and Mark Copeland

A.S. 10.06.208. Articles of Incorporation. This, like section 155, carries forward the parochial requirement for disclosing the involvement of outsiders in Alaskan corporations. Since no law prohibits foreign or alien participation, why should there be special requirements for disclosing their involvement?

A.S. 10.06.208(6). There is inherent in this provision the requirement for a specific detailing of the relative rights and privileges of various classes and series of shares of stock. We question the necessity of such specificity if, by reason of section 315, the Board may be given the authority to determine the rights and privileges of particular series by its own resolution.

A.S. 10.06.210. Articles of Incorporation: Optional Provisions.

210(1)(C). This provision requires that for a restriction on qualifications of shareholders is to be effective, the restrictions must be set out in the Articles. This could prove to be a burden for a corporation which wishes to qualify an offering under one of the exemptions under the Federal Securities Act. It would appear that continued modification of the Articles would be required to tailor the shareholder qualifications to the needs of differing offerings.

210(1)(H). Certain forms of bank and other institutional borrowing require that voting rights be conferred in the event of default. It is hard to know until the borrowing arrangements are made what the terms of such an agreement will be, yet the Articles must permit this authority. It could prove fatal to a borrowing transaction if the deal were held up pending approval of an amendment to the Articles of Incorporation.

As a general observation, it would appear that the general thrust of these sections is to use the Articles as much as a prospectus and disclosure statement as an organic document to bring the corporation into existence. This may, we suspect, be asking the corporation to unduly tie its hands, since changes to the Articles are made only after some time and difficulty, particularly if there are many shareholders.

A.S. 10.06.223. Organization Meeting. For most private corporations, it seems unnecessary to require 20 days notice before the organization meeting. We suspect that either the first meeting will be a "paper" meeting only, in which the case the requirement will be essentially ignored or the careful lawyer will have to insist on a basically needless delay in the incorporation process.

A.S. 10.06.230. By-laws: Number of Directors. There is offered no reason for putting statutory parameters on the number of directors that may be placed upon the Board. As long as the number does not exceed the limits if any placed in the Articles, the Board should not be further restricted in bringing needed or desired talent to its midst.

ARTICLE 4. CORPORATE FINANCE.

By: Richard Block, David Bendell and Mark Copeland

A.S. 10.06.320/323. Filing of Statement. These sections create a new way to amend the Articles-determine the specifics of a new stock offering and file a description of the new issue with Division of Corporations. Assuming that the offering does not require filing for a securities permit, these sections would be tantamount to making a securities filing anyway, with unclear responsibilities on the Director of the Corporations Division in dealing with the filing when it is made.

A.S. 10.06.325. Redemption of Shares. This provision unnecessarily prohibits what is believed to be a valid form of corporate financing, a security with a put. So long as all parties are cognizant of the terms there is no reason to prohibit such a financing option.

A.S. 10.06.333. Forfeiture of Shares. We here reiterate our concern for requiring the by-laws to contain things that can and ought to be merely a matter of contract. Remedies for failure to pay for subscribed shares are necessarily contained in what ever document the subscriber signs, making restatement in the by-laws redundant. Furthermore, the statute becomes unduly specific in the rights of a defaulting subscriber, including giving him a vested right in the realized appreciation in the value of shares for which he has failed to pay.

A.S. 10.06.348. Certificates Representing Shares. It is our concern whether the preservation of the certificate concept, even with the authority for facsimile signature, really will facilitate going to a book entry registration of share ownership capability.

A.S. 10.06.355. Issuance of Fractional Shares or Script. The proposed statute precludes the simplest method of dealing with fractional interests, the payment of cash. It is realignment of public policy to provide protection of the interests of infinitesimal minority shareholders by increasing the administrative burden on the corporation.

A.S. 10.06.358-363. The Financials. These sections introduce one of the most significant of substantive changes to the corporate law of this state. To achieve the intended result of prevention of asset dissipation for the protection of creditors, the Commission does away with the concept of "par value", establishes new criteria and more stringent criteria which must be met before dividends may be declared and imposes upon the corporate officers and directors standards for determining the propriety of dividends that can only be met, in our opinion, by obtaining a certified public audit of the books to determine if the criteria have been satisfied.

It is not within the province of this review to discuss the propriety of the public policy provisions, although the Task Force does not believe that the financial problems of debtors have been occasioned by abuses that would be stopped by these provisions. It is, however, our desire to bring to the attention of the Committees, what we perceive as the significant impacts of these provisions.

The oil of the free enterprise system is capital and the trick for a state that has as one of its manifestos, the attraction of capital, is to create an environment that permits the freest use of that capital consistent with equity and fairness for all involved with the enterprise. Recognizing that this last statement in a sense begs the issue, nonetheless, for the last many decades, at least, it has not seemed unfair to creditors to permit business enterprise the latitude to structure their capital to maximize their leveraged use of the resource, moving money from one enterprise to another.

The legislature should consider carefully what impact there will be on the attraction of capital to an enterprise that must by law reduce their leverage opportunity.

A.S. 10.06.368. Exception for Purchase or Redemption of Shares of Deceased Shareholder. This provision is of course important, but we cannot understand why the authority is limited to proceeds of insurance beyond the premiums paid. In other words, if over time $25,000 were paid in premiums for $500,000 life insurance to fund a buy-out provision, the corporation could only pay $475,000.

A.S. 10.06.378 Liability of Shareholders Receiving Prohibited Distribution. This provision raises some interesting prospective problems.

It should be noted that there are some on the Task Force that wonder why knowledge of the improprieties of the distribution is requisite to the cause of action. They argue that if the distribution is wrongful, akin to theft from the creditors, it should be returned, even though they may not have actually had knowledge of its illicit nature.

It is suspected by the Task Force that this section could be the foundation for a whole new source of complicated and expensive litigation.

ARTICLE 5. SHAREHOLDERS

By: Brian J. Brundin

A.S. 10.06.405 MEETINGS OF SHAREHOLDERS.

This section proposes three changes to the current Alaska Business Corporation Act. The first is that a shareholder may petition for a court order that an annual shareholder meeting be held if one has not been held within any 13-month period. The second is removal of the provision that failure to hold the annual meeting at the designated time does not work a forfeiture or dissolution of the corporation. The third adds the Chairman of the Board to the virtually unlimited number of persons who may be authorized to call a shareholders' meeting.

COMMENT: The first change, allowing any shareholder to obtain a court order to hold an annual meeting, presents more questions than it answers. Who will pay the court costs? May there be legitimate reasons for not holding a meeting within any 13 months? The major business usually conducted at the annual meeting of shareholders who can influence the electing of directors, namely who holds one-tenth or more of the shares entitled to vote, already have the statutory right to call a meeting. Under this proposal, the holder of one share could sue for an order that a meeting be held and probably charge the court costs to the corporation - even if he had no real ability to affect the business to be done at the meeting and even if there was a good reason why there had not been a meeting within the past 13 months. This change is unnecessary and gives the ability for an insignificant minority "trouble-maker" shareholder to either grab publicity or otherwise stir the pot to the detriment of other shareholders and the corporation. The holding of the meeting of a large corporation, and particularly one publicly held where proxie statements must be mailed, can be a very expensive undertaking.

Does the second proposed change mean to suggest that failure to hold the annual meeting at the designated time <u>may</u> work a forfeiture or dissolution of the corporation? That consequences could be disastrous.

As to the third proposed change, present law allows the president, the board, ten percent shareholders "or the other officers or persons provided in the articles of incorporation or the bylaws" to call a shareholders' meeting. If ommission of the Chairman of the Board is a problem, corporations may now resolve that problem by simply including his name in the Articles or Bylaws. A change of statute is not required. Apparently the Revised Model Act does not confer this right on the Chairman of the Board, since absent other authority given to the Chairman, he simply chairs the Board of Directors, and it is the Board of Directors who takes Board action, not the Chairman.

A.S. 10.06.408 CLOSING OF TRANSFER BOOKS AND FIXING RECORD DATE.

It appears three changes here are also proposed. The first is that instead of closing the stock transfer books for a period not exceeding 50 days, and for at least 10 days before a meeting, 60 days and 20 days are substituted. Secondly, a new way to fix record date is provided. If the Directors do not act, the date on which the notice of meeting is mailed or the date on which the resolution of the Board declaring the dividend is adopted is the record date. Thirdly, the determination of shareholders applies to an adjournment of the meeting of shareholders - under earlier law it would apply if the 50 days had expired.

COMMENT: As to the first change, this and the subsequent sections appear to make it impossible to hold a meeting of shareholders in less than 20 days without waiver of all shareholders; an extension of time which, in this day of modern communication, would seem to unnecessarily hamper the corporation in the holding of a meeting in less time if necessary. The Model Act retains 10 days. No reason is given why 20 days is suggested.

The second change seems unnecessary. In a very small corporation, the people who are shareholders remains relatively fixed, and no "new" way to determine who they are is required. In a large corporation, the present law is adequate and directors are capable of utilizing one of the two ways now provided.

The third change would seem to allow a possible "freezing out" of new shareholders by the adjournment of a meeting for longer than the 50-day period that the stock transfer books may now be closed.

A.S. 10.06.410 NOTICE OF SHAREHOLDERS' MEETINGS.

Besides some rewording, it appears the change in this section is to set a minimum time of 20 days rather than 10 days from the date notice is given until the meeting held. See comment above.

A.S. 10.06.413 VOTING LIST; LIABILITY.

Despite the long discussion of this section in the official comment, it appears there is no change to the prior law except again the 10 days to 20 days.

COMMENT: Shareholders now have an absolute right to view the shareholder list prior to a meeting, and so far as I know, the "proper purpose" doctrine is not applied in this instance, for it is manifestly a proper purpose for a shareholder to exercise his statutory right to view a voters' list prior to a meeting. See earlier comment regarding increase in time from 10 to 20 days.

A.S. 10.06.415 QUORUM OF SHAREHOLDERS.

The change proposed here allows a quorum once constituted to continue notwithstanding the withdrawal of enough shareholders to leave less than quorum and is intended to prevent a meeting from continuing by a "walk-out" of a minority.

COMMENT: While this change is not now in our statutes, it may be provided for by common law or by Roberts Rules of Order. While it seems to be a useful change, in my almost 18 years of practice, this question has never presented a problem to a client.

A.S. 10.06.418 PROXIES.

This proposed change expands the four-line section of current law to more than two pages in an attempt to regulate the giving of proxies under several enumerated situations. It undoes a 1972 amendment which prohibited proxies lasting more than eleven months.

COMMENT: While it is arguably useful to allow long-term proxies for security agreements, pledges, employment contracts, trusts and the like, the two new pages of proposed regulations will undoubtedly create many new opportunites for court battles. On balance I think it is cheaper and better to maintain the present law that only short-term proxies are allowed. The important right to vote should be difficult to take away from a shareholder. Requiring a shareholder who wishes to give a proxy to do so annually makes him think about his corporate investment at least annually and allows a reconsideration of whether a proxy given should be renewed.

A.S. 10.06.420 VOTING OF SHARES.

The major proposed change of this section is to lean back again toward cumulative voting, only more strongly than ever before. Alaska's law has bounced back and forth on this question, and presently allows cumulative voting unless the Bylaws provide otherwise. The suggested change presumes it unless the Articles say otherwise, and once cumulative voting is allowed, for no change to it if not approved by a shareholder who, under cumulative voting, could elect a director. Part (f) lists "administrator, executor" instead of personal representative as described in A.S. 13.06.050(30).

COMMENT: The issue of presuming or not presuming cumulative voting has long been debated and, as stated earlier, Alaska law has changed on this subject over the years. I am not aware of any Alaskan business proposal to change it back again.

Since the present statute has been unamended since 1964, adoption of this new provision would require many corporations to undergo the expenses of amending their Articles or Bylaws for a matter than does not appear to be a burning issue.

A.S. 10.06.423 ACTIONS TAKEN WITHOUT MEETING: MEETING CONSENT, REVOCATION OF CONSENT.

This appears only to rewrite and not change current law regarding unanimous consent. The official comment is confusing; it seems to say there is a change. Added to present law is a provision allowing revocation of such consent.

COMMENT: The rewriting does not seem to be required, nor is the addition of a provision alllowing revocation of consent. In my experience, consent is most always requested to confirm actions earlier taken.

A.S. 10.06.425 VOTING TRUSTS AND AGREEMENTS AMONG SHAREHOLDERS.

This provision again amplifies current law. Whether or not it changes the law is debatable. Current law requires a copy of the trust agreement to be deposited with the corporation for inspection. The new proposals spells out the names and addresses of all the holders of trust certificates also must be deposited, which may already be required. Additionally a new section is added from California law which does not invalidate pooling arrangements so long as they comply with the more complex proxy rules proposed by Section 418.

COMMENT: Voting trust and pooling interest have not been burning issues in Alaska. The proposal is to regulate them to a greater degree. The proposal is at variance with the Model Act and is apparently a synthesis of former Alaska law, the Model Act and California law.

Like other provisions proposed, where a question has not been an issue in Alaska and is unlikely therefore to have court interpretations, I think it is not useful to adopt proposals that synthesize the law of several jurisdictions. From a practitioner and businessman's view point it would be better to adopt the Model Act so that if questions do arise, decisions from other jurisdictions regarding the Model Act, and its commentaries, will provide guidance.

A.S. 10.06.428 SHAREHOLDERS' PRE-EMPTIVE RIGHTS.

This is again a one-page substitution for 12 lines of two current sections. Current law leaves the matter to the Articles of Incorportion and, if not covered by the Articles, provides for sales to officers or employees upon a two-thirds

vote of shareholders. The proposal continues the right to limit or deny (but apparently not to expand) pre-emptive rights and spells out several rules that will exist with respect to different kinds of shares if such rules are not changed by the Articles. The official comments suggest the Legislature intends to occupy the field with respect to circumstances under which pre-emptive rights are to be recognized and, apparently beyond the words of the proposed statute, for the Legislature to adopt the holding and reasoning of the Kazowitz case, which limits the ability of a corporation to issue additional stock, thus financially troubling shareholders who wish to exercise pre-emptive rights, unless a valid business purpose can be established for the issuance of the stock.

COMMENT: The proposal is stated to be "predicated" upon the Model Act, but apparently is not the same. For reasons suggested above, I think it is preferable, if any change needs to be made, the Model Act language be used.

A.S. 10.06.430 BOOKS AND RECORDS.

This proposal enlarges considerably the requirement for keeping of books and records and allowing inspection of them by shareholders. Under present law, a person who has been a shareholder of record for at least six months or who holds at least five percent of the outstanding shares may inspect and copy such records. The proposal allows all shareholders to do so. Under current law refusal to give the information can result in payment of a penalty of ten percent of the value of the shares owned by the shareholder in addition to other damages. The new proposal is that the penalty be ten percent or $5,000.00, whichever is greater, in addition to other damages. Under current and proposed law a court may order inspection irrespective of the amount of shares owned or the time they have been owned. Official comments declare that the Legislature intends to adopt numerous cases cited.

COMMENT: This change would make it easier for a person to buy one share of the stock of a corporation and "stir up the pot". The citation of cases and the official comment which the writer requests that the Legislature adopt again suggests the proposal is not verbatim from the Model Act, which carries its own interpretive law, and accordingly the proposal may be "skewed" toward the bias of the drafter.

A.S. 10.06.433 ANNUAL REPORT TO SHAREHOLDERS: CONTENTS; FINANCIAL STATEMENT ON REQUEST.

This proposal, new to Alaska and taken from the California law according to the official comment, describes an elaborate three-page regulation requiring annual reporting by corporations to shareholders. Corporations with under 100 share-

holders will have to amend their Articles of Incorporation to avoid its complex rules. Corporations with 100 or more shareholders will have to make elaborate reporting such as is done by a publicly-owned corporation under provisions of the Securities & Exchange Act. Additionally the corporation must prepare quarterly financial statements, keep them on file, and mail them to any shareholder demanding a copy. A penalty of up to $1,500.00 per shareholder is provided for violation.

COMMENT: This is surely one of the "land mines" of the proposed statute, which would, on the one hand, blow the feet off a small corporation which fails to amend its Articles to avoid its onerous provisions or, on the other hand, create an entirely new and expensive level of reporting and penalties for corporations with more than 100 shareholders. It is unprecedented in Alaska law, and apparently draws on the "innovation" recently made in California law. No similar provision is contained in the Model Act.

The more one reads this proposed law, the more it appears that the drafter of it has a bias against corporations and an intention to "save" shareholders and others from the "ghastly beasts".

The proposed provision appears not only unnecessary but potentially very damaging. Any investor who buys stock in a large publicly-owned company is already protected by securities laws. Small closely-held corporations on the other hand are ordinarily not owned by other than those involved in the business closely enough to not require such "protection". Larger and publicly-owned corporations which must now comply with other regulation, such as securities laws, will be me. in Alaska with an unnecessary additional layer of regulation which includes the costs of keeping and mailing additional financial reports to any shareholder who requests them. Would this add to what some feel is an "anti-business" attitude in Alaska? As earlier suggested, this proposal can only act to cause unnecessary potentially damaging problems to smaller corporations.

Again because the proposal, purportedly "adapted" from the new California law appears to be the words of the drafter, one can only begin to contemplate all of the new issues which might be raised and for which there would be no answer from other jurisdictions to guide the practitioner or businessman.

A.S. 10.06.435 SHAREHOLDERS' DERIVATIVE ACTION.

This is another proposal without precedent in Alaska statutory law. It is a four-page detailed scenario for the suing of a corporation by a disgruntled shareholder which requires eight pages of the official comment to describe. It sets out in detail some rules to be followed in pleading the action.

COMMENT: Provisions of this nature do not belong in the corporate statutory law. Rules of pleading in Alaska should be left to the court and the development of derivative actions to the common law. Again the proposal exhibits a bias against corporations by making it easier to bring and maintain such derivative actions. Again it is the words of the drafter, adapting the law of other jurisdictions, reportedly mostly New York and California, and accordingly will create problems of interpretation unique to Alaska.

A.S. 10.06.438 LIABILITY OF SHAREHOLDERS AND SUBSCRIBERS.

This proposal does not appear to change present statutory law, being almost verbatim.

COMMENT: The official comment suggests there are words in the proposal which I do not find, and the comment deals almost entirely with other liability which may arise under another section, Section 487.

ARTICLE 6. DIRECTORS AND OFFICERS

By: Julius J. Brecht

A.S. 10.06.450 Board of Directors: Duty of Care; Right of Inspection; Failure to Dissent.

Proposed 10.06.450(b) sets forth various individuals upon which a director may rely in performing his directorship functions. Subsection (c), however, removes the insulation from liability provided by Subsection (b) if the reliance is found to be "unwarranted". Substantial questions are therefore raised as to what protection, if any, is provided by the provision of Subsection (b).

A.S. 10.06.465. Vacancies and Resignation; Special Meeting of Shareholders.

Proposed 10.06.465(d) provides that a director may not be relieved from the responsibilities of his or her office until a qualified successor has been elected. Since the effective date of resignation is apparently unimportant for fixing liability, it is possible that a director who has resigned from the board will continue to be personally liable for board actions long after his active participation with the company has ended.

A.S. 10.06.488. Secondary Liability of Directors and Officers.

Proposed 10.06.488 imposes primary and secondary liability upon directors and officers which is an aberration and contrary to long standing corporate principals and judicial decisions. For all practical purposes, the distinction between "corporation" and "individual" has been lost in the proposed Senate Bill. This extension of liability is apparently designed to provide corporate creditors with an additional and/or secondary source for corporate business failures. As Mr. Reitman has indicated, these aberrations are almost guaranteed to generate traps for the unwary and result in a proliferation of litigation. Well known and understood business practices, such as personal guarantees have long been used to secure payment of corporate indebtedness. The liability of directors and officers is also a matter of long established statutory law and judicial precedent. The radical departure proposed by these sections should not be adopted without much additional study and justification. The potential impact of this provisioin was the subject of ample comment at the joint committee hearings in Anchorage on February 24, 1984, and will not be further developed here.

ARTICLE 7. AMENDMENTS AND CHANGES
By: Kenneth Eggers

AS 10.06.502 AUTHORIZATION: PERMITTED AND PROHIBITED AMENDMENTS.

Appears to be more confusing than is necessary. The MBCA (Revised Model Act) would appear to accomplish the same purpose in a more clear, streamline manner.

AS 10.06.504 PROCEDURE TO AMEND ARTICLES OF INCORPORATION.

Gives shareholders explicit power to initiate amendments. Merely need majority of shares entitled to vote as opposed to 2/3rds as required under present Alaska law unless otherwise provided.

AS 10.06.508 GREATER VOTING REQUIREMENTS.

If articles require super majority then amendment must be approved by same super majority. Consistent with MBCA.

AS 10.06.522 AMENDMENT OF ARTICLES OF INCORPORATION IN REORGANIZATION PROCEEDINGS.

Allows Amendment pursuant to order of Bankruptcy Court in reorganization proceeding. Section taken from MBCA.

ARTICLE 8. ORGANIC CHANGES
By: Kenneth Eggers

AS 10.06.542 DISPARATE TREATMENT OF THE SAME CLASS OR SERIES PROHIBITED: EXCEPTIONS.

New to Alaska, allows disparate treatment to preserve Sub S election, unanimous consent, or sound business reason. The last reason is undefined, leaves open the possibility of abuse and is an invitation to litigation.

AS 10.06.554 MERGER OF SUBSIDIARY CORPORATION.

Allows merger without shareholder vote if parent owns at least 90% of stock of subsidiary. Taken from Model Act. New to Alaska. Short form merger.

AS 10.06.556 PROCEDURE FOR MERGER OF SUBSIDIARY CORPORATION.

Premised on Model Act except require that provisions of 542 be met.

AS 10.06.562 MERGER, CONSOLIDATION, OR EXCHANGE OF SHARE DOMESTIC AND FOREIGN CORPORATION.

Domestic corporation must comply with Alaska law. If foreign corporation survives, it must comply with Alaska law for doing business. Must agree to pay dissenting shareholders. This section again calls into question the idea of [illegible]g Alaska law on foreign corporation no matter how minimal t[illegible]ntract may be with Alaska. This could very well discourage [illegible]gn corporations from looking at Alaska corporations for mer[illegible] partners and could adversely impact business opportunities for Alaska-owned corporation.

AS 10.06.566 SALE OF ASSETS IN REGULAR COURSE OF BUSINESS; MORTGAGE OR PLEDGE OF ASSETS.

New in that it ALLOWS MORTGAGE OR PLEDGE of any or all property and assets of corporation whether or not in the usual and regular course of business without shareholder approval. One must ask from a policy point of view if the directors of a corporation who need not have any financial interest in a corporation at all to hold office should have the power to mortgage all of the property of the corporation not in the usual and regular course of business without going to the shareholders. Obviously such decisions could lead to the bankruptcy of a corporation. While the Model Act has the same provision, it

specifically provides that shareholder approval can be required if such a provision is set forth in the Articles of Incorporation. At a minimum, the Alaska act should do the same.

AS 10.06.568 SALE OF ASSETS NOT IN REGULAR COURSE OF BUSINESS.

New in that it eliminates need for shareholder approval for mortgage or pledge of any or all property.

AS 10.06.570 APPROVAL OF TRANSACTION BY SHAREHOLDERS.

If Buyer in the sale is in control of or under the common control with the Seller 570(b) erects an extraordinary requirement of approval via at least 90% of the outstanding shares regardless of restrictions or limitations in the Articles or share indenture - UNPRECEDENTED IN ALASKA LAW. This gives minority shareholders (11%) tremendous power and one must question why a 2/3rds requirement is not sufficient and more practical.

AS 10.06.574 RIGHT OF SHAREHOLDER TO DISSENT.

No right in case of short merger (554) and shares traded on national securities exchange.

AS 10.06.582 ACTION TO DETERMINE VALUE OF SHARES UPON FAILURE TO AGREE.

Premised on Model Act. Burden on corporation to initiate action. A consolidated action. Corporation must bear costs and expenses unless shareholder acted in an arbitrary or vexatious manner or in bad faith. Costs exclude attorney fees and experts (except appraiser) unless fair value determined by court materially exceeds amount corporation offered to pay in which case, shareholders can obtain reimbursement for expenses. This is a very one sided provision in favor of the shareholders. Shareholders could recover costs from corporation even if corporation offer exceeded what the court ultimately awards. The effect of this section as written is to encourage dissent and unnecessary litigation. This section should be rewritten so that the possible risks are more fairly apportioned. This will serve to encourage settlement of any disputes which may arise.

ARTICLE 9. DISSOLUTION

By: Richard Rosston, Stanley Reitman, Ray Gardner and Bruce Frenzel

A.S. 10.06.605. Section 605 permits the Board of Directors under specified circumstances to authorize involuntary dissolution without a shareholder vote by filing a petition on behalf of the corporation in the Bankruptcy Court. Without safeguards, the Board of Directors may usurp a corporate opportunity by dissolving the existing corporation and then forming their own corporation to take advantage of opportunities available to the previously existing corporation.

A.S. 10.06.635. Section 635(a)(2) confers broad authority on the state to involuntarily dissolve a corporation which "has continued to exceed or abuse the authority conferred upon it by law." Additionally, it should be noted that subsection (3) ambiguously refers to the imposition of involuntary dissolution by the state if "the corporation has seriously violated a statute regulating corporations." The Subcommittee considers the interpretation of a serious violation as opposed to a minor violation to be overly subjective.

A.S. 10.06.605. By comparing provisions of the exposure draft of the old Model Act, as distinguished from the ABA revised MBCA, with Section 605, the Subcommittee concluded that certain provisions in Section 605 are counterproductive. For instance, the old Model Act requires notice of pending dissolution to all of the shareholders, rather than just the voting shareholders as set forth in Section 605. Nonvoting shareholders should be informed of the pending dissolution of a corporation in which they have a beneficial interest. Additionally, Section 605 needlessly requires class voting for dissolution, whereas the old Model Act relies upon the Articles of Incorporation for the voting structure in order to avoid conflicts.

A.S. 10.06.608. The requirement to file a "certificate of election" with the commissioner in addition to the "Articles of Incorporation" is superfluous and will result in unnecessary administrative burden.

A.S. 10.06.615. Provisions of Section 615 permitting the conduct of business after dissolution only to preserve "goodwill or going concern value" are ambiguous insofar as they do not specify what business activities are authorized thereunder.

A.S. 10.06.628. Section 628 curtails the rights of creditors to initiate involuntary dissolution proceedings. The commentary justifies this revision of existing law on the basis of the proposed Section 488 imposition of liability on officers and directors. To the extent that the revision represented by Section 628 is predicated upon the adoption of Section 488, it is opposed by the Subcommittee.

A.S. 10.06.633. Section 633 permits the Commissioner to administratively initiate involuntary dissolution proceedings against the corporation if "a misrepresentation of material fact has been made in the application, report, affidavit or other document" submitted to the Commission. Neither the revised code nor the commentary indicate whether such liability may be imposed for innocent misrepresentation or whether a negligence standard applies. Additionally, Section 633's provisions for an administrative appeal by a trial de novo in Superior Court could create a substantial burden on both the Department of Commerce and the court system.

A.S. 10.06.645. By invoking the equity jurisdiction of the court, Section 645 injects an element of uncertainty into the dissolution process and increases the possibility of unnecessary litigation.

A.S. 10.06.653. Section 653 requires the Commissioner of Revenue to act as a stake-holder of corporate assets which are the subject of dispute between shareholders or creditors. This provision could involve the Commissioner of Revenue in litigation and may increase administrative burdens.

A.S. 10.06.663. It is doubtful that any qualified individual would accept an appointment as a director under Section 663 given the potential liability created by Section 488.

ARTICLE 10. FOREIGN CORPORATIONS

By: Richard Rosston, Stanley Reitman, Ray Gardner and Bruce Frenzel

A.S. 10.06.743. Section 743 permits the commissioner to revoke a foreign corporation's certificate of authority if "the corporation" is a party to an illegal combination in restraint of trade." No similar statutory provision exists with respect to domestic corporations, and the Subcommittee is unaware of any reason to discriminate against foreign corporations. Although the provision is in the existing statute, it should be eliminated pursuant to a comprehensive code revision.

A.S. 10.06.773. Although foreign corporations are not required to file their Articles of Incorporation with the Commissioner, Section 773 mandates the filing of amendments. The subcommittee recommends that if the Articles are not to be filed, then the requirement to file amendments should also be deleted.

A.S. 10.06.828. Section 828 provides that "the filing fee should be uniform and fixed without reference to the amount of authorized shares," whereas the commentary states that the filing fee shall be fixed "with reference" to the amount of authorized shares.

A.S. 10.06.955. Section 955 makes Section 488 liability to directors and officers applicable to foreign corporations doing business in the State of Alaska. The Subcommittee believes that such imposition of liability will have a significant "chilling effect" on outside investments in the state.

A.S. 10.06.960. Corporations organized under PL 92-203: It should be noted that the provisions in Section 960 protecting officers and directors of Native corporations under Section 10.06.488 does not extend to subsidiary corporations which are wholly or partially owned by corporations formed under the Alaska Native Claims Settlement Act. Additionally, Section 960 may violate the equal protection clauses of the U.S. and Alaska Constitutions.

SB

246

#2

ALASKA STATE LEGISLATURE - SENATE

COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON
CHAIRMAN

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

OFFICIAL BUSINESS

LETTER OF INTENT

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

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

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

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

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

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

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

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

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

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

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

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

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

STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: January 31, 1984

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

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

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

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

ANALYSIS: Attach a separate page for analysis

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

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

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

12/1/83

ALASKA STATE LEGISLATURE - SENATE

COMMITTEE ON LABOR AND COMMERCE

SENATOR RICHARD I. ELIASON
CHAIRMAN

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

OFFICIAL BUSINESS

Feb. 2, 1984

LETTER OF INTENT

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

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

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

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

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

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

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

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

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

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

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

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

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

ALASKA CODE REVISION COMMISSION

COMMISSIONERS
JOHN W. ABBOTT - CHAIRMAN
JAMES L. BALDWIN - VICE CHAIRMAN
PATRICK M. RODEY
CHARLIE BUSSELL
L. S. KURTZ, JR.
JUDGE (RET.) THOMAS B. STEWART
FREDERIC E. BROWN

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

EXECUTIVE SECRETARY
BILLY G. BERRIER

MEMORANDUM

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

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: February 2, 1984

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

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

(1) CHANGE:

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

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

(2) CHANGE:

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

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

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

(3) CHANGE:

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

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

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

DR:chw
Attachments

A M E N D M E N T

Offered in the SENATE LABOR AND COMMERCE COMMITTEE BY:

TO: SB 246

Page 12, line 27-29:

Delete all material and insert:

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

Page 12, line 29:

Delete "at that address"

Page 16, line 5:

Delete "AS 10.06.873" and insert "AS 10.06.870"

Page 56, following line 28:

Insert:

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

Page 127, lines 7-9:

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

Page 138, line 28:

Insert "Class A" before "misdemeanor"

Page 139, line 9:

Insert "Class A" before "misdemeanor"

Page 147, lines 28-29:

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

Page 148, line 8:

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

Page 148, line 18:

Delete ", 7(i),"

Page 148, lines 25-26:

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

Page 149, line 12, following the period:

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

Page 149, line 15:

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

Page 161, line 13:

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

ALASKA CODE REVISION COMMISSION

COMMISSIONERS
JOHN W. ABBOTT - CHAIRMAN
JAMES L. BALDWIN - VICE CHAIRMAN
PATRICK M. RODEY
CHARLIE BUSSELL
L. S. KURTZ, JR.
JUDGE (RET.) THOMAS B. STEWART
FREDERIC E. BROWN

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

MEMORANDUM

EXECUTIVE SECRETARY
BILLY G. BERRIER

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

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

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: February 1, 1984

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

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

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

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

DR:chw

Enclosure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RODEY: Mr. Pestinger.

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

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

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

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

RODEY: Representative Koponen.

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

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

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

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

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

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

FESSLER: Mr. Chairman.

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

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

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

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

suppliers.

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

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

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

RODEY: Mr. Brown.

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

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

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

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

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

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

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

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

RODEY: Thank you, Mr. Brown.

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

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

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

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

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

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

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

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

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

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

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

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

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

FESSLER: Certainly.

RODEY: Mr. Kirkpatrick, continue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ALASKA CODE REVISION COMMISSION

COMMISSIONERS
JOHN W. ABBOTT - CHAIRMAN
JAMES L. BALDWIN - VICE CHAIRMAN
PATRICK M. RODEY
CHARLIE BUSSELL
L. S. KURTZ, JR.
JUDGE (RET.) THOMAS B. STEWART
FREDERIC E. BROWN

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

EXECUTIVE SECRETARY
BILLY G. BERRIER

MEMORANDUM

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

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

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 31, 1984

RE: HB 343/SB 246 on profit corporations

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

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

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

DR:chw

Enclosure

A M E N D M E N T

Offered in the SENATE LABOR AND COMMERCE COMMITTEE BY:

TO: SB 246

Page 12, line 27-29:

Delete all material and insert:

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

Page 12, line 29:

Delete "at that address"

Page 16, line 5:

Delete "AS 10.06.873" and insert "AS 10.06.870"

Page 56, following line 28:

Insert:

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

Page 127, lines 7-9:

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

Page 138, line 28:

Insert "Class A" before "misdemeanor"

Page 139, line 9:

Insert "Class A" before "misdemeanor"

Page 147, lines 28-29:

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

Page 148, line 8:

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

Page 148, line 18:

Delete ", 7(i),"

Page 148, lines 25-26:

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

Page 149, line 12, following the period:

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

Page 149, line 15:

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

Page 161, line 13:

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

ALASKA CODE REVISION COMMISSION

COMMISSIONERS
JOHN W. ABBOTT - CHAIRMAN
JAMES L. BALDWIN - VICE CHAIRMAN
PATRICK M. RODEY
CHARLIE BUSSELL
L. S. KURTZ, JR.
JUDGE (RET.) THOMAS B. STEWART
FREDERIC E. BROWN

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

EXECUTIVE SECRETARY
BILLY G. BERRIER

MEMORANDUM

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

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

FROM: Dick Regan, Research Director
Alaska Code Revision Commission

DATE: January 31, 1984

RE: HB 343/SB 246 on profit corporations

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

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

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

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

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

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

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

DR:chw

Enclosure

CHANGES IN THE COMMENTARY ON HB 343/SB 246

PROPOSED BY THE ALASKA CODE REVISION COMMISSION

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

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

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

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

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

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

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

Official Comment to ACC Section 10.06.455. CLASSIFICATION OF DIRECTORS.

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

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

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

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

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