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sec. 433 has followed an innovation made by the State of California which requires that the board shall cause an annual report to be sent to all shareholders irrespective of their voting rights. The nature and degree of disclosure will vary according to the number of shareholders of record, and whether or not the corporation is subject to the reporting provisions of the Federal Securities and Exchange Act of 1934 or the Alaska Native Claims Settlement Act.

Sec. 433(a) establishes the basic obligation of the board to cause an annual report to be sent to shareholders not later than 180 days after the close of the fiscal year or, the date on which the notice of the annual meeting in the next fiscal year is given, whichever date is first. (See AS 10.06.440) If the corporation has fewer than 100 holders of record of all its shares (as determined by the machinery established in ACC sec. 408), its articles of incorporation are competent to waive the requirements of sec. 433. For all others the information required is mandatory. A provision in the articles, the bylaws or extrinsic contract which attempt to limit or surrender the provisions of sec. 433 would be contrary to the public policy enshrined in this section and a nullity.

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

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

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

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

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

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

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

Official Comment to ACC Section 10.06.435.

SHAREHOLDER'S DERIVATIVE ACTION.

SCOPE: With the enactment of ACC sec. 435 Alaska, for the first time, subjects shareholders' derivative action to statutory regulation. Sec. 435 regulates the standing of shareholders, the exhaustion of intracorporate remedies, security for expenses of the corporation or real defendants abandonment, discontinuance, or settlement of any such action and the circumstances in which a prevailing plaintiff

may recover expenses (including attorney fees) in addition to the damages which are to be paid to the corporation.

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

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

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

One of the most difficult policy questions respecting derivative actions is to balance the initiative which ought to be left with a disgruntled shareholder against respect for the norm that corporate governance decisions are normally committed to the board of directors. The accommodation worked out in ACC sec. 435(c)(f) evolved from the legislature's approval of two recent decisions: Zapata Corp. v. Maldonado, 430 A.2d 779 (S.Ct. Del. 1981); and, Barr v. Wackman, 36 N.Y.2d 371, 329 N.E.2d 180 (1976).

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

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

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

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

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

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

If demand is not excused: Sec. 435(e) establishes that in any case in which a demand upon the board is required by sec. 435(c) a decision by the board consonant with the individual director's duties of care and loyalty to the corporation that, in their business judgment, such

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

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

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

Subsequent efforts by board members to dismiss the action: If the initial demand upon the board has been excused, or

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

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

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

Sec. 435(h) covers the matter of security for expenses of the corporation and/or the actual defendants. If the plaintiff shareholder(s) hold five percent or more of any class of outstanding shares of the corporation or voting trust certificate representing such shares, there shall be no security for expenses requirement. If not, either the corporation or the actual defendants are permitted to move the court at any time before final judgment to require the plaintiff(s) to give security for the reasonable expenses,

including the fees of their attorneys, that may be incurred by the petitioners. The amount of such security shall be determined by the court which may, thereafter, raise or lower it upon a showing that it had become inadequate or excessive. Whether the petitioners shall have recourse to such security shall depend upon the judgment of the court.

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

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

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

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

Official Comment to ACC Section 10.06.438.

LIABILITY OF SHAREHOLDERS AND SUBSCRIBERS.

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

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

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

Official Comment to ACC Section 10.06.450.

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

SCOPE: This section replaces former AS 10.05.171 (Board of Directors), .222 (Presumption of Consent of Director and Filing of Dissent), and .219 (Effect of Good Faith Reliance on Financial Statements). These Alaska provisions were drawn from the pre-1969 version of Model Act Sections 35 and 48. Sec. 450 gathers into one place basic provisions on four major questions: (1) the exercise and potential delegation of board functions; (2) the articulation of a standard for the discharge of the duty of care which must be observed by directors and their right to rely upon certain information, opinions, reports or statements from officers, experts, or committees of the board on which they do not

serve: (3) the grant of an absolute right of inspection to every director as to all corporate books, records and documents of every kind together with the right to use an agent or attorney and the right to make copies or extracts of such information; and (4) the consequences of a director's failure to dissent as to any action taken by the board at a meeting at which such director is present.

Note that under subsection (a), the articles are competent to delegate the powers and duties imposed by this chapter on directors. If the delegation is by the board to a committee consisting of some, but not all of the directors, it is governed by sec. 468. If the delegation is pursuant to the terms of the articles under sec. 430(a), such provisions may also extend to the delegates the privileges and liabilities conferred and exacted in this chapter. However, the mere fact of delegation does not relieve the directors of ultimate responsibility for the faithful discharge of their statutory responsibilities or the duties of care and loyalty owed to the corporation.

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

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

CHANGE IN FORMER ALASKA LAW: Subsection (a) is premised upon the 1984 revision of Section 35 of the Model Act.

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

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

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

Deviating from the text of MBCA Section 35, ACC sec. 450(b) borrows from ACC Section 309(a) to make clear that this duty of care includes a duty of reasonable inquiry. See National Auto & Cas. Ins. Co. v. Payne, 261 Cal. App. 2d 503, 509, 67 Cal. Rptr. 734 (1968), for elaboration of this concept. Another important change in Alaska law is sec. 450(b)'s substantial expansion of the right of reliance upon statements, records, and other information furnished to a director from officers, employees, or other directors. Former AS 10.05.219 contained a limited right to rely upon financial statements for the purpose of avoiding liability for the declaration and payment of an illicit dividend or other distribution of assets under former AS 10.05.216.

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

Official Comment to ACC Section 10.06.453.

NUMBER AND ELECTION OF DIRECTORS.

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

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

As modified from the BCL, sec. 453(a) makes it impossible for the board to act in this important particular without participation of the shares unless it is operating under a provision of the articles or bylaws adopted by approval of the outstanding shares. Subsection (b) would also require

shareholder participation in the increase or decrease of the board size or in adopting the article or bylaw which empowers the board to effect this change. See also sec. 228 and the comment thereto.

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

Subsection (d) is taken from Section 36 of the Model Act and works no substantive change over former AS 10.05.180 except that it substitutes the permissive "may" for the mandatory "shall" of the former statute.

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

Official Comment to ACC Section 10.06.455.

CLASSIFICATION OF DIRECTORS.

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

CHANGE IN FORMER ALASKA LAW: Sec. 455(a) is an enactment of Model Act Section 37 and works an important change from former AS 10.05.186 respecting the election to classify the board. Under prior Alaska law this decision could be taken

by a bylaw adopted by the board without shareholder participation. The danger to minority share representation in such circumstances led to subsection (a)'s requirement that the election be taken in the articles, which insures shareholder participation.

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

Official Comment to ACC Section 10.06.458

VACANCIES ON THE BOARD.

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

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

Official Comment to ACC Section 10.06.460.

REMOVAL OF DIRECTORS WITHOUT CAUSE.

SCOPE: Sec. 460 provides an important shareholder check upon the incumbent directors innovated in California and now found in the New York (optional), Delaware (optional), and Model Acts. Subject to specific provisions on notice, incumbent directors may be removed at any time without any reason by a vote of the outstanding shares. If removal is sought at a special meeting then notice must be given under AS 10.06.410, which notice includes the purpose for which the meeting is called. Sec. 460(a)(1)creates a special exception to the general rule under the ACC that no notice of the agenda or purpose need be given in a notice for a nonspecial meeting. In the case of corporations the voting shares are which are held of record by 300 or more

shareholders only, notice of an intention to seek removal of any or all directors must be sent to the shareholders entitled to vote on the question. Sec. 460(a)(1) provides that in the instance of an annual meeting the shareholder may submit this notice to the president or secretary of the corporation for inclusion, without cost to the shareholder, on the notice sent pursuant to AS 10.06.410. In order to gain the advantage of this no-cost machinery the shareholder must deliver notice of his intention and request for inclusion to the president or secretary no later than 75 days before the date fixed for the annual meeting.

A shareholder who does not make a timely submission of this notice may, at that shareholder's expense, comply with the requirement of sec. 460(a)(1) by delivering the notice personally or by mail at least 20 days before the date fixed for the meeting. In the case of a corporation the voting shares of which are held of record by fewer than 300 shareholders there need be no notice of intention to seek removal if the attempt is to be made at a nonspecial meeting.

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

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

The special provisions on notice are original having no parallel in statutory precedent. They are intended to apply

only to corporations the voting shares of which are held of record by five hundred or more shareholders.

Official Comment to ACC Section 10.06.463.

REMOVAL OF DIRECTOR BY SUPERIOR COURT.

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

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

Official Comment to ACC Section 10.06.465.

VACANCIES AND RESIGNATION; SPECIAL MEETING OF SHAREHOLDERS.

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

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

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

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

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

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

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

Official Comment to ACC Section 10.06.468.

EXECUTIVE AND OTHER BOARD COMMITTEES.

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

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

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

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

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

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

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

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

Official Comment to ACC Section 10.06.470.

MEETINGS: CALL, PLACE, NOTICE, AND WAIVER.

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

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

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

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

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

Official Comment to ACC Section 10.06.473.

QUORUM OF DIRECTORS.

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

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

Official Comment to ACC Section 10.06.475.

INFORMAL ACTION BY DIRECTORS.

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

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

Model Act Section 43. Section 475(b) is a modified version of Model Act Section 4, and former AS 10.05.199 making it clear, for the first time, that the written consents obtained from all directors must be identical in content. The permission for the transaction of board business without a meeting is extended by sec. 475(b) to board committees.

Official Comment to ACC Section 10.06.478.

DIRECTOR CONFLICTS OF INTEREST.

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

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

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

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

Sec. 478(a)(2) is an alternative whereby a disinterested and fully informed majority of a quorum of the full board approves the transaction. Whether or not the presence of the interested director(s) is counted for the purposes of ascertaining a quorum (sec. 478(d)), the majority working

approval must meet the absolute majority requirement of sec. 478(a)(2). Section 310 of the GCL would permit this validation decision to be made by a committee of the board, an alternative deliberately eliminated from ACC sec. 478(a). Also eliminated is California's third alternative for validation which would be accomplished by the proponent of the contract or transactions upon proof that the transaction was just and reasonable to the corporation. Instead of being an independent vehicle for validation as in GCL Section 310(a), such a requirement is imposed as an additional ground for validation under ACC sec. 478(a)(2).

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

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

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

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

Official Comment to ACC Section 10.06.480.

LIABILITY OF DIRECTORS.

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

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

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

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

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

Official Comment to Section 10.06.483.

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

SCOPE: Five major topics are addressed by this section:

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

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

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

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

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

Subsection (e) is premised upon BCL Section 715(h) without inclusion of the explicit "right of reliance" provision of the New York Act. Former Alaska law did not define a duty of care for officers. This matter has now been remedied. Unlike BCL Section 715, ACC sec. 483(e) makes it clear that the duty of care includes a duty of reasonable inquiry. Further, it is not the white heart and empty head standard articulated in some common law decisions, but rather a duty of care which would be exhibited by an ordinarily prudent person in similar circumstances. National Auto & Cas. Ins. Co. v. Payne, 201 Cal.App.2d 403, 409, 67 Cal. Rptr. 764 (1968), is an excellent application of the standard, including the duty to act upon inquiry notice, which this section seeks to impose upon officers. The lesser duty of mere good faith enunciated in Katdish v. Phx.-Scotts Sports Co., 11 Ariz. App. 175, 466 P.2d 794, 797 (1970), is disapproved.

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

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

Official Comment to ACC Section 10.06.485.

LOANS TO DIRECTORS, OFFICERS, AND EMPLOYEES.

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

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

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

Sec. 485(a) repudiates the flat prohibition on loans to officers or directors. Loans to directors may not be extended without the approval of two-thirds of the voting shares. The board is competent to extend loans to officers or employees, consistent with the duty of care defined in

sec. 485(f). If a vote of the shares is required, a shareholder who is also a director may vote his shares notwithstanding his interests. If an officer or employee is also a director, then shareholder approval is required for an extension of any loan.

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

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

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

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

Official Comment to ACC Section 10.06.488.

SECONDARY LIABILITY OF DIRECTORS AND OFFICERS.

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

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

upon enterprisers who sought the privilege of a corporate vehicle for the conduct of their affairs.

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

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

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

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

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

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

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

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

Observance of the standard of "due care" created by ACC sec. 450(b) and made a matter of affirmative defense to liability created within the corporate entity under ACC sec. 470 has no application to the secondary liability to third party claimants created by sec. 488.

CHANGE IN FORMER ALASKA LAW: ACC sec. 488 is new and without precedent in former Alaska statutory law. Two recent decisions of the Supreme Court of Alaska have surveyed common law theories for disregarding or "piercing" the corporate veil. In neither was such a step ultimately taken. Jackson v. General Electric Company, 574 P.2d 1170, 1172-73 (1978), cites with approval and then finds inapplicable both fraud and instrumentality theories for disregarding the formal distinction between parent and subsidiary corporations

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

Official Comment to ACC Section 10.06.490.

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

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

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

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

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

Discretionary indemnification is provided in two circumstances. Sec. 490(a) deals with a defendant in direct civil, administrative or criminal proceedings. Note that while the decision is left to the judgment of the corporation (sec. 490(d)) it is conditioned upon a finding that the defendant ". . . acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to a criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful . . . ." These standards are a limitation upon the power of the corporation conferred in sec. 490(a) and exercises under sec. 490(d). The final sentence of sec. 490(a) stipulates that the mere fact that the direct action terminated ". . . by judgment, order, settlement, conviction, or upon a plea of nolo contendere or

its equivalent, does not, of itself, create a presumption that (the defendant did not act with the requisite state of mind)." With respect to criminal convictions (and arguably a plea of nolo) see, Sneidel v. State, 460 P.2d 77, 75 (Alaska 1969); State v. Guest, 583 P.2d 836, 839 (Alaska 1978); and Hentzner v. State, 613 P.2d 821 (Alaska 1980), which would seem to preclude the ability of a defendant to establish the absence of a specific mens rea. This would place it beyond the power of the corporation to act under sec. 490(d) to authorize discretionary indemnification.

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

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

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

Under sec. 490(e), a three step procedure must be observed in requesting and granting an advance of corporate assets. First, assuming that a determination has been arrived at under sec. 490(d), the director or officer must furnish the corporation with a written affirmation of good faith belief that the applicable standard of care has been met. In the instance of a director that standard is set forth in sec. 450(b). The standard of care for corporate officers is set forth in sec. 481(e). In addition to the affirmation of belief in the observance of the applicable standard of conduct, the party seeking a disbursement of corporate assets must furnish a written unlimited general undertaking to repay the advance if it is ultimately determined that an acceptable standard of conduct has not been met.

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

Official Comment to ACC Section 10.06.502

AUTHORIZATION: PERMITTED AND PROHIBITED AMENDMENTS.

SCOPE: ACC sec. 502 permits a corporation to amend its articles in "any and as many respects as may be desired." Sec. 502(a) states the legislature's intent to exercise its reserve power over corporations to authorize any amendment to the articles regardless of whether any such amendment was permissible under prior law. Such power was reserved under AS 10.05.822 for corporations formed under the Alaska Business Corporation's Act of 1957. As to corporations formed prior to 1957 under Territorial Law, the case of Starkey v. American Airlines Inc., 68 Wash.2d 318, 419 P.2d 352 (1966) is approved with respect to its interpretation of the intent of the Alaska Legislature in adopting sec. 502.

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

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

CHANGE IN FORMER ALASKA LAW: Sec. 502(a) is taken from GCL Section 950. It repeats the substance of former AS 10.05.270, which it replaces, and adds language which makes clear the legislative intent in providing for the amendment of articles.

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

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

As is discussed in State ex rel. Swanson, et al. v. Perham, 10 Wash.2d 372, 494 P.2d 1363 (1972), the articles are a contract of a fourfold nature: (1) between the state and the corporation; (2) between the state and the stockholders; (3) between the corporation and the stockholders; and (4) between the stockholders themselves. The statutory authorization to amend the articles is a part of the contract. It is a broad authorization with no express statutory limitations. However, traditional contract law principles of equity do exist as limitations on the power to amend. See Honigman v. Green Giant Co., 208 F.Supp. 754, aff'd 309 F.2d 867 (6th Cir. 1962) which held that amendments working a drastic change in the manner in which the corporation was held and controlled were permissible "in the absence of fraud and the violation of any fiduciary relationship."

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

Well-conceived draftmanship can protect minority interests against tumultuous recapitalizations or a diluting issuance of new stock. Sec. 210 expressly permits the articles to require supermajority votes; such votes could be employed for the approval of amendments to the articles if the

majority vote provided by sec. 504 was considered to be insufficiently protective of minority interests. Sec. 508 would protect such a supermajority provision. Miscellaneous provisions in Article 12 give existing corporations a choice of remaining under the 2/3 voting requirement of prior law or of being governed by the majority voting requirement of sec. 504.

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

Official Comment to ACC Section 10.06.504.

PROCEDURE TO AMEND ARTICLES OF INCORPORATION.

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

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

Under the ACC scheme, approval by the outstanding shares normally means approval by an absolute majority of the outstanding shares entitled to vote. In order to determine

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

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

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

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

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

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

Official Comment to ACC Section 10.06.506

CLASS VOTING ON AMENDMENTS.

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

First, the section strong-arms voting rights for any class of shares adversely affected within the specific provisions of the statute. These voting rights obtain irrespective of

any provisions of the articles and may not be impaired or denied by any internal rule within the corporate structure.

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

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

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

Official Comment to ACC Section 10.06.508.

GREATER VOTING REQUIREMENTS.

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

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

Official Comment to ACC Sections:

Sec. 10.06.510. ARTICLES OF AMENDMENT.

Sec. 10.06.512. FILINGS ARTICLES OF AMENDMENT.

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

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

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

Official Comment to ACC Section 10.06.514.

EFFECT OF CERTIFICATE OF AMENDMENT.

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

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

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

Official Comment to ACC Section 10.06.516.

RESTATED ARTICLES OF INCORPORATION.

SCOPE: This housekeeping provision merely authorizes a corporation from time to time to restate the content of its

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

CHANGE IN FORMER ALASKA LAW: ACC sec. 516 is a reenactment of former AS 10.05.[illegible].

Official Comment to ACC Sections:

10.06.518. FILING OF RESTATED ARTICLES OF INCORPORATION;

10.06.520. EFFECT OF ISSUANCE OF RESTATED CERTIFICATE OF INCORPORATION.

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

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

Official Comment to ACC Section 10.06.522.

AMENDMENT OF ARTICLES OF INCORPORATION IN REORGANIZATION PROCEEDINGS.

SCOPE: ACC sec. 522 is designed to coordinate local law with the Federal Bankruptcy Act. A plan of reorganization under that act may alter or eliminate shareholder interests in a manner which would never obtain an affirmative vote of

the shares. If local law does not permit amendment without such a vote, an involuntary dissolution and reincorporation would be necessary to achieve the desired result of the bankruptcy reorganization. This process may, among other things, increase liability for federal income taxes. ACC sec. 522 prevents this problem by permitting amendment of the articles as part of the reorganization proceedings.

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

Official Comment to ACC Sections:

10.06.524. FILING OF AMENDMENT OF ARTICLES IN REORGANIZATION PROCEEDINGS;

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

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

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

Official Comment to ACC Sections 10.06.530-540.

MERGER, CONSOLIDATION, SHARE EXCHANGE.

SCOPE: These sections define and set up uniform procedures for the proposal of three classic forms of organic change. In the event of either a merger or consolidation, one or both of the participating corporations formally ceases to

exist. In the event of a share exchange, there is no formal supression of a constituent corporation but it becomes a wholly owned subsidiary of the accuiring corporation. In each instance the scheme of the ACC is to place the responsibility for the framing of a proposal within the discretion of the boards of the constituent or participating corporations. The approval of the shareholders is then obtained under secs. 544 and 546.

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

Official Comment to ACC Section 10.06.542.

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

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

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

As to other business reasons or purposes which may actuate the majority, sec. 542(b)(2) places the burden of proof (in the event of litigation challenge by any shareholder) upon

the proponents to establish the disparate treatment as consistent with fiduciary duties owed to all shareholders. In this manner the ACC recognizes that majority shareholder(s) also have "rights." See Tanzer v. International General Industries, Inc., 379 A.2d 1121 (Del. 1977).

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

Official Comment to ACC Section 10.06.544.

NOTICE TO AND APPROVAL BY SHAREHOLDERS.

SCOPE: ACC sec. 544 mandates the steps which must be taken to seek the approval of shareholders of the constituent corporations to any merger, consolidation, or share exchange. Approval of the merger of a subsidiary corporation (sec. 534) is not within the scope of sec. 544. Written notice must be given to each shareholder irrespective of voting rights not less than 20 days before the meeting. This notice must state that the purpose or one of the purposes of the meeting is to consider the proposed organic change. A copy of the plan for the proposed change together with the text of the ACC provisions on the rights of dissenting shareholders must accompany the notice.

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

Official Comment to ACC Section 10.06.546.

MANNER OF APPROVAL BY SHAREHOLDERS.

SCOPE: ACC sec. 546 enfranchises all shares of every class or series of each constituent corporation to an organic

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

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

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

Official Comment to ACC Section 10.06.548.

ABANDONMENT OF PLAN OF MERGER, CONSOLIDATION, OR EXCHANGE.

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

CHANGE IN FORMER ALASKA LAW: ACC sec. 548 is taken from Section 75 of the Model Act and mirrors without change the content of former AS 10.05.393 save for inclusion of the share exchange.

Official Comment to ACC Section 10.06.550

ARTICLES OF MERGER, CONSOLIDATION, OR EXCHANGE.

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

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

Official Comment to ACC Section 10.06.552.

FILING OF ARTICLES OF MERGER, CONSOLIDATION, OR EXCHANGE.

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

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

Official Comment to ACC section 10.06.554.

MERGER OF SUBSIDIARY CORPORATION.

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

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

Official Comment to ACC Section 10.06. 56.

PROCEDURE FOR MERGER OF SUBSIDIARY CORPORATION.

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

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

Official comment to ACC Section 10.06.558.

FILING OF ARTICLES OF MERGER OF SUBSIDIARY CORPORATION.

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

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

Official Comment to ACC Section 10.06.560.

EFFECT OF MERGER, CONSOLIDATION, OR EXCHANGE.

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

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

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

Official Comment to ACC Section 10.06.562.

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

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

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

Official Comment to ACC Section 10.06.564.

REORGANIZATION: DISCLOSURE OF ALIEN AFFILIATES.

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

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

Official Comment to ACC Section 10.06.566.

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

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

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

Official Comment to ACC Section 10.06.568.

SALE OF ASSETS NOT IN REGULAR COURSE OF BUSINESS.

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

Sec. 568 mandates that this notice shall, in addition to stating the specific purpose of the meeting, include a copy

of ACC secs. 574 and 576 respecting the rights of a dissenting shareholder.

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

Official Comment to ACC Section 10.06.570.

APPROVAL OF TRANSACTION BY SHAREHOLDERS.

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

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

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

Sec. 570(b) is new and addresses a subject matter unprecedented in Alaska law. The problem is with a de facto "cash out" of minority share interests implicit in the sale of all or substantially all of the corporation's assets other than in the regular course of business. Sec. 542 is unavailing as a source of protection to minority shareholders because there is no "distribution." The

corporate entity remains although with its assets (and consequent living in the market place) perhaps fundamentally changed. The opportunities implicit in the former asset holdings may now have passed to another corporation controlled by the majority of the shares, thus excluding the minority. The requirement of the extraordinary absolute ninety percent approval by the outstanding shares (with all shares franchised) is designed to minimize this danger.

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

Official Comment to ACC Section 10.06.572.

ABANDONMENT OF TRANSACTION BY BOARD.

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

CHANGE IN FORMER ALASKA LAW: ACC sec. 572 is predicated upon Section 79(d) of the Model Act and reflects without substantive change the content of former AS 10.05.644. Note the contrast with abandonment under sec. 458. If the transaction is a merger, consolidation, or exchange it may be abandoned by the board only to the extent that abandonment machinery was place within the plan.

Official Comment to ACC Section 10.06.574.

RIGHT OF SHAREHOLDERS TO DISSENT.

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

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

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

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

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

CHANGE IN FORMER ALASKA LAW: ACC sec. 574 is predicated upon Section 80 of the Model Act with alterations to allow

dissenter's rights to shareholders in all corporations which are party to a share exchange. In company with secs. 576 to 582, sec. 574 consolidates provisions found in two areas of the former corporations code. Dissenter's rights attaching in the case of a merger or consolidation were found in former AS 10.05.417-432, while those arising in the event of a "sale or exchange of all or substantially all of the property and assets of the corporation" were located in former AS 10.05.447-462.

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

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

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

Official Comment to ACC Section 10.06.575.

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

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

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

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

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

Under the ACC, the obligation of the resulting or surviving corporation to tender what it deems to be the fair value of dissenters' shares matures upon consummation of the organic change. Accordingly, sec. 576(d) fixes the effective date determined in accordance with sec. 560 as consummating a merger, consolidation or share exchange. A transaction involving assets under sec. 566 is deemed consummated when the corporation has received the consideration specified in the board resolution submitted to the shareholders in accordance with that section.

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

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

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

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

CHANGE IN FORMER ALASKA LAW: ACC sec. 575 is predicated upon section 513(a), (b), (c), (e), and (f) of the MBCL as amended in 1982. It significantly expands coverage of the

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

Official Comment to ACC Section 10.06.578.

OFFER AND PAYMENT TO DISSENTING SHAREHOLDERS; CIRCUMSTANCES WHERE PROHIBITED.

SCOPE: Sec. 578(a) defines the basic obligation of the surviving or resulting corporation to those shareholders who have perfected and maintained the status of a dissenter under sec. 576. The corporation is obligated to make a written offer to pay each dissenter what the corporation estimates to be the fair value of such shares. In order that the shareholder may have an opportunity to gauge the fairness of this offer, sec. 578(b) requires that the corporate offer be accompanied by financial disclosure of profit and loss as well as the current balance sheet. In addition, the offer must be accompanied by a copy of this section and sec. 580 which define the rights and obligations of such dissenting shareholders.

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

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

value. In the event that litigation by objecting shareholders fixes a different value, those shareholders who failed to make timely objections under sec. 578(f) are barred from further claim against the corporation.

Sec. 578(g) addresses the obligations of a resulting or surviving corporation which is unable to purchase the shares of dissenting shareholder without violating the restraints upon distributions found in sec. 358, 370, 363, 365, or 375. The scheme is clearly designed to subordinate the rights of dissenting shareholders to those of corporate creditors. Before it may engage in any payment, the corporation must first ascertain the total dimension of its obligation to all dissenters and then determine if that obligation can be met without violating the ACC restraints upon distributions. If it cannot, the corporation is forbidden to make any payment for this would violate the cardinal rule that all dissenting shareholders are to be treated in an identical fashion.

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

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

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

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

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

Official Comment to ACC Section 10.06.580.

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

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

In the event that the corporation refuses or fails to inaugurate such a proceeding, sec. 580(a)(2) confers standing upon any dissenting shareholder to proceed in the name of the corporation. If such a proceeding is not commenced within the time fixed by that section the rights

of all remaining dissenters shall be lost and those shareholders shall be regarded as having withdrawn their election to dissent. The superior court may, for good cause shown, limit the scope of relief against the incidence of this loss of dissenter's status.

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

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

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

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

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

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

Official Comment to ACC Section 10.06.582.

STATUS OF SHARES ACQUIRED FROM DISSENTING SHAREHOLDERS.

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

CHANGE IN FORMER ALASKA LAW: ACC sec. 582 is predicated upon Model Act Section 61 and consolidates former AS 10.05.429 and 462 with the substituted references to "reacquired" for "treasury" shares.

Official Comment to Article 9 of the ACC.

DISSOLUTION.

INTRODUCTION: Dissolution is to a corporate entity what death is to a natural person. As with the provisions

respecting the articles and bylaws, amendments and organic change, the protection of the interests of shareholders and creditors and the imposition of duties of care and loyalty upon directors and officers are addressed in the ACC provisions governing dissolution. Unlike the statutory provisions establishing and managing the corporate form, Article 9 assumes that the corporation is, or shortly shall be, dead and gone.

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

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

Official Comment to ACC Section 10.06.605.

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

SCOPE: ACC sec. 605 places the decision to voluntarily dissolve a functioning corporate entity with the shareholders. A two-thirds affirmative vote of the shares entitled to vote is required to approve a plan of voluntary dissolution. Under the ACC the board of directors is given no role in either proposing or passing upon the decision to voluntarily dissolve. The proposal will thus be initiated by a shareholder or shareholders under sec. 610. As an

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

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

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

Official Comment to ACC Section 10.06.608.

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

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

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

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

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

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

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

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

Official Comment to ACC Section 10.06.610.

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

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

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

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

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

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

Official Comment to ACC Section 10.06.613.

EFFECT OF CERTIFICATE OF REVOCATION OF ELECTION.

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

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

Official Comment to Section 10.06.615.

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

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

CHANGE IN FORMER ALASKA LAW: ACC sec. 615 replaces former AS 10.05.480 and 489(1) (based upon MBCA Section 86 and 87); it is an adapted version of GCL Section 1903. Sec. 615 changes Alaska law by giving explicit recognition of the propriety of continuing normal business activities to the extent necessary to preserve either the goodwill or going-concern value of the business if a sale of the business or its assets is contemplated. The express mention of board powers during a period of winding up is also new to Alaska law; ACC sec. 660 is also relevant to this topic.

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

Official Comment to ACC Section 10.06.618.

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

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

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

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

Official Comment to ACC Section 10.06.620.

ARTICLES OF DISSOLUTION: CONTENTS.

SCOPE: Upon completion of the winding up proceedings, a corporation is to file articles of dissolution signed and verified by a majority of the directors then in office. The

articles are to recite that the corporation is completely wound up, that the debts and liabilities of the corporation have been paid or otherwise adequately provided for (see ACC sec. 668) and that the remaining assets have been distributed to shareholders.

CHANGE IN FORMER ALASKA LAW: ACC sec. 623 is taken from GCL Section 1905 and replaces former AS 10.05.510, modeled after MBCA Section 92. Under prior law, execution of the articles of dissolution was done by two officers; execution by a majority of the directors is required by the new provision. The requirement regarding the contents of the articles has been altered to eliminate information already in the commissioner's files, such as the name of the corporation and a reference to the statement of intent to dissolve and the date of its filing.

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

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

Official Comment to ACC Sections:

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

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

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

Official Comment to ACC Section 10.06.628.

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

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

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

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

CHANGE IN FORMER ALASKA LAW: ACC sec. 628 is predicated upon ACC Section 1900 with the delegation of 1900(d). It replaces former AS 10.05.540-543, which had been premised upon Section 97 of MBCA. Key changes include elimination of the former provision whereunder a single shareholder could initiate an involuntary dissolution proceeding. The grounds

for fraud, mismanagement, unfairness, or other violations of the rights of certain or all other shareholders are spelled out with greater specificity in sec. 628. Former AS 10.05.543 permitted a creditor to bring an action to liquidate the corporation. No such provision is included in ACC sec. 628. Note that under ACC sec. 488 creditors are permitted to proceed directly against directors and officers of the corporation if normal collection proceedings against the corporate debtor prove unsuccessful.

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

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

Official Comment to ACC Section 10.06.630.

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

SCOPE: ACC sec. 628 established involuntary dissolution by verified complaint as a means of resolving deadlock or charges of oppression within the corporation. While society has an interest in resolving such grave disputes, it also faces a potential loss of a corporate employer, competitor, or servant within the marketplace. For this reason, ACC sec. 630 has created machinery under which the plaintiff shareholders may be "bought out" at a fair price which goes beyond mere liquidation value to include the value of the business as going concern. This buy out may be effected by 50 percent or more of the voting power of the corporation or by the corporate entity. If the purchase is by the latter, it amounts to a "distribution" and is subject to the ACC restrictions on distributions designed to protect creditors and holders of senior shares (secs. 353-365).

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

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

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

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

Official Comment to ACC Section 10.06.633.

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

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

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

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

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

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

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

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

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

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

ACC sec. 633(a) continues the content of former AS 10.05.519 in augmenting the grounds under which involuntary dissolution may be had. The phrase "principal officers and directors" in former .519(b) and (c) has been replaced by president, secretary or registered agent in sec. 633 so as

to eliminate any potential argument over the status of the recipient of the notice. Former .519(h) has never been severed from ACC sec. 633 and given separate treatment in sec. 635.

Official Comment to ACC Section 10.06.635.

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

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

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

Official Comment to ACC Section 10.06.638.

JURISDICTION AND PROCESS FOR COMMISSIONER'S ACTION.

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

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

Official Comment to ACC Section 10.06.640.

APPOINTMENT OF PROVISIONAL DIRECTOR: DEADLOCK.

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

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

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

Official Comment to ACC Section 10.06.643.

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

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

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

There is a further major modification implicit in the legislature's approval of GCL Section 1803. The former use of a receiver in involuntary proceedings was that of a "liquidation receiver" (Section 98 of the MBCA and former AS 10.05.555-573). The California act upon which the ACC is now modeled uses a receiver for the purpose of preserving the corporation and its business pending a hearing on the

complaint for involuntary dissolution. The subsequent provisions of the ACC follow California law in using the incumbent directors (under the discipline of the court) to handle the affairs which the Model Act vested in the liquidating receiver.

Official Comment to ACC Section 10.06.645.

DECREE FOR WINDING UP AND DISSOLUTION: FURTHER JUDICIAL RELIEF.

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

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

Official Comment to ACC Section 10.06.648.

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

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

Upon commencement of winding up proceedings, regular business operations are to cease and future actions are to be directed toward the cessation of business activity on advantageous terms. An exception is recognized where the continuation of business activities is necessary to preserve good will or the going-concern value of assets which are to be sold. In the absence of a perfected appeal or stay order, notice of the commencement of winding up is to be

given by those acting under sec. 648(a) to all shareholders and all known creditors and claimants.

CHANGE IN FORMER ALASKA LAW: ACC sec. 648 is taken from GCL Section 805 and replaces former AS 10.05.555 and 558 which had been based upon Section 98 of the MBCA. Sec. 648 departs from prior law by relying upon the existing management of the corporation, rather than a liquidating receiver, to accomplish the winding up.

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

Official Comment to ACC Section 10.06.650.

JURISDICTION OF COURT.

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

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

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

Official Comment to ACC Section 10.06.653.

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

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

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

In the event the assets subject to such claims have been reduced to cash, the Commissioner of Revenue is established as a stakeholder. Thereafter they are to be paid over pursuant to the terms of an agreement as among the disputants or by order of the court. However, sec. 653(e) recognizes that in certain circumstances it may be improvident to reduce assets to cash. In such cases, the assets are to be held in specie pending a resolution of the dispute by agreement between or among the creditors or claims or a court order. Generally, the determination to reduce assets to cash or not is one to be made according to the business judgment of those conducting the winding up. Abuse of this discretion would be subject to corrective orders of the court.

If the winding up is a consequence of voluntary dissolution and there has been no sec. 618 petition, then all disputes are to be resolved according to sec. 653(f). It will be noted, there is no provision for avoiding the conversion of assets into cash and lodging such funds with the Commissioner of Revenue as a stakeholder. Again, the

commissioner holds such assets pending agreement among the disputants or order of a court.

In order to ensure that these disputes do not leave the commissioner with custody of assets for an indefinite period, sec. 653(g) requires that claims against the corporation which have been rejected under either (c) or (f) must be made the object of suit within thirty days or be barred.

CHANGE IN FORMER ALASKA LAW: ACC sec. 653 is predicated upon UCC sections 1007 and 1008 and replaces former AS 10.05.579 which had been based upon Section 300 of the MBCA. Sec. 653 repeats the basic substance of prior law which also provided a procedure for settling all claims against the corporation.

Sec. 653 adds several items to the former law: specifications regarding notice, special treatment for secured creditors, a requirement of provision for claims not yet disallowed, a provision allowing a creditor holding an unmatured debt to collect the present value, and a thirty (30) day limit upon the commencement of actions on rejected claims.

Official Comment to ACC Section 10.06.655.

ORDER DECLARING CORPORATION WOUND UP AND DISSOLVED; DECLARATIONS; EFFECT; ADDITIONAL ORDERS; DISCHARGE OF DIRECTORS.

SCOPE: Upon final settlement of accounts under ACC sec. 648 and determination that the corporation's affairs are in a condition for it to be dissolved, ACC sec. 655 directs the court to make an order declaring the corporation duly wound up and dissolved. This order is to state information regarding the provisions made for taxes and penalties owing under Article 11 and other known debts and liabilities. Any distribution of assets to shareholders is to be noted. The order is to declare that those conducing the winding up have settled their accounts and that their duties and liabilities are discharged.

Note that nothing contained in sec. 655 is intended to diminish the liability of officers and directors which may be established by an aggrieved creditor under ACC sec. 488.

Corporate existence ceases upon issuance of the sec. 635 order except to the extent of further winding up and to the extent provided in ACC sec. 678.

CHANGE IN FORMER ALASKA LAW: ACC sec. 635 is derived from GCL Section 308 and replaces former AS 10.05.565 which had been based upon MBCA Section 102. Former law required that all property be distributed prior to entry of the decree; ACC sec. 655 permits the court to make a decree even though some winding up is yet to be done.

Official Comment to ACC Section 10.06.658.

FILING OF DECREE OF DISSOLUTION.

ACC sec. 658 is a reenactment without change of former AS 10.05.588 which is based upon Section 103 of the MBCA.

Official Comment to ACC Section 10.06.660.

POWERS AND DUTIES OF DIRECTORS IN DISSOLUTION PROCEEDINGS.

SCOPE: ACC sec. 660 is the heart of the reformed framework for utilizing the incumbent directors and officers of the corporation to conduct both voluntary and involuntary dissolution of a corporation. It enumerates powers and duties of the board; the items listed in sec. 660 are illustrative and not intended to limit what the board may do.

The main limitations imposed upon the board are found in secs. 615(c) and 643(c) which direct that the corporation shall cease its normal business and start winding up except to the extent necessary to preserve the good will or going-concern value of the corporate business.

CHANGE IN FORMER ALASKA LAW: ACC sec. 660 is new to Alaska law, being derived from Section 2001 of the GCL. Its coverage replaces that of several sections of prior law, including former AS 10.05.469(2), 564, and 570 based respectively on Sections 87 and 98 of the MBCA. The use of existing management to conduct the voluntary dissolution proceedings is a significant change from prior law which utilized a "liquidating receiver" appointed by the superior court.

The new framework adopts the GCL philosophy that it is best to continue to utilize the existing management of the corporation, subject to the discipline of the court, to conduct the winding up and dissolution. In the event the superior court does not repose confidence in the abilities or fidelity of the incumbent management, it has power under ACC sec. 648 to appoint other persons to conduct the winding up.

Official Comment to ACC Section 10.06.663.

PROCEEDING TO DETERMINE IDENTITY OF DIRECTORS OR TO APPOINT DIRECTORS.

SCOPE: Since the ACC relies upon directors to conduct the winding up and dissolution of a corporation, it is important to be able to establish the identity of such persons and to replace those who are unwilling or unable to perform their duties. ACC sec. 663 creates a procedure for accomplishing these tasks. It is applicable to all dissolutions proceedings.

CHANGE IN FORMER ALASKA LAW: ACC sec. 663 is taken from GCL Section 7003. There is no comparable provision in prior Alaska law or in the MBCA.

Official Comment to ACC Section 10.06.665.

DISTRIBUTION OF CORPORATE ASSETS AMONG SHAREHOLDERS; WHEN TO BE MADE.

SCOPE: Once the interests of creditors and other claimants against the corporation have been settled or made the object of adequate provision, the remaining assets are to be distributed among the shareholders according to their respective rights and preferences. In the context of dissolution proceedings under judicial supervision, no distribution may be made until expiration of the period for presentation of claims under ACC sec. 653.

CHANGE IN FORMER ALASKA LAW: ACC sec. 665 is based upon Section 7004 of the GCL; it replaces former AS 10.05.489 and 561 which were based upon Sections 87 and 93 of the MBCA.

Official Comment to ACC Section 10.06.668.

PROVISION FOR PAYMENT OF DEBT OR LIABILITY.

SCOPE: The concept of "adequate provision" for a debt or liability is used extensively throughout Article 9 as a precondition for distributing assets to shareholders when all claims by creditors have not yet been settled. The definition provided in ACC sec. 668 is intended to clarify the meaning of this important concept.

CHANGE IN FORMER ALASKA LAW: ACC sec. 668 is taken from Section 2005 of the GCL. It is without precedent in Alaska law.

Official Comment to ACC Section 10.06.670.

DISTRIBUTION IN MONEY OR IN KIND; INSTALLMENTS.

SCOPE: ACC sec. 670 gives express sanction to distribution schemes which give shareholders property as opposed to cash. Installment plans are also sanctioned. The statute places a value on making distributions as soon as possible but allows for delays consistent with the beneficial liquidation of the corporation. It is the intent of the legislature to authorize distribution schemes which satisfy some shareholder claims in kind and others in cash if the value of the disparate forms of distribution meets the statutory requirement of proration and if such a plan is fair to all shareholders.

CHANGE IN FORMER ALASKA LAW: ACC sec. 670 is taken from Section 2006 of the GCL. It is without precedent in either prior Alaska law or the MBCA.

Official Comment to ACC Section 10.06.673.

PLAN OF DISTRIBUTION; ADOPTION; BINDING EFFECT; NOTICE; PAYMENT TO DISSENTING SHAREHOLDERS; ABANDONMENT.

SCOPE: Th liquidation preferences of senior shares may prove a hindrance to the execution of a plan of distribution of assets other than money which may be most beneficial to shareholders. ACC sec. 673 permits the liquidation rights of outstanding shares to be altered so as to accommodate

such a plan upon approval by the outstanding shares (ACC sec. 990(5)). Class voting is expressly provided. Preferred shares dissenting from the plan may require the corporation to make payment according to their unaltered liquidation preferences. If such dissent and demand prejudices the plan, the board is authorized to abandon it without further recourse to the shareholders.

Liquidation preferences may also be altered by an amendment to the articles under Article 7 if approved by the outstanding shares with full recognition of the rights of the affected shares to vote by class. Under Article 7 there is no right to dissent and then receive treatment according to the terms of the unamended indenture. It is the intention of the legislature that any alteration in the liquidation preferences of senior shares after the filing of an election to wind up and dissolve or after the initiation of involuntary dissolution proceedings is to be governed exclusively by the provisions of ACC sec. 673. Where dissolution is not in process, amendment is governed by the provisions of ACC Article 7.

CHANGE IN FORMER ALASKA LAW: ACC sec. 673 is without prior statutory precedent in Alaska. It is predicated upon Section 2007 of the GCL.

Official Comment to ACC Section 10.06.675.

RECOVERY OF AMOUNTS IMPROPERLY DISTRIBUTED.

SCOPE: Any amount improperly distributed to shareholders may be recovered under ACC sec. 675. Unlike sec. 378, there is no requirement that shareholders have knowledge of the impropriety of any distribution made to them in liquidation. Subsection (d) precludes a corporation contemplating liquidation but not formally engaged in dissolution from exploiting the varying standards between secs. 378 and 673.

Subsection (c) makes clear that any recovery against any shareholders may not function to alter the right of shareholders to share pro rata in the residual assets of the corporation. A right of contribution or a right to compel the corporation or recover from other shareholders may be used to enforce pro rata participation in the assets.

CHANGE IN FORMER ALASKA LAW: ACC sec. 675 is taken from Section 1009 of the UCL. It is new to Alaska law.

Official Comment to ACC Section 10.06.678.

CONTINUED EXISTENCE OF DISSOLVED CORPORATIONS; PURPOSES; ABATEMENT OF ACTIONS; DISTRIBUTION OF OMITTED ASSETS.

SCOPE: ACC sec. 678 provides for a limited continued existence of a corporation which has been dissolved. For an indefinite period of time such a corporation continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, collecting and discharging obligations, disposing of and conveying its property and collecting and dividing its assets. Under the terms of subsection (d), the directors of the corporation on the date of its dissolution or as determined under sec. 663 enjoy the powers to pursue any matter preserved to the corporation under subsection (a).

CHANGE IN FORMER ALASKA LAW: ACC sec. 678(a) is taken from former AS 10.05.594 and is based upon Section 105 of the MBCA. Subsections (b), (c), and (d) are take from SB 112 as passed in the 1980 session of the legislature.

Official Comment to ACC Section 10.06.705.

ADMISSION OF FOREIGN CORPORATION.

SCOPE: ACC sec. 705 conditions entry of a foreign corporation for the purpose of transacting business within the State of Alaska (intrastate business). It is intended to exercise to the fullest extent the police power of the state while respecting the equal protection guarantees made obligatory by the Fourteenth Amendment to the United States Constitution. See Eli Lilly & Co. v. Sav-on-Drugs, Inc., 366 U.S. 276 (1961). Exercise of this power is manifest in sec. 705's requirement that as precondition to the transaction of intrastate business a foreign corporation must obtain a certificate of authority from the commissioner.

While California has recently launched an effort to impose substantial portions of its general corporation law to regulate the internal affairs of what are deemed "pseudo

foreign corporations", the ACC has refrained from the imposition of its provisions upon the internal affairs of foreign organized corporations electing to transact business within this state.

Indeed, the commission is expressly forbidden to deny a certificate of authority because the laws of the state or country under which a foreign corporation is organized differ from the laws of Alaska.

CHANGE IN FORMER ALASKA LAW: ACC sec. 705 is a reenactment of former AS 10.05.597, which is based upon Section 106 of the MBCA. The final sentence of former .597, which disclaimed any regulation of the internal affairs of the corporation, was deleted as unnecessary.

Official Comment to ACC Section 10.06.710.

LIABILITY FOR TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY

SCOPE: In order to enforce the requirement that a foreign corporation obtain a certificate of authority prior to transacting business within Alaska, ACC sec. 710 imposes a penalty of up to $10,000 per year or portion thereof during which such intrastate business is transacted without compliance with sec. 705. In addition, such a foreign corporation is made liable for all fees and taxes which would have been paid if there had been full and prompt compliance with this Chapter.

CHANGE IN FORMER ALASKA LAW: ACC sec. 710 is a reenactment of former AS 10.05.690 and is based upon Section 124 of the MBCA. The penalty ceiling has been increased from $5,000 to $10,000. ACC Article 10 has reorganized the sequence of former Alaska law, situating the sections imposing penalties for noncompliance with sec. 705 immediately after the sections requiring application for the certificate of authority.

Official Comment to ACC Section 10.06.713.

TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY AS A BAR TO RIGHT TO SUE.

SCOPE: Among the disciplinary consequences of a foreign corporation's transaction of intrastate business within Alaska without compliance with ACC sec. 705 is sec. 713's denial to such a corporation of the right to maintain any action, suit or proceeding in the courts of this state. In National Bank of Alaska v. J.B.L.I. N. of Alaska, Inc., 546 P.2d 579, 580-89 (1976), the court indicated a strong disposition to read an identical provision, former AS 10.05.690, as not precluding the assertion of a counterclaim or set-off by such a disabled foreign corporation at least where such counterclaim or set-off would not result in the use of an Alaska court to obtain an affirmative recovery. Such a conclusion would be in accord with a decision of the Supreme Court of Washington. North Star Trading Co. v. Alaska-Yukon-Pacific Exposition, 85 Wash. 451, 148 P. 525, 530 (1915). This position, while not a holding in National Bank of Alaska, supra, is approved by the legislature in the enactment of ACC sec. 710.

Whether a noncomplying foreign corporation under the disabilities of ACC sec. 713 could use a federal court in a diversity case cannot be controlled by the state legislature. However, the legislature notes with satisfaction Fred Hale Machinery, Inc. v. Laurel Hill Lumber Co., Inc., 483 F.2d 46 (5th Cir. 1973), and the authorities there reviewed, holding that a preclusion which would, upon disciplinary grounds, bar a foreign corporation from the use of state courts would also bar use of a federal forum. Accord, Boston Towboat Co. v. John H. Seemen Co., 199 Fed. 445 (W.D. Wash. 1912).

CHANGE IN FORMER ALASKA LAW: ACC sec. 713 is a reenactment without change of former AS 10.05.690 and is based upon Section 124 of the MBCA.

Official Comment to ACC Section 10.06.713.

TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY NOT AFFECTING CONTRACTS AND RIGHT TO DEFEND ACTION.

SCOPE: ACC sec. 713 confines the disciplinary consequences of the transaction by a foreign corporation of intrastate business within Alaska without a certificate of authority to those imposed by this Chapter. It does not generate grounds for a contracting party to assail the validity of a contract or transaction with such a noncomplying foreign corporation.

Finally, although precluded by ACC sec. 713 from initiating any action, suit, or other proceeding, such a noncomplying foreign corporation is not precluded from defending an action, suit, or proceeding commenced by another in an Alaska court.

CHANGE IN FORMER ALASKA LAW: ACC sec. 715 is a reenactment without change of former AS 10.05.693.

Official Comment to ACC Section 10.06.718.

ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS IN THIS STATE.

SCOPE: Under the Interstate Commerce Clause and common law comity principles, a foreign corporation may engage in certain activities within a state without being required to first obtain a certificate of authority. In an effort to reduce litigation on this issue and to draw clear lines through the conflicting lines of decisional authority in other jurisdictions, ACC sec. 718 enumerates activities which a foreign corporation may pursue without the necessity of obtaining a certificate of authority under ACC sec. 705. The language of the section makes it clear that the list is not exclusive.

Note that identical language in former AS 10.05.690 has been held by the Supreme Court of Alaska not to define those activities which may subject a foreign corporation to the jurisdiction of the courts of this state. Northern Supply, Inc. v. Curtiss-Wright Corporation, 397 P.2d 1013, 1015-16 (1965). In reenacting this language as ACC sec. 718, the legislature intends to approve the holding in that case.

CHANGE IN FORMER ALASKA LAW: ACC sec. 718 is a reenactment of former AS 10.05.690, and is based upon Section 136 of the MBCA. The phrase "for the purpose of this chapter" has been added to the introductory paragraph to foreclose the use of sec. 718 in litigation to contest the imposition of taxes, the service of process, and jurisdictional issues which are governed by ACC sec. 765 and disciplined by federal constitutional guarantees to corporations requiring minimum contacts with this state before a state officer may be designated to receive services of process.

Official Comment to ACC Section 10.06.720.

CORPORATE NAME OF FOREIGN CORPORATIONS.

SCOPE: ACC sec. 720 imposes upon foreign corporations seeking a certificate of authority under sec. 705 the same limitations with respect to a corporate name which are imposed upon domestic corporations by ACC sec. 705.

CHANGE IN FORMER ALASKA LAW: ACC sec. 720 represents a modified content of former AS 10.05.606 and is based upon Section 108 of the MBCA. Subsection (3) has been added to the text of the former act in order to subject foreign corporations to the same restrictions imposed upon domestic corporations by ACC sec. 705. For a rationale of these restrictions, see official comment to ACC sec. 705.

Official Comment to ACC Section 10.06.723.

ASSUMED CORPORATE NAME.

SCOPE: In order to accommodate a foreign corporation while at the same time vindicating the policies of Alaska law with respect to the permissible content of a corporate name, ACC sec. 723 permits a corporation disabled by sec. 720 from using its actual name to adopt an assumed name which, if it is permissible under sec. 720, is the name under which it elects to do business in this state.

In order that any interested person may track the true identity of a foreign corporation operating in Alaska under an assumed name, sec. 723(b) requires the commission to maintain records which cross reference the actual and assumed names of all foreign corporations authorized to transact business in this state.

CHANGE IN FORMER ALASKA LAW: ACC sec. 723(a) is based upon former AS 10.05.607 which was taken from Section 108(c)(1) of the MBCA. Wording changes have been made in order to avoid any confusion in coordinating this section with ACC sec. 720.

Sec. 723(b) is new and replaces the former requirement that a corporation using an assumed name identify its true corporate name in all advertising, contracts, and other legal doctrines with a scheme whereby any interested party

may resort to records maintained by the commissioner which are cross referenced as to actual and assumed names of foreign corporations.

Official Comment to ACC Section 10.06.725.

CHANGE OF NAME BY FOREIGN CORPORATION.

SCOPE: ACC sec. 725 furthers the policy with respect to permissible and impermissible content of corporate names by providing that a foreign corporation authorized to transact intrastate business in Alaska will have that right suspended if it were to change its name to one which was violative of any provision of sec. 720.

CHANGE IN FORMER ALASKA LAW: ACC sec. 725 is a reenactment without change of former AS 10.05.609 and is based on Section 109 of the MBCA.

Official Comment to Section 10.06.729.

APPLICATION FOR CERTIFICATE OF AUTHORITY.

ACC sec. 728's content is self-evident. It represents a reenactment without change of former AS 10.05.612. It is based upon Section 110 of the MBCA.

Official Comment to ACC Section 10.06.730.

CONTENTS OF APPLICATION.

SCOPE: ACC sec. 730 specifies the subject matter and information which must be included in an application for a certificate of authority to transact intrastate business in Alaska. Three of the enumerated items may be unfamiliar to foreign counsel.

Sec. 730(5) goes beyond the statement of purpose which the corporation proposes to pursue in Alaska to require a selection from the identification code established under ACC sec. 950 of the code(s) which most closely describes the activities in which the corporation will engage in this state.

Sec. 730(12) requires that the application include the name and address of each alien affiliate (defined in ACC sec. 990(2) and (3)), the percentage of outstanding shares controlled by each alien affiliate, and a specific description of the nature of the relationship between the foreign corporation and its alien affiliate.

Sec. 730(13) requires that the application state the name and address of any person(s) owning at least five percent of the shares, or five percent of any class of shares, and the percentage of the shares of class of shares owned by that person or those persons.

CHANGE IN FORMER ALASKA LAW: ACC sec. 730 is a reenactment without change of former AS 10.05.615 as amended. With the exception of the three items noted above, it is based upon Section 110 of the MBCA. Note that the changes in the ACC financials (Article 4) are not applicable to foreign corporations. Thus, references in prior law to "par value" and "stated capital" have been retained to accommodate foreign corporations which employ traditional financial restraints on the dissipation of assets.

Official Comment to ACC Section 10.06.733.

FILING OF APPLICATION FOR CERTIFICATE OF AUTHORITY.

SCOPE: ACC sec. 733 requires the filing of the original and an exact copy of the application for a certificate of authority using forms prescribed and furnished by the commissioner. The manner of signature and verification requirements are also specified. Processing by the commissioner shall be according to the uniform procedures established under sec. 910.

CHANGE IN FORMER ALASKA LAW: ACC sec. 733 is a reenactment with changes of former AS 10.05.618 and 621 and is based upon Section 111 of the MBCA. Sec. 733 has been technically rewritten to participate in the consolidation of statutory instructions to the commissioner regarding the processing of filed documents (ACC sec. 910).

Official Comment to ACC Section 10.06.735.

EFFECT OF CERTIFICATE OF AUTHORITY.

SCOPE: ACC sec. 735 parallels sec. 218 by establishing a "bright line" event upon which the authority to transact intrastate business is granted by the State of Alaska. In reenacting the content of sec. 735 it is the intention of the legislature to disapprove any doctrine of "de facto" or "colorable" compliance with the provisions of this Chapter as creating any right to transact intrastate business in Alaska.

CHANGE IN FORMER ALASKA LAW: ACC sec. 735 is a reenactment without change of former AS 10.05.624. It is based upon Section 112 of the MBCA.

Official Comment to ACC Section 10.06.738.

AMENDED CERTIFICATE OF AUTHORITY.

SCOPE: ACC sec. 738 obliges a foreign corporation which changes its corporate name or desires to pursue an intrastate purpose in Alaska other than the purpose(s) set forth in its application for a certificate of authority to obtain an amended certificate of authority as a precondition to effecting such change.

CHANGE IN FORMER ALASKA LAW: ACC sec. 738(a) is a reenactment without change of former AS 10.05.657. Sec. 738(b) is new and conforms the entire section to Section 118 of the MBCA. Subsection (b) was added to clarify the filing procedures for amendments to the certificate of authority.

Official Comment to Section 10.06.740.

POWERS OF FOREIGN CORPORATION.

SCOPE: Consonant with the obligation to extend the equal protection of the laws, ACC sec. 740 establishes that an authorized foreign corporation shall have the same powers as would a domestic corporation organized for the purposes stated in the application for or amendment to the certificate of authority. Sec. 740 is not intended to and does not increase the powers of an authorized foreign corporation beyond those permitted under the laws of the state of its incorporation. The statutory proclamation that a foreign corporation ". . . is subject to the duties, restrictions, penalties and liabilities now or hereafter

imposed upon a domestic corporation . . . ." is not intended to impose the general provisions of the ACC.

CHANGE IN FORMER ALASKA LAW: ACC sec. 740 is a reenactment without change of former AS 10.05.603 and is based upon Section 107 of the MBCA.

Official Comment to ACC Sections:

10.06.743. REVOCATION OF CERTIFICATE OF AUTHORITY;
10.06.745. LIMITATIONS ON REVOCATION OF CERTIFICATE OF AUTHORITY;
10.06.748. ISSUANCE OF CERTIFICATE OF REVOCATION;
10.06.750. EFFECT OF CERTIFICATE OF REVOCATION

SCOPE: ACC secs. 743, 745, 748, and 750 authorize, regulate, and determine the effect of a certificate of revocation issued by the commissioner. The power of revocation under sec. 743 is similar to the commissioner's power to involuntarily dissolve domestic corporations under ACC sec. 630. The sixty (60) day notice and grace period established by sec. 745 is also similar to the procedures limiting the commissioner's power to effect involuntary dissolution. If the certificate of authority is revoked pursuant to sec. 748, sec. 750 declares that the foreign corporation is no longer authorized to transact intrastate business in Alaska. Further transaction of such intrastate business would subject the foreign corporation to the provisions of sec. 710.

CHANGE IN FORMER ALASKA LAW: ACC secs. 743, 745, 748, and 750 are reenactments without change of former AS 10.05.675, 678, 681, and 684. They are based upon Sections 121 and 122 of the MBCA.

Official Comment to ACC Sections:

10.06.753. REGISTERED OFFICE AND REGISTERED AGENT OF FOREIGN CORPORATION;
10.06.758. CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OF FOREIGN CORPORATION;
10.06.760. FILING OF STATEMENT OF CHANGE.

SCOPE: ACC secs. 753, 758, and 760 parallel secs. 150, 165, and 170 respecting domestic corporations. They oblige