

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988
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authorized foreign corporations to designate both a registered office and a registered agent, govern the change of such office or agent, and establish procedures for notification of the commissioner.

CHANGE IN FORMER ALASKA LAW: ACC secs. 753, 758, and 760 are reenactments without change of former AS 10.05.627, 633, and 636. They reflect the content of Sections 113 and 114 of the MBCA.

Official Comment to ACC Sections:

10.06.763. SERVICE OF PROCESS ON FOREIGN CORPORATION;
10.06.765. SERVICE ON COMMISSIONER;
10.06.768. RECORDS KEPT BY COMMISSIONER;
10.06.770. PROCEDURE NOT EXCLUSIVE.

SCOPE: ACC secs. 763, 765, 768 and 770 balance the needs of a party desiring to initiate litigation against an authorized foreign corporation in Alaska with the need of that entity to maximize the circumstances in which notice and service of process will be actual as opposed to constructive. ACC sec. 765 is a reenactment of language in former AS 10.05.642 which was interpreted in Northern Supply, Inc. v. Curtiss-Wright Corporation, 397 F.2d 1013, 1015-16 (1965), as not being restricted by the "transacting business within the state" definition and exclusions of ACC sec. 718.

Therefore, while sec. 765 speaks to the fate of both authorized and no longer authorized foreign corporations, it is likely to be interpreted as providing machinery for substitute service upon a foreign corporation which would not, by virtue of sec. 718, have been required to secure a certificate of authority, but which has the requisite minimum contracts with Alaska to warrant an assertion of jurisdiction by an Alaska court. See also ACC sec. 175(b).

CHANGE IN FORMER ALASKA LAW: ACC secs. 763, 765, 768, and 770 are reenactments without substantial change of former AS 10.05.639, 642, 645, and 648. They are based upon Section 115 of the MBCA. The incorporation by reference in sec. 765 of sec. 175(b) is new and alters the law insofar as sec. 175(b) relied upon Section 57.075(j) of the Oregon Revised Statutes.

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Official Comment to ACC, Section 10.06.775.

ORGANIC CHANGE OF FOREIGN CORPORATION.

SCOPE: Whenever a foreign corporation is involved in an "organic change" (defined in ACC sec. 990(26)), notification of the commissioner is to be made by filing a copy of the articles of merger, consolidation, exchange or reorganization authenticated by the proper authority in the jurisdiction in which it is domesticated. No amendment of the certificate of authority is necessary unless the corporate name or purposes to be pursued in the conduct of intrastate business in Alaska is altered.

CHANGE IN FORMER ALASKA LAW: ACC sec. 775 is a reenactment without substantive change of former AS 10.05.654. It is based upon Section 117 of the MCA with terminology changes to clarify the scope of the section and conform to the style of the ACC.

Official Comment to ACC Sections:

- 10.06.778. WITHDRAWAL OF FOREIGN CORPORATION;
- 10.06.780. CONTENTS OF APPLICATION FOR WITHDRAWAL;
- 10.06.783. FORM OF APPLICATION FOR WITHDRAWAL;
- 10.06.785. FILING OF APPLICATION FOR WITHDRAWAL;
- 10.06.788. EFFECT OF CERTIFICATE OF WITHDRAWAL.

SCOPE: ACC secs. 778, 780, 785, and 788 provide for the orderly and official withdrawal of a foreign corporation from Alaska. If these procedures are not followed, and the bright line events of secs. 785 and 788 observed, the foreign corporation would have a continued liability for taxes and fees.

CHANGE IN FORMER ALASKA LAW: ACC secs. 778, 780, 783, 785, and 788 are reenactments of former AS 10.05.660, 663, 666, 669, and 672. They are based upon Sections 119 and 120 of the MCA. Sec. 785 has been restated to observe the consolidation of procedures effected by ACC sec. 910.

Official Comment to ACC Sections:

- 10.06.605. BIENNIAL REPORT OF DOMESTIC AND FOREIGN CORPORATIONS;

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10.06.808. CONTENTS OF BIENNIAL REPORT;
10.06.811. FILING OF BIENNIAL REPORT.

SCOPE: ACC secs. 805, 808, and 811 establish on the part of each domestic corporation and each foreign corporation authorized to transact business in this state, an obligation to file a biennial report with the Department of Commerce and Economic Development. Prior to 1980 former Alaska law required that these reports be filed on an annual basis. The 1980 session saw the legislature replace this requirement with a biennial obligation supplemented by sec. 813's obligation to update the report with respect to important, specified particulars.

CHANGE IN FORMER ALASKA LAW: ACC secs. 805, 808, and 811 are predicated upon former AS 10.05.699, 702, and 705 as amended by SB 112 (1980). These provisions of former Alaska law were based upon Sections 125 and 126 of the MSA. Sec. 811(d) is new and was suggested by the Department of Commerce and Economic Development. Its purpose is to eliminate the possibility that the sec. 808 information would not be available on a newly formed or authorized corporation.

Official Comment to ACC Section 10.06.813.

FILING NOTICE OF CHANGE OF OFFICERS, DIRECTORS, FIVE PERCENT SHAREHOLDERS, AND ALIEN AFFILIATES.

SCOPE: Sec. 813 reflects the intense concern of the state that it be informed as to the identity of officers, directors, five percent shareholders, and alien affiliates as these are defined in the ACC.

CHANGE IN FORMER ALASKA LAW: ACC sec. 813 is predicated upon former AS 10.05.706 as amended by SB 112 (1980).

Official Comment to ACC Section 10.06.815.

PENALTY FOR FAILURE TO FILE BIENNIAL REPORT.

SCOPE: ACC sec. 815 imposes a sanction applicable to any failure or refusal to file the biennial report required by this Chapter. The scheme imposes a strict liability standard for compliance.

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CHANGE IN FORMER ALASKA LAW: ACC sec. 815 is predicated upon former AS 10.05.777 as amended by SB 112 (1980). The general provision is based upon Section 135 of the MBCA.

Official Comment to ACC Section 10.06.818.

INTERROGATORIES BY COMMISSIONER; JUDICIAL PROCEEDINGS TO CONTEST.

SCOPE: ACC sec. 818 is intended to grant broad powers to the Commissioner to utilize interrogatories in order to ascertain compliance with or violations of this Chapter. Such interrogatories are limited as to subject matter or extent in that they must be reasonably necessary to enable the commissioner to discharge the functions imposed upon his office by this Chapter.

Subsection (d) is designed to permit either a corporate or individual person faced with interrogatories propounded under subsection (a) to judicially contest either the method of propounding (subsection (b)), the substantive scope of the request (subsection (a)), or the confidentiality of the information disclosed (sec. 820). The power of the superior court to modify or set aside the commissioner's interrogatories shall be broadly construed.

CHANGE IN FORMER ALASKA LAW: ACC sec. 813(a), (b), and (c) is predicated upon former AS 10.05.777 and Section 137 of the MBCA. Subsection (d) is modeled after AS 45.52.210(f) and is designed to provide the target of interrogatories propounded under this section an opportunity for a judicial contest before incurring misdemeanor consequences of a refusal to fully comply.

Official Comment to ACC Section 10.06.820.

CONFIDENTIALITY OF INFORMATION DISCLOSED BY INTERROGATORIES.

SCOPE: ACC sec. 820 is intended to exempt the answers to interrogatories propounded under sec. 813 from the disclosure requirements of AS 09.25.110 and AS 09.25.120. The later sections of Title 9 provide that state agency records are public records unless specifically provided otherwise by state law. ACC sec. 820 specifically provides otherwise.

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Note that a failure on the part of the commissioner to observe the injunction of sec. 820 would be grounds for a court to limit or set aside the interrogatories under sec. 818.

CHANGE IN FORMER ALASKA LAW: ACC sec. 820 is a reenactment of former AS 10.05.730 and is based upon Section 138 of the MCA.

Official Comment to ACC Section 10.06.823.

FAILURE TO ANSWER INTERROGATORIES.

SCOPE: ACC sec. 823 establishes that any corporate or natural person who fails or refuses to make a timely, full, and truthful answer to interrogatories propounded by the commissioner under sec. 818 shall be guilty of a misdemeanor. Further, the commissioner shall not be under any obligation to file any document to which the interrogatories relate until they have been properly answered and need not file the document if the answers to those interrogatories disclose that the document does not conform to the provisions of this Chapter.

CHANGE IN FORMER ALASKA LAW: ACC sec. 823 combines provisions of former AS 10.05.783, 786, and 777 which were predicated upon Sections 135, 136, and 137 of the MCA. No change in the former substantive content of Alaska law has been wrought by sec. 823.

Official Comment to ACC Section 10.06.825.

PENALTIES IMPOSED UPON OFFICERS AND DIRECTORS.

SCOPE: The failure or refusal of an officer or director to make timely, full, and truthful answers to interrogatories propounded by the commissioner under ACC sec. 818 has been rendered a misdemeanor by sec. 823. ACC sec. 825 goes beyond this requirement to impose misdemeanor consequences upon any officer or director of a domestic or foreign corporation who signs any articles, statement, report, application or other document filed with the commissioner the content of which is "known" to be false.

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For the purpose of this section it should be remembered that under the ACC secs. 450(b) and 483(e) there is an active duty of inquiry commensurate with the good faith efforts of a reasonable person in like circumstances. A defendant unable to demonstrate conduct conforming to this standard would not be able to claim lack of "knowledge" for purposes of evading the penalties imposed by sec. 325.

CHANGE IN FORMER ALASKA LAW: ACC sec. 325 represents a modification of former AS 10.05.786 as amended by SB 112 (1980). As with the former provision, sec. 325 is predicated upon Sec. 136 of the MBCA.

Official Comment to ACC Section 10.06.323.

INCORPORATION OR FILING FEES.

SCOPE: ACC sec. 328 establishes a filing fee for both domestic and foreign corporations doing business in Alaska and fixes in the Department of Commerce and Economic Development the power to set the amount by regulation. However, while the department has the power to determine the amount of such fee, sec. 328 mandates that it be fixed without reference to the amount of authorized capital stock of the corporation. Not for profit corporations, organized under AS 10.20, and their foreign counterparts are exempted from this provision.

CHANGE IN FORMER ALASKA LAW: ACC sec. 328 is a modified version of former AS 10.05.708 (Section 130 of the MBCA) as amended by SB 112 (1980). Reference to shares without par value in the former statute have been eliminated following the ACC's destruction of this concept. Notwithstanding, par value continues to be a viable concept in other jurisdictions and the commissioner may take such factors into account in framing the content of departmental regulations.

Official Comment to ACC Section 10.06.330.

FEES ON APPOINTMENT OR REVOCATION OF APPOINTMENT OF PROCESS AGENT OR CHANGE OF AGENT'S ADDRESS.

SCOPE: ACC sec. 330 establishes the appointment and consent of a process agent by a foreign corporation in Alaska as an

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occasion for the imposition of a fee established by regulation by the Department of Commerce and Economic Development. The revocation of the appointment of a resident agent presents the foreign corporation with a second occasion for the imposition of a fee. Subsection (b) sets forth the circumstances in which the registered agent who has changed the agent's address or resigned is to pay a fee for filing the statement provided in ACC sec. 170(a) and (b).

CHANGE IN FORMER ALASKA LAW: ACC sec. 830 represents a reorganizing without substantive change of former AS 10.05.714 which had been based upon Section 125 of the MBCA.

Official Comment to ACC Sections:

- 10.06.833. FEES AND PENALTIES PAYABLE ON WITHDRAWAL OF FOREIGN CORPORATION;
- 10.06.835. FEES ON DISSOLUTION OF DOMESTIC CORPORATION;
- 10.06.838. TAXES, PENALTIES, AND FEES ON FILING CERTIFICATE OF DISSOLUTION OF FOREIGN CORPORATION;
- 10.06.840. FEES FOR CERTIFIED COPIES OF DOCUMENT;
- 10.06.843. OTHER FILING FEES.

SCOPE: ACC secs. 833-843 establish the indicated events as occasions for the imposition of fees which are to be established by the Department of Commerce and Economic Development.

CHANGE IN FORMER ALASKA LAW: ACC secs. 833, 835, 838, 840, and 843 reenact without substantive change former AS 10.05.750, 753, 756, 762, and 747 as amended by SB 112 (1980).

Official Comment to ACC Sections:

- 10.06.845. BIENNIAL CORPORATION TAX; PENALTY FOR NONPAYMENT;
- 10.06.848. FAILURE TO PAY TAX OR MAKE REPORT AS PRECLUDING SUIT BY CORPORATION;
- 10.06.850. COMMISSIONER TO INSTITUTE SUITS TO COMPEL PAYMENT;
- 10.06.853. FAILURE TO PAY TAX AS EVIDENCE OF INSOLVENCY;

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10.06.855. PAYMENTS TO BE MADE IN ADVANCE;
10.06.858. ACCOUNTING FOR AND DISPOSITION OF TAXES AND
FEES PAID.

SCOPE: ACC secs. 845-858 impose on both domestic and foreign corporations doing business in Alaska a biennial corporation tax and fix the consequences for failure to make payment of such taxes.

CHANGE IN FORMER ALASKA LAW: ACC secs. 345-358 represent, with such modifications as are hereafter mentioned, a reenactment of former AS 10.05.717, 720, 723, 725, 755, and 760. In turn, these provisions are precanceled upon Sections 132, 133, and 134 of the MSCA. ACC sec. 350 has substituted the Commissioner of the Department of Commerce and Economic Development for the Attorney General as the state official to commence suit to compel the payment of the biennial corporation tax.

Official Comment to ACC Section 10.06.863.

APPEAL FROM REVOCATION OF CERTIFICATE OF AUTHORITY.

SCOPE: ACC secs. 863 and 915 utilize the superior court for the purpose of contesting any disapproval of any document or the revocation of any certificate of authority. In each instance, upon compliance with the procedure set out in these sections, the appellant is entitled to a trial de novo on the disputed matter and the court is empowered to sustain the commissioner or to order the commissioner to take such action as shall, to the court, appear proper.

CHANGE IN FORMER ALASKA LAW: ACC secs. 263 and 915 are reenactments without change of former AS 10.05.792 and 799 and are based upon Section 140 of the MSCA.

Official Comment to ACC Section 10.06.865.

CANCELLATION OF CERTIFICATES ISSUED AND FILINGS ACCEPTED.

SCOPE: ACC sec. 365 recognizes that the volume of documents presented to the commissioner for filing may well preclude a full opportunity for a determination of their state of compliance with the provisions in this Chapter. To the end that the directives of the Chapter may be vindicated, sec.

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865 gives the commissioner a period of one year in which to discover the defects and to act upon them. If the defect is such that it would have been grounds for refusal to issue the certificate of accept the filing, and the discovery is made within one year, the commissioner is empowered to give notice of cancellation and, upon compliance with the further provisions of this section, to cancel the certificate issued or filing accepted.

CHANGE IN FORMER ALASKA LAW: ACC sec. 865 is a reenactment with one change of former AS 10.05.794 as amended by SB 112 (1980). The alteration in language to the first sentence is intended to make it clear that the ground for cancellation must be one which existed at the time of the original filing or issuance of the certificate. Cancellations on any other grounds must be authorized by other law.

Official Comment to ACC Section 868.

FORMS TO BE FURNISHED BY THE COMMISSIONER.

SCOPE: ACC sec. 868 grants to the commissioner the right to prescribe the content of forms for any report required by this Chapter. As to both required reports and all other documents to be filed in the office of the commissioner or department, sec. 868 obliges the commissioner to furnish appropriate forms.

CHANGE IN FORMER ALASKA LAW: ACC sec. 868 is a reenactment without change of former AS 10.05.798 and is based upon Section 142 of the MBCA.

Official Comment to ACC Section 10.06.870.

IDENTIFICATION CODE.

SCOPE: ACC sec. 870 furthers the state's interest in tracking business activities within Alaska and to that end directs the commissioners of the Departments of Revenue and of Commerce and Economic Development to jointly establish and adopt a coded list of business activities and make such list available to the public.

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CHANGE IN FORMER ALASKA LAW: ACC sec. 870 is a reenactment without change of former AS 10.05.799 and was added to the statutory law of Alaska by SB 112 ('1980).

Official Comment to ACC Section 10.06.905.

VOTING OF SHARES.

SCOPE: ACC sec. 905 clarifies that the references to ACC secs. 990(5), 990(6), and 415 to a majority of shares means a majority of shares entitled to vote under the articles of incorporation. The ACC enfranchises shares not enfranchised by the articles in only a few limited situations; i.e., class voting on amendments to the articles and organic changes.

The second sentence makes it clear that votes disqualified from voting on a matter are not to be considered "outstanding" for any determination regarding what constitutes a "quorum" or a "majority".

CHANGE IN FORMER ALASKA LAW: ACC sec. 905 is taken from GCL Section 112. It is without precedent in Alaska law.

Official Comment to ACC Section 10.06.910.

PROCESSING OF WRITINGS FILED WITH THE COMMISSIONER

SCOPE: ACC sec. 910 directs the commissioner to review documents filed for conformity to law and ascertain whether all fees and corporation taxes have been paid by the corporation. If no inadequacy or delinquency is noted, the original and an exact copy of the writing are to be endorsed with the word "filed" and the date. The exact copy is to be filed in the office. The original is to be returned to the corporation along with any writing, such as a certificate of incorporation, amendment, merger, consolidation, exchange, authority, or dissolution, which the commission is to issue.

CHANGE IN FORMER ALASKA LAW: In former AS 10.05, the matters covered in ACC sec. 910 were repeated numerous times, see former AS 10.05.081, 158, 298, 303, 321, 329, 357, 402, 468, 483, 514, 513, 621, and 669. All of these sections have been consolidated into ACC sec. 910 without substantive impact, thus streamlining the ACC.

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Official Comment to ACC Section 10.06.915.

DISAPPROVAL OF WRITING BY COMMISSIONER: APPEAL.

SCOPE: ACC sec. 915, like sec. 863, utilizes the superior COURT for the purpose of contesting and disapproval of any document or the revocation of any certificate of authority. In each instance, upon compliance with the procedure set out in these sections, the appellant is entitled to a trial de novo on the disputed matter and the court is empowered to sustain the commission or order him to take such action as shall, to the court, appear proper.

CHANGE IN FORMER ALASKA LAW: ACC secs. 863 and 915 are reenactments without change of former AS 10.05.792 and 789 and are based upon Section 140 of the MBCA.

Official Comment to ACC Section 10.06.920.

WRITINGS; CORRECTIONS.

SCOPE: In cases of writings which have been filed but are discovered to have minor errors, it is useful to be able to correct the mistakes without affecting the effective date of the writing filed. ACC sec. 920 permits such corrections and sets forth a procedure for making them. The scope of errors which may be corrected is not precisely defined by the language of the statute, but it is the intent of the legislature that any major omission or misinformation existing in an original writing may not be corrected by the procedure created under in this section.

CHANGE IN FORMER ALASKA LAW: ACC sec. 920 derives from BCL Section 105. Minor language alterations without substantive impact have been made.

Official Comment to ACC Section 10.06.925.

WRITINGS AS EVIDENCE.

SCOPE: ACC sec. 925 specifies that certain writings and certifications by the commission of the absence of a filing are to be regarded as prima facie evidence of the facts stated in the writing and the execution or nonexecution thereof.

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CHANGE IN FORMER ALASKA LAW: ACC sec. 925 is adopted from BCCL Section 100. The language in subsection (a) is similar to former AS 10.05.795, which was modeled upon MBCA Section 141.

Official Comment to ACC Section 10.06.933.

CORPORATE SEAL AS EVIDENCE.

SCOPE: ACC sec. 930 treats the presence of a corporate seal on a writing purporting to be executed by authority of either a domestic or foreign corporation as prima facie evidence that the writing was so executed.

CHANGE IN FORMER ALASKA LAW: ACC sec. 930 is predicated on Section 107 of the MISC and is without precedent in former Alaska law.

Official Comment to ACC Section 10.06.935.

WAIVER OF NOTICE.

SCOPE: A written waiver of notice, whether executed before or after the time stated for notice, is equated to the giving of notice in any situation where notice of a director or shareholder is required.

CHANGE IN FORMER ALASKA LAW: ACC sec. 935 is a reenactment of former AS 10.05.804, based upon MBCA Section 144.

Official Comment to ACC Section 10.06.950.

POWERS OF COMMISSIONER.

SCOPE: ACC sec. 950 is intended as a broad grant of nonsubstantive administrative authority to the commissioner of the Department of Commerce and Economic Development. The limited authority of the commission or the department to adopt regulations to further the provisions and objectives of this Chapter is set forth in ACC sec. 953.

CHANGE IN FORMER ALASKA LAW: ACC sec. 950 is a reenactment without change of former AS 10.05.813 and is based upon Section 139 of the MBCA.

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Official Comment to ACC Section 10.06.953.

REGULATIONS.

SCOPE: ACC sec. 953 is intended as a restrictive grant of rule making authority to the commissioner and Department of Commerce and Economic Development. Such a power must be exercised in conformity with the Administrative Procedure Act (AS 44.62), and may be invoked only with respect to specific references to rule making authority contained in this Chapter.

CHANGE IN FORMER ALASKA LAW: ACC sec. 953 represents a reorganizing of former AS 10.05.823 designed to make clear the restrictive nature of the grant of rule making authority.

Fees: Authority to establish various fees by regulation is set out in sections throughout the bill. Setting of fees comes under public scrutiny through publication and hearing requirements of the Administrative Procedure Act. Since that scrutiny should provide adequate protection against setting of excessive fees, a former section AS 10.05.773 is not carried over into the ACC. That section set a ceiling on fees increases based upon changes in the consumer price index, often an inaccurate gauge of changes in the cost of processing documents.

Official Comment to ACC Section 10.06.955.

APPLICATION.

SCOPE: ACC sec. 955 makes the new code applicable to domestic corporations organized under former AS 10.05 and, to the extent provided generally in Article 10 and expressly elsewhere, to foreign corporations. As to foreign corporations, it is important to note that beyond the provisions of Article 10, provisions in Article 11 and ACC sec. 488 on director and officer liability are specifically applicable by their terms.

Subsection (b) makes it clear that the existence of corporations formed under prior law is not affected. However, it is important to stress that the new law does not apply to existing corporations and may affect many aspects of the internal governance of such corporations. The requirements as to formation of corporations do not affect

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existing corporations except to the extent provided in Article 12.

Subsection (c) makes it clear that the new law does not affect legal disputes preexisting the enactment of the ACC.

CHANGE IN FORMER ALASKA LAW: Subsection (a) is a modified version of GCL Section 103; it replaces former AS 10.05.316, based upon MBCA Section 147. Subsection (b) is a modified version of GCL Section 102(b); it replaces former AS 10.05.816, based upon MBCA Section 147. It supplements AS 01.10.100.

Official Comment to ACC Section 10.06.958.

PROVISIONS CONSTRUED AS RESTATEMENTS AND CONTINUATIONS.

SCOPE: Much of the ACC represents a reenactment of former Alaska law, either verbatim or with minor changes to conform to ACC usage and style. These reenactments are to be construed as restatements and continuations of prior law.

CHANGE IN FORMER ALASKA LAW: ACC sec. 958 is taken from GCL Section 2.

Official Comment to ACC Section 10.06.960.

CORPORATIONS ORGANIZED UNDER P.L. 92-203.

SCOPE: Under P.L. 92-203, the Alaska Native Claims Settlement Act, either the general business corporations code or the nonprofit corporations code of the State of Alaska is to be used to organize the entities which will hold the assets distributed through ANCSA. Due to the special nature of these corporations and the federal requirement that the corporate form of business be used, a variety of special provisions apply to Native Corporations.

The capitalization of Native corporations, distributions to shareholders, approval of plans of merger or consolidation and the liability of directors and officers to contract claimants are all topics subject to special treatment by ACC sec. 960.

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CHANGE IN FORMER ALASKA LAW: ACC sec. 960 is a reenactment of former AS 10.05.005 with the addition of subsection (d) which exempts Native corporations from the provisions of ACC sec. 488 on the liability of directors and officers to contract claimants.

Official Comment to ACC Section 10.06.963.

SEVERABILITY.

SCOPE: ACC sec. 963 guarantees that the ACC will not be struck down as a whole on account of the invalidity of any provision in it. Any invalid provision is declared to be severable.

CHANGE IN FORMER ALASKA LAW: ACC sec. 963 is taken from BCL Section 110. It supplements the provisions of AS 01.10.030.

Official Comment to ACC Section 10.06.965.

RESERVATION OF POWER.

SCOPE: In order to provide itself with a plenary right to alter, amend, suspend, or repeal in whole or in part the provisions of the ACC, the legislature expressly reserves such right in this section. The constitutional precedent which both permits and requires a state to reserve such power was established in Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

CHANGE IN FORMER ALASKA LAW: ACC sec. 965 is based upon former AS 10.05.822, MCA Section 149 and BCL Section 110.

Official Comment to ACC Section 10.06.968.

SIGNATURE.

SCOPE: ACC sec. 968 specifies that a mark is a signature when the signer cannot write and the signer's name is written out by a witness who signs his own name. A mark so authenticated can be acknowledged and may serve as a signature to a sworn statement.

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CHANGE IN FORMER ALASKA LAW: ACC sec. 958 is new to Alaska law, deriving from GCL section 17. The language of the GCL provision was altered to eliminate a requirement that two witnesses sign for a mark to be acknowledged or serve as a signature to a sworn statement.

Official Comment to ACC Section 10.06.372.

RULES OF CONSTRUCTION AND INTERPRETATION.

SCOPE: To obviate the possibility of litigation on a variety of topics susceptible of differing interpretations and to specify the handling of financial accounting procedure, ACC sec. 970 sets out basic rules of construction to be applied to matters the ACC governs. Of particular interest is subsection (5) on financial accounting. The ACC has abandoned the traditional corporate accounting concepts of "par value", "stated capital", "capital surplus" and "earned surplus". This former system has been replaced by the "retained earnings" and "ratio/assets surplus" tests found in ACC secs. 358-365; the new system relies upon the generally accepted accounting principles applicable at the time of performance of a financial accounting task. This reliance upon concepts of the accounting profession and awkwardly imposed upon accountants as under prior law, should function to yield financial reports reflecting economic realities according to the evolved customs of accountants.

Unless some other accounting principle is mandated by specific provision of the ACC, subsection (5)(a) requires that financial statements, balance sheets, income statements, and statements in changes in financial position of a corporation and references to assets, liabilities, earnings, retained earnings, and similar accounting items of a corporation be determined and expressed so as to fairly and reasonably present the purported matters. Within the specific provisions of the ACC there are two variations from this general norm. In some circumstances (e.g., sec. 358(c)), the observance of generally accepted accounting principles is mandatory. In others, the ACC specifically defines terms such as "paid-in capital" and "retained earnings" in a manner which may not conform to generally accepted accounting principles terminology or practice. These particular statutory specifications are necessary to the symmetry and clarity of the ACC and the design of the

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regulatory system imposed upon the dissipation of corporate assets. For these reasons, no deference to a norm of "reasonableness" or generally accepted accounting principles is made in those areas.

In any area or usage not specifically defined or commanded by a provision of the ACC, subsection (5)(b) creates a safe harbor in the use of generally accepted accounting principles. They are conclusively presumed to be "fair and reasonable." Other principles or practices may meet the "fair and reasonable" standard mandated by subsection (5)(a), but the burden of establishing such compliance would be that of the litigant responsible for or defending the election of an alternative method.

Note also that subsection (5)(c) specifies the use of consolidated statements for corporations with subsidiaries.

CHANGE IN FORMER ALASKA LAW: All of the rules of construction in ACC sec. 970 are new to Alaska law. They derive from GCL Sections 5, 6, 7, 8, 113, 114, 113, 10, 11, 12, 13, 15, and 16, respectively. In adopting subsection (3) the phrase "in the English language" was deleted from GCL Section 8. Under the GCL use of generally accepted accounting principles is mandatory. In adopting subsection (5) the ACC follows the RMBCA suggestion and does not insist upon the use of such practices and procedures. See RMBCA Section 6.40 and official comment 4a. However, use of generally accepted accounting principles does invoke a presumption of a fair and reasonable presentation of the purported matters. In adopting subsection (6) the term "electronic means" was substituted for the GCL language "telephone or wireless".

Official Comment to ACC Section 10.06.990.

DEFINITIONS.

SCOPE: Many terms used in the ACC have special meanings which must be clearly understood to gain a full comprehension of the coverage of statutes using such terms. All of these terms are defined in ACC sec. 990, which is organized in alphabetical order. Definitions of particular importance to the ACC are discussed in this comment.

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"Approved by (or approval of) the outstanding shares" is a term of art in the ACC which means that an absolute majority of all outstanding shares has approved a proposal or resolution. When such approval is required, any share not voting casts, in effect, a "no" vote.

"Approved by (or approval of) the shareholders" is also a term of art in the ACC. It refers to the affirmative vote of a majority of the shares attending a duly held meeting.

"Distribution to its shareholders" is an important term of art in the ACC. It is the essential concept underlying restraints upon the dissipation of corporate assets. It includes both the traditional dividend and the share redemption or repurchase transaction. It does not include a stock split or a share dividend. The basic concept thus focuses on the transfer of assets from the corporation to shareholders. The relevant date for determining when a distribution is made is set as the declaration date for a dividend and as the date of transfer of cash or property for a share repurchase or redemption. These timing issues are important to the operation of the provisions restraining a corporation's right to make a distribution.

"Paid-in capital" and "retained earnings" are definitions which set up the two shareholders' equity accounts upon which the financial restraint provisions of Article 4 rely. The definitions are restrictive in comparison with the definitions from prior law which they replace. Unlike the concept of "stated capital", former AS 10.05.325, the concept of "paid-in capital" looks to the consideration actually received by the corporation. Thus, a corporation raising capital through a stock sale by an underwriter is to only count the net amount received from the underwriter. The "capitalization of retained earnings" permitted by ACC sec. 390 is explicitly recognized in the definition of "paid-in capital". This is important since any distribution which is accounted for by a reduction in the "paid-in capital" account must meet the tests of ACC secs. 359(b) and 365.

"Subsidiary" is clearly defined since under the ACC the financial picture of a corporation and its subsidiaries are viewed compositely. Thus, a clear definition of subsidiary is required and provided.

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CHANGE IN FORMER ALASKA LAW: The source of the definitions of the ACC is either former Alaska law, typically based on a definition from MCA Section 2, or the GCL. The following chart indicates these sources:

1. New
2. Former AS 10.05.825(18) (1976)
3. Former AS 10.05.825(22) (1980)
4. GCL Section 151
5. GCL Section 152
6. GCL Section 153
7. Former AS 10.05.825(5)
8. Former AS 10.05.825(9)
9. GCL Section 155
10. Former AS 10.05.825(1)
11. GCL Section 159
12. Former AS 10.05.825(19)
13. Former AS 10.05.825(2)
14. Former AS 10.05.825(17)
15. Former AS 10.05.825(3)
16. GCL Section 164
17. GCL Section 166
18. GCL Section 169
19. Former AS 10.05.825(24) (1980)
20. Former AS 10.05.825(4)
21. GCL Section 115
22. GCL Section 172
23. Former AS 10.05.825(11)
24. GCL Section 173
25. GCL Section 174
26. New
27. GCL Section 175
28. New
29. Former AS 10.05.825(20)
30. GCL Section 176
31. GCL Section 178
32. GCL Section 179
33. GCL Section 180
34. New (stemming from former AS 10.05.825(14))
35. GCL Section 193
36. Former AS 10.05.825(8)
37. Former AS 10.05.825(6)
38. New
39. Former AS 10.05.825(7)
40. GCL Section 189
41. GCL Section 190
42. GCL Section 192

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- 43. AS 09.63.040; GCL 193
- 44. GCL Section '94
- 45. GCL Section 195
- 46. New

Official Comment to ACC Section 10.06.995.

SHORT TITLE.

SCOPE: The title of the chapter regulating the organization and operation of business corporations has been changed from "Alaska Business Corporation Act" to "Alaska Corporations Code". The change in the official name will facilitate distinctions between old and new law.

CHANGE IN FORMER ALASKA LAW: ACC sec. 995 replaces former AS 10.05.328.

Official Comment to ACC Sections 3-4.

Amends the references to the present corporation code in AS 10.15.030, AS 10.15.075, and AS 10.20.452.

Official Comment to ACC Section j.

REPEALER.

SCOPE: This section repeals AS 10.05.

CHANGE IN FORMER ALASKA LAW: This section is new to Alaska law.

Official Comment to ACC section 6.

APPLICATION OF PROVISIONS.

SCOPE: The basic approach of the ACC on the question of transition from the former Alaska Business Corporations Act is to establish January 1, 1986, as the effective date with the ABCA governing all transactions, contracts, or acts prior to that date. To the extent that a contract is wholly or partially executory on the effective date, subsequent

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performance of its terms shall conform to the provisions of the ACC unless such conformance would impair such terms, in which case performance shall be in accordance with the terms of the ABCA.

CHANGE IN FORMER ALASKA LAW: ACC Section 6 is predicated upon the approach taken in Chapter 23 of the California General Corporation Law and reflects the content of GCL Sections 162, 2300 and 2301.

Official Comment to ACC Section 7.

EXERCISE OF RESERVED POWER.

SCOPE: ACC Section 7 provides a statement of the legislature's intent to exercise to the fullest extent the reserve power of the state over corporations and to authorize any amendment of the articles permitted under AS 10.05.502(a) regardless of whether a provision contained in the amendment was permissible at the time of original incorporation.

CHANGE IN FORMER ALASKA LAW: ACC Section 7 is taken from AS 10.05.822.

Official Comment to ACC Section 8.

APPLICATION TO ARTICLES OF EXISTING CORPORATIONS.

SCOPE: One of the new features of the ACC is to require that certain aspects of the governance structure of corporations formed under the new act be placed in the articles at peril of otherwise being wholly ineffective. Section 5 grants a broad exemption to corporations formed prior to the effective date to elect to conform to this new arrangement or to continue with the content of the articles conforming to the terms of the former ABCA.

CHANGE IN FORMER ALASKA LAW: ACC Section 8 is patterned after Section 2302 of the GCL. Note that the special treatment of amendments affecting the number of directors in the GCL provision was omitted as unnecessary given the content of prior Alaska law.

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Official Comment to ACC Section 9.

AMENDMENT OF ARTICLES OF INCORPORATION.

SCOPE: ACC Section 9 grants a further election to corporations existing on the effective date. The general scheme under former AS 10.05.276 was to establish a procedure under which the amendment had to originate in a resolution adopted by the board and thereafter be submitted to shareholders. At the meeting of the shareholders notified for that purpose, the amendment was adopted only if it received two-thirds vote of the shares entitled to vote. If a class was entitled to vote under former AS 10.05.279 or 282, then the amendment was not adopted unless, in addition to receiving a two-thirds vote of the total shares entitled to vote, it also received the affirmative vote of two-thirds of each class of shares entitled to vote as a class.

Under Section 9(a) the voting procedures and rights established under former AS 10.05.276, 279, and 282 are preserved and made the norm for a corporation existing on the effective date of the ACC. Such a corporation may elect to replace this machinery with the provisions of ACC secs. 504 and 506, which establish simple absolute majorities ("approval of the outstanding shares") for the former two-thirds norm but only if the amendment making this election passes under the voting procedures and rights established under the aforementioned sections of the former ABCA. However, the provisions of the ACC which permit the amendment to originate with the shareholders as well as the content of ACC secs. 504 and 506 which does not relate to the matter of class voting or the norm of two-thirds for approval are intended to govern the election under Section 6(b).

An election to amend the corporate articles under Section 9 shall respect the voting rights and machinery preserved under Section 9(a) unless there is a Section 9(b) procedure.

CHANGE IN FORMER ALASKA LAW: ACC Section 6 is without precedent.

Official Comment to ACC Section 10.

INDEMNIFICATION OF CORPORATION.

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SCOPE: ACC Section 10 is an exception to the general norm that events arising prior to the effective date are governed by the content of the former ABCA.

CHANGE IN FORMER ALASKA LAW: ACC Section 10 is modeled after GCL Section 2304.

Official Comment to ACC Section 11.

DISTRIBUTIONS AND REACQUISITION OF SHARES.

SCOPE: ACC Section 11 is designed to avoid any impairment of an executory contract for distributions to shareholders including the reacquisition by the corporation of its own shares. Note that under sec. 990(16) the time of distribution by way of dividend is deemed to be the date of the declaration. The intention of the legislature in enacting these two sections is to permit any dividend which had been declared prior to the effective date of the ACC to be governed by the ABCA.

With respect to distributions by repurchase or redemption, sec. 990(16) provides that the distribution is deemed to take place on the date of transfer of cash or other consideration to the shareholder. In order to avoid any impairment of an executory contract to make such a purchase of distribution, Section 11 specifies that any redemption or repurchase made pursuant to a contract existing prior to the effective date is permissible if it can qualify under either the ABCA or the ACC.

CHANGE IN FORMER ALASKA LAW: ACC Section 11 is a modified version of Section 2308 of the GCL.

Official Comment to ACC Section 12.

TENURE OF OFFICERS PRESERVED.

SCOPE: ACC Section 12 makes it clear that the tenure of officers and directors as established under prior law continues.

CHANGE IN FORMER ALASKA LAW: ACC Section 12 is new to Alaska law; it is taken from GCL Section 3.

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Official Comment to ACC Section 13.

EXISTING ACTIONS.

SCOPE: ACC Section 13 provides that enactment of the new code does not affect a cause of action, liability, penalty, or special proceeding existing, incurred, or accrued on the effective date of the Act.

CHANGE IN FORMER ALASKA LAW: ACC Section 13 is taken from GCL Section 4.

Official Comment to ACC Sections 14-15.

These sections describe how the proposed new code amends the state's court rules.

Official Comment to ACC Section 36.

EFFECTIVE DATE.

SCOPE: ACC Section 36 provides that the effective date for the ACC is January 1, 1989.

CRC87/001

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY
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JUNEAU, ALASKA 99811
907-465-3800

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

House Judiciary:

3/2/88

4/12/88

AN ACT REVISING THE CORPORATIONS CODE; AMENDING ALASKA RULES OF CIVIL PROCEDURE 4, 10, 11, 19, 20, 23.1, 24, 65, 73, and 82 ALASKA RULES OF APPELLATE PROCEDURE 204 and 609, AND ALASKA RULE OF EVIDENCE 803(8); AND PROVIDING FOR AN EFFECTIVE DATE.

SUMMARY OF BILL

- ** EXISTING 10.05.010 ET SEQ. THE "CORPORATIONS CODE" WAS DRAFTED IN 1953 AND TAKEN FROM OREGON LAW IN 1957. THE CODE IS 35 YEARS OLD.
- ** THE EXISTING CORPORATION CODE IS POORLY ORGANIZED AND HORRIBLY OUT OF DATE, ONLY MINOR CHANGES HAVING BEEN MADE BY LEGISLATIVE AMENDMENTS TO THE CODE SINCE 1957.
- ** THE EXISTING CODE PROVISIONS ARE ANACHRONISTIC AND DO NOT COME CLOSE TO REFLECTING COURT DECISIONS AND LEGISLATIVE CHANGES TO CORPORATION CODES IN OTHER STATES.
- ** BECAUSE THE EXISTING CODE IS SO POORLY DRAFTED, FAILS TO ADDRESS SO MANY LEGAL QUESTIONS A CORPORATION MUST ANSWER, IT IS DIFFICULT FOR AN ATTORNEY TO UNDERSTAND AND IMPOSSIBLE FOR A LAY PERSON TO LEARN WHEN OBLIGATIONS EXIST WHEN ONE INCORPORATES.
- ** HB 322 WAS DRAFTED BY THE ALASKA CODE REVISION COMMISSION OVER A PERIOD OF EIGHT YEARS. OVER 30 PUBLIC SESSIONS WERE HELD BY THE COMMISSION FOR THE PURPOSE OF TAKING PUBLIC COMMENT.
- ** HB 322 HAS HAD MORE THAN EIGHT LEGISLATIVE HEARINGS OVER THE PAST SIX YEARS. IT HAS BEEN THE SUBJECT OF SEMINARS AND BAR ASSOCIATION CONVENTION TOPICS.
- ** MORE THAN \$500,000 HAS BEEN SPENT BY THE STATE OF ALASKA ON REVISING THE CODE AND THOUSANDS OF MAN HOURS HAVE BEEN SPENT ON REVISING AND REVIEWING THE PROPOSED CODE.
- ** THE PROPOSED CODE HAS DRAWN HEAVILY FROM THE CORPORATION CODES OF THE STATES OF: ALASKA, CALIFORNIA, NEW YORK, OREGON, WASHINGTON AND DELEWARE.
- ** THE PROPOSED CODE IS A "MIDDLE OF THE ROAD" CORPORATION CODE. IT NEITHER FAVORS MANAGEMENT OR SHAREHOLDERS ALTHOUGH IT PROVIDES HANDY OPTIONAL PROVISIONS FOR THE ARTICLES OF INCORPORATION WHICH WILL ALLOW THE INCORPORATOR TO CREATE EITHER A MANAGEMENT OR SHAREHOLDER ORIENTED CORPORATION.

- ** THE MOST CONTROVERSIAL PROVISION OF THE PROPOSED CODE, SECTION 488 HAS BEEN REMOVED FROM THE BILL. THIS PROVISION CREATED SECONDARY LIABILITY OF OFFICERS AND DIRECTORS.
- ** THE PROPOSED CODE HAS BEEN WRITTEN IN LAY LANGUAGE WHENEVER POSSIBLE, USING A "COOKBOOK" APPROACH. THE INDEX IS BROKEN DOWN INTO LOGICAL SECTIONS DEALING WITH SPECIFIC MATTERS RELATING TO CORPORATIONS; E.G. INCORPORATION, OFFICERS AND DIRECTORS, AMENDMENTS AND DISSOLUTION.
- ** UNLIKE THE EXISTING CODE, EVERY MATTER HAVING TO DO WITH A CORPORATION IS DEALT WITH IN A LOGICALLY ORGANIZED MANNER. MANY AREAS OF CORPORATION LAW NOT EVEN MENTIONED IN THE EXISTING CODE ARE EXHAUSTIVELY DEALT WITH IN THE PROPOSED DRAFT.
- ** A LAY PERSON CAN READ, FIND AND UNDERSTAND THE LEGAL REQUIREMENTS FOR INCORPORATION. UNDER THE EXISTING CODE, IT IS NECESSARY TO READ THE ENTIRE CODE TO MAKE SURE YOU HAVE FOUND EVERYTHING HAVING TO DO WITH A PARTICULAR TOPIC.
- ** BECAUSE OF THE ORGANIZATION AND CLEAR, LAY LANGUAGE OF THE PROPOSED CODE, THE SERVICES OF AN ATTORNEY WILL BE MINIMIZED.
- ** THE PROPOSED CODE CONTAINS IMPORTANT INCORPORATION AND REPORTING REQUIREMENTS NEEDED BY THE DIVISION OF CORPORATIONS.
- ** THE PROPOSED CODE ADDRESSES IMPORTANT NEEDS AND UNIQUE PROBLEMS OF ALASKA NATIVE CORPORATIONS.
- ** MUCH OF EXISTING ALASKA LAW IS INCLUDED IN THE PROPOSED CODE.
- ** THE PROPOSED CODE HAS BEEN SPECIFICALLY TAILORED TO MEET THE NEEDS OF ALASKA CORPORATIONS.
- ** INTERNAL INCONSISTENCIES CONTAINED IN EXISTING ALASKA LAW HAVE BEEN RESOLVED IN THE PROPOSED CODE ALONG WITH LANGUAGE THAT IS EASIER TO UNDERSTAND.
- ** THE PROPOSED CODE CONTAINS IMPORTANT SECTIONS NOT PRESENTLY FOUND IN THE EXISTING LAW, INCLUDING:

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- A COMPLETE FINANCIALS SECTION
- A SECTION DEALING WITH SHAREHOLDER DERIVATIVE SHAREHOLDER ACTIONS
- A SECTION DEALING WITH DIRECTOR CONFLICTS OF INTERESTS
- A SECTION DEALING WITH MINORITY SHAREHOLDER RIGHTS
- A SECTION DEALING WITH OPTIONAL PROVISIONS FOR THE ARTICLES OF INCORPORATION

** THE PROPOSED CODE APPLIES TO CORPORATIONS HAVING A LARGE NUMBER OF SHAREHOLDERS OR MOM AND POP CORPORATIONS (CLOSELY HELD CORPORATIONS).

** THE PROPOSED CODE HAS BEEN RECOMMENDED FOR APPROVAL IN PAST LEGISLATIVE COMMITTEE HEARINGS BY:

ALASKA AIRLINES, THE LARGEST CORPORATION IN ALASKA
THE ALASKA FEDERATION OF NATIVES SUBCOMMITTEE
THE DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT,
DIVISION OF CORPORATIONS.

** BECAUSE THE PROPOSED CODE IS SO CLEARLY DRAFTED AND SO DETAILED IN DEALING WITH VIRTUALLY EVERY LEGAL MATTER INVOLVING A CORPORATION, IT SHOULD ENCOURAGE OUTSIDE BUSINESS TO INCORPORATE IN ALASKA. THEY WILL EASILY AND CLEARLY ANTICIPATE THE LEGAL CONSEQUENCES OF THEIR ACTIONS USING THE CORPORATE FORM.

** THE PROPOSED CODE IS REVENUE NEUTRAL. IT WILL NOT COST THE STATE ONE PENNY TO ADOPT OR IMPLEMENT.

MAR 30 1988

ALASKA CODE REVISION COMMISSION
LEGISLATIVE AFFAIRS AGENCY
POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811

March 27, 1988

The Honorable John Sund
Chairman, House Judiciary Committee
Room C-122 State Capitol Building
Juneau, Alaska 99811

Re: HB 322; An Act revising the corporations code.

Dear Representative Sund:

This letter is in response to your recent request for information about HB 322, the corporations code bill.

Existing AS 10.05.010 et seq., Alaska's corporation code, was adopted from Oregon law in 1957. Oregon had previously passed its version of the American Bar Association Model Act, adopted by the ABA in 1953. As such, Alaska's corporation code is approximately 35 years old, having been amended to a small degree in 1976 and 1980. Most of the amendments dealt with specific sections of the code and no attempt was made to overhaul the entire code.

The existing Title 10 is poorly organized and horribly out of date. In order to locate all sections of the code dealing with a specific corporation matter, it is necessary to review the entire title to insure that no provisions have been overlooked. The index provides little guidance to anyone seeking to determine rights and obligations, as well as corporate procedures, under the existing law. It is written in language that makes the code difficult to use by the lay person.

In response to the great need to update and organize the corporation code, the Alaska Code Revision Commission undertook a complete rewrite of the code beginning in about 1980. In furtherance of this effort, the Commission engaged the services of Professor Daniel Wm. Fessler to serve as the reporter for the code revision project. Professor Fessler teaches corporate and business organization law at the University of California, Davis law school. He is presently the reporter for Corbin On Contracts and his texts on corporations and business associations are used

HON. JOHN SUND
HB 322; CORPORATIONS CODE
PAGE 1

in law schools throughout the United States. The Alaska Code Revision Commission is a legislatively created commission with representatives from all three branches of government as well as public members. Work on the corporations code continued through the period 1980 to the present, with the greatest emphasis on the period from 1981 to 1984. The Commission has spent more than \$350,000.00 in consulting fees, has spent literally thousands of man hours in drafting and research, has conducted more than 30 public meetings on the code, has made several presentations to the Alaska Bar Association and attorney groups, and has had a commissioner or its consultant testify before a number of legislative committees. The draft bill has drawn the most articulate statements of corporation law from Alaska, California, New York, Oregon, Washington and Delaware. It is a "middle of the road" bill, meaning that there is a balance between a strong management or strong shareholder corporation model. By using the optional incorporation provisions found in the draft, an incorporator can easily create either a strong management or strong shareholder corporation.

The most controversial provision of the draft bill, Section 488, has been removed from the draft. This provision dealt with secondary liability of officers and directors in the event the corporation became insolvent. Other criticisms of the bill have focused upon provisions of the draft which are only re-statements or inclusions of existing Alaska law. While the "financial" provisions of the draft will certainly remove some flexibility from the manner in which corporations declare dividends, they have not been the subject of much attention by businesses or attorneys.

To summarize, the following features of the draft strongly argue in favor of its adoption by the Legislature as a new code for Alaskan corporations:

1. The code uses a "cookbook" approach to organization. All general topics are included in sections dealing only with those topics. One need only look to one section to determine how to incorporate or to dissolve. Under the existing code, it is necessary to review the entire code to make sure that no provision has been overlooked.

2. The topic headings are informative as to the area of substantive law that is covered in each section. The code is written in lay language whenever possible. The design of the format and its organization has been accomplished so that the lay person can easily discover how to incorporate and how to carry on business in the corporate form, thus minimizing the need to have an attorney guide you through simple incorporation matters.

3. The draft bill contains important incorporation and reporting requirements needed by the Division of Corporations. The Commission worked closely with the Division in the drafting of its corporations bill so as to insure that the Division's needs would be addressed.

4. The draft bill addresses important needs and unique problems of Alaska native corporations. The Commission worked closely with a special subcommittee of the Alaska Federation Of Natives in the drafting of the bill.

5. Much of existing Alaska law is continued in the present draft, although the language has been rewritten in many instances to make it more understandable to the lay person.

6. Because the language is concisely drafted, internal inconsistencies existing in present Alaska law have been resolved, and because of its superior organization and lengthy commentary indicating the source of its provisions, the draft should reduce considerably the need for litigation over the meaning of the language contained in HB 322.

7. The draft contains important new sections not currently found in Title 10. They include:

a. A new section dealing with corporation financial activities, specifically defining the conditions when a distribution is appropriate;

b. A new section dealing with shareholder derivative actions, an area only minimally covered by rules of the Alaska Supreme Court under existing law;

c. A new, expanded section dealing with all matters involved in corporation dissolution;

d. New sections dealing with conflicts of interest by directors, minority shareholder rights, rights and obligations of various classes of shares, and the purchase of shares of a deceased shareholder.

e. A number of optional provisions for the Articles that will determine corporate bias for management or shareholders. These provisions can be easily selected and inserted by the incorporator depending upon what type of corporation is desired.

8. While drawing heavily from the best laws of other states, the draft has been carefully crafted to address corporate problems unique to Alaska. The draft can be truly characterized as an Alaska drafted code. Additionally, the draft incorporates a great many of the substantive provisions found in the recently adopted ABA revised model business corporations act.

No attempt has been made by the Commission to address the extremely complex problem of corporate takeovers. Because of the radical and rapid changes that have taken place in the past 5 or 6 years, such an undertaking would require much study and a considerable expenditure of time in order to even formulate a policy for dealing with takeovers.

The existing Title 10 is woefully outdated and poorly organized. It is difficult for the lay person and even the practitioner to use. It is full of anachronistic provisions and internal inconsistencies. It does not reflect changes in corporation law that have occurred over the past 35 years. It doesn't even contain much needed sections dealing with shareholder derivative actions, conflict of interest, indemnification of officers and directors or financial accountability. The draft has previously been approved by the Division of Corporations, the Alaska Federation of Natives and Alaska Airlines, the largest private (non-native) corporation in Alaska. It is organized and written so that it can be easily used by the lay person, but contains all of the features needed by the practitioner to advise a corporate client on sophisticated matters. There is nothing in the draft that would discourage outside business from choosing Alaska as a domicile for incorporation because the corporation can be tailored to the needs of any business. It should encourage businesses to locate in Alaska because the rights and obligations of the corporation are so clearly spelled out in the draft. Finally, the code should greatly decrease the need for litigation because of the lengthy and comprehensive commentary accompanying the draft.

If you have any questions concerning the draft, please contact me and I will attempt to answer those questions.

Very truly yours,

John W. Abbott
JOHN W. ABBOTT, Chairman

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 322
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act revising the
corporation's code
Sponsor: Rules Committee
Requester: Legislative Council

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

EXPENDITURES / REVENUES : (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
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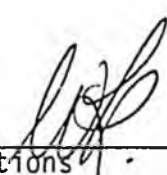
FUNDING: (Thousands of dollars)

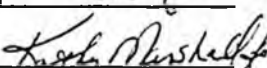
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Willis F. Kirkpatrick, Director 
Division: Banking, Securities and Corporations Phone: 465-2521
Date: 3-2-88

Approved by Commissioner: J. Anthony Smith 
Agency: Department of Commerce and Economic Development Date: 3/2/88

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page _____ of _____

THE ALASKA CODE REVISION COMMISSION

August Meeting, 1984

A WORKING PAPER IN THREE PARTS

THE ORIGINS OF THE ALASKA CORPORATIONS CODE

A SECTION BY SECTION COMPARISON OF THE ALASKA CORPORATIONS CODE

with the

FINAL DRAFT OF THE REVISED MODEL BUSINESS CORPORATIONS ACT

SUGGESTED AMENDMENTS TO THE ALASKA CORPORATIONS CODE

Prepared by

THE CODE REVISION PROJECT

Professor Daniel Wm. Fessler

James J. Banks

231 G. Street # 26
Davis, California 95616

PREFACE

This study paper consists of three parts each designed to familiarize the reader with the contents of the proposed Alaska Corporations Code [ACC] and its relationship to the final exposure draft of the Revised Model Business Corporations Act [RMBCA] (June 1, 1984). In Part I the reader will find a chart showing the origin of each provision of the ACC and its comparable coverage in existing Alaska law, the classical Model Act, and the Revised Model Act. Part II follows the organizational structure of the ACC and gives a brief description of the origin of each section, its content, and a specific comparison to provisions of the RMBCA. Part III sets an agenda for the August, 1984, meeting at which time the Code Revision Commission will consider modifications to the draft of the ACC incorporating potential improvements found in the RMBCA. The list reflects the consultant's tentative conclusions and should not be deemed exhaustive. Indeed, the August Commission meeting is an appropriate forum for the consideration of any modification to the draft content of the ACC.

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CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

PREFACE

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PART ONE

CORRESPONDING STATUTORY COVERAGE TO EACH SECTION OF

THE PROPOSED ALASKA CORPORATIONS CODE

ACC	ABCL	MBCA	GCL	NBCL	OTHER	RMBCA
-----	------	------	-----	------	-------	-------

ARTICLE 1. CORPORATE PURPOSES AND POWERS

.005	P	X				X
.010	X	X				P
.015	P	P	P	P		X
.020			X			
.025			X			

ARTICLE 2. NAME AND SERVICE OF PROCESS

.105	X	X				X
.110	X	X				X
.115	X	X				X
.120	X	X				X
.125	X	X				X
.130	X	X				P
.135	X	X				X
.140	X	X				X
.145	X	X				X
.150	X	X				X
.155	X					
.160	X					
.165	X	X				X
.170	X	X				P
.175	X	X			ORE	P

ARTICLE 3. FORMATION OF CORPORATIONS

.205	X					
.208	X	X	X			
.210	X	X	X		DEL	
.213	X	X				
.215	X	X				
.218	X	X				P
.220	X	X				P
.223	X	X				X
.225			X		DEL	X
.228			X		DEL	P
.230			X			P
.233			X			

ARTICLE 4. CORPORATE FINANCE

.305	X	X	X			X
.308	X	X				X
.310	X	X				P
.313	X	X				P
.315	X	X				P
.318	X	X				P
.320	X	X				P
.323	X	X				P
.325			X			P

ACC	ABCL	MBCA	GCL	NBCL	OTHER	RMBCA
.328	X	X				X
.330	X	X				X
.333	X	X				X
.335	X	X				X
.338	X	X				X
.340	X	X				X
.343		X				P
.345	X	X				P
.348	X	X				P
.350	X	X				P
.353	X	X				
.355	X	X				X
.358			X			P
.360			X			P
.363			X			P
.365			X			P
.368			X			
.370			X			
.373	X	X				X
.375	X					X
.378			X			P
.380			X			
.383			X			
.385			X			P
.388			X			X
.390	X					

ARTICLE 5. MEETINGS OF SHAREHOLDERS

.405		X	P			P
.408		P				X
.410	X	X				X
.413	X	X				X
.415	X	X	P			X
.418			X			X
.420		X	P			P
.423	X	X	P			P
.425	X	X	P			P
.428		X				
.430	X	X				P
.433			X			P
.435		P		P		P
.438	X	X				X

ARTICLE 6. DIRECTORS AND OFFICERS

.450		X				P
.453				P		P
.455		X				P
.458			X			
.460			X			P
.463			X			X
.465			X			P

ACC	ABCL	MBCA	GCL	NBCL	OTHER	RMBCA
.468		X				X
.470			X			X
.473	X	X				X
.475	X	X				X
.478			X			X
.480	X	X				X
.483			X	X		X
.485		X	X			
.488				P		
.490	X	X				X

ARTICLE 7. AMENDMENTS AND CHANGES

.502	X	X	X			X
.504	X	X	X			P
.506	X	X				P
.508			X			X
.510	X					
.512	X					X
.514	X	X				P
.516	X					P
.518	X					P
.520	X					P
.522		X				X
.524		X				X
.526		X				X

ARTICLE 8. ORGANIC CHANGE

.530	X	X				X
.532	X	X				X
.534	X	X				
.536	X	X				X
.538	X	X				X
.540	X	X				X
.542			X			
.544		X				P
.546	X	X				
.548	X	X				X
.550		X				X
.552	X	X				X
.554		X				X
.556		X				X
.558		X				X
.560		X				P
.562		X				X
.564	X					
.566		X				X
.568		X				P
.570	X	X				P
.572	X	X				P
.574	X	X				P
.576		X				X

ACC	ABCL	MBCA	GCL	NBCL	OTHER	RMBCA
.578		X				P
.580	X	X				P
.582		X				P
.584			X			P
.586	X	X				

ARTICLE 9. DISSOLUTION

.605	X		X			P
.608	X	X	X			X
.610	X	X	X			P
.613	X	X				P
.615			X			X
.618	X	X	X			P
.620			X			
.623	X	X				
.625	X	X				
.628			X			P
.630			X			
.633	X	X				P
.635	X				ORE	X
.638	X	X				
.640			X			P
.643	X	X	X			
.645			X			
.648			X			X
.650			X			P
.653			X			X
.655			X			
.658	X	X				
.660			X			P
.663			X			
.665			X			
.668			X			
.670			X			
.673			X			
.675			X			X
.678	X	X				X

ARTICLE 10. FOREIGN CORPORATIONS

.705	X	X				X
.708	X	X				X
.710	X	X				X
.713	X	X				X
.715	X					X
.718	X	X				X
.720	X	X				X
.723	X	X				X
.725	X	X				X
.728	X	X				X
.730	X	X				X
.733	X	X				X

ACC	ABCL	MBCA	GCL	NBCL	OTHER	RMBCA
.735	X	X				X
.738	X	X				P
.740	X	X				X
.743	X	X				P
.745	X	X				X
.748	X	X				X
.750	X	X				X
.753	X	X				X
.758	X	X				X
.760	X	X				X
.763	X	X				P
.765	X	X				
.768	X	X				
.770	X	X				
.773	X	X				
.775	X	X				
.778	X	X				X
.780	X	X				P
.783	X	X				
.785	X	X				X
.788	X	X				X

ARTICLE 11. REPORTS, FEES, AND PENALTIES

.805	X	X				P
.808	X	X				P
.811	X	X				X
.813	X					
.815	X	X				
.818	X	X				
.820	X	X				
.823	X	X				
.825	X	X				P
.828	X	X				P
.830	X	X				P
.833	X	X				P
.835	X	X				P
.838	X	X				P
.840	X	X				P
.843	X	X				P
.850	X	X				
.853	X	X				
.855	X	X				
.858	X	X				
.860	X					
.863	X	X				X
.865	X					
.868	X	X				P
.870	X					

ARTICLE 12. MISCELLANEOUS PROVISIONS

ACC	ABCL	MBCA	GCL	NBCL	OTHER	RMBCA
.905			X			
.910	P					X
.915	X	X				P
.920				X		X
.925	P	P		P		P
.930				X		
.935	X	X				X

ARTICLE 13. GENERAL PROVISIONS

.950	X	X				X
.953	X					
.955			P	P		X
.958			X			
.960	X					
.963				X		X
.965	X	X		P		X
.968			X			
.970			X			
.990	P	P	P			P
.995	P					P

"X" indicates the presence of identical or functionally identical statutory language.

"P" indicates the presence of partial congruence between the ACC and the source code or the RMBCA. The "origin" and "comparison" discussion for each section of the ACC should be consulted in order to determine the differences.

ACC: CSSB 246/HB 343, The Alaska Corporations Code

ABCL: AS 10.05, The Alaska Business Corporations Law

MBCA: Model Business Corporations Act

GCL: California General Corporations Law

NBCL: New York Business Corporations Law

RMBCA: Tentative exposure draft of the Revised Model Business Corporations Act

PART TWO
A COMPARATIVE SURVEY OF THE CONTENTS
of the
PROPOSED ALASKA CORPORATIONS CODE
with the
REVISED MODEL BUSINESS CORPORATIONS ACT

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ARTICLE 1. CORPORATE PURPOSES AND POWERS

Section .005 PURPOSES

ORIGIN: ACC Section .005 alters the content of AS 10.05.003 to conform to the content of Section 3 of the Model Business Corporation Act (MBCA).

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

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: ACC Section .005 is functionally identical to RMBCA Section 3.01(a). The limitations spelled out in RMBCA Section 3.01(b) are found in ACC Section .010.

Section .010 GENERAL POWERS

ORIGIN: ACC Section .010 is predicated upon AS 10.05.009 which was, in turn, predicated upon Section 4 of the Model Business Corporation Act.

SUMMARY OF COVERAGE: The introductory phrase was adopted from Section 207 of the California General Corporation Law (hereafter the "GCL") and makes explicit that while the general grant of powers are co-extensive with that of a natural person, this grant is subject to limitation by provisions in the articles of incorporation or other law. Subsection (6) makes direct reference to the new provisions on loans to officers and directors (Section . 485). Subsection (15) adds "stock option plans" to the list of incentive plans which a corporation may establish for its directors, officers and employees.

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: Section 3.02 also contains a general grant and specific enumeration of corporate powers. It is functionally identical to ACC Section .009, except that it does not contain express authority to make loans to corporate officers and directors. Within the RMBCA loans to directors are governed by Section 8.32. They are licit if approved by a majority of the outstanding voting shares. The loan may also be authorized by the direc-

tors if the board, in its collective judgment, determines that the loan is in the best interest of the corporation.

Section 3.02 follows ACC Section .009 in specifically listing "share option plans" among the incentive plans which a corporation may establish. The idea that a corporation has powers which are presumptively coextensive with those of a natural person is explicit in ACC Section .009. It is left to implication in the comment to RMBCA 3.02.

Section .015 DEFENSE OF ULTRA VIRES

ORIGIN: ACC Section .015(a) is predicated upon Section 203 of the New York Business Corporation Law (hereafter the "NBCL"). It is a modified version of former AS 10.05.018 and Section 7 of the MBCA. Section .015(b) is new and is taken from Section 208 of the GCL.

SUMMARY OF COVERAGE: ACC Section .015 governs the limited circumstances in which a claim of "ultra vires" may affect the rights of third parties who have dealt with a corporate entity and the impact of such behavior in creating liability on the part of the corporate officers and directors of the corporation. While the concept of "ultra vires" is frequently included in the discussion of agency problems within the corporate framework, properly understood it is not a traditional doctrine of agency law. A transaction is ultra vires when it is beyond the powers of the corporation as those powers are conferred by law and the terms of the articles of incorporation.

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: The provisions of ACC Section .015 and those of RMBCA 3.04 are functionally identical.

Section .020 LIMITATIONS ON AUTHORITY OF CORPORATE AGENTS

ORIGIN: ACC Section .020 is predicated upon GCL Section 208.

SUMMARY OF CONTENT: Unlike conduct assailed as beyond the powers of the corporation, a subject covered by ACC Section .015, Section .020 deals with the consequences of an abuse of authority which was within the power of the corporate principal to confer. The provisions of Section .020 confront the common law of agency as it has been applied to the unique problems generated by an artificial corporate person as principal. The thrust of Section .020 is to shift the risk of transactions which exceed the authority of corporate agents to the corporation thus relieving the interests of innocent third persons. Subsection (3) makes it clear that either the corporation or a shareholder suing in a derivative capacity may assert lack of authority in any action against the faithless agent.

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: The official comment to RMBCA Section 3.04 makes it clear that the Model Act has no coverage of this important question at all. See pp. 3-17, 18.

Section .025 CONTRACTS OR CONVEYANCES BINDING DOMESTIC AND FOREIGN CORPORATIONS

ORIGIN: ACC Section .025 is predicated upon GCL Section 208.

SCOPE OF COVERAGE: ACC Section .025 settles two important questions associated with contracts or conveyances entered by corporate agents who have exceeded their actual authority. If the transaction is within the scope of the agent's "apparent authority", it is binding upon the corporate principal and upon the third party. Thus, the defect in the authority of the agent does not defeat the corporation's liability on the transaction, nor does it prevent it from acquiring rights against the third party measured by the terms of the transaction.

COMPARED WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA has no statutory provision covering this important question.

Notes

ARTICLE 2. NAME AND SERVICE OF PROCESS

Section .105 CORPORATE NAME

ORIGIN: ACC Section .105 is a reenactment of AS 10.05.021 as amended.

SUMMARY OF COVERAGE: ACC .105 requires that a corporation adopt as part of its name one of the listed alternatives designed to warn third parties that they are dealing with a corporate entity. ACC .105 also prohibits a person from adopting a name that contains words suggesting a corporation unless that person has either been issued a certificate of incorporation in Alaska or has obtained a certificate of authority for a foreign corporation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: ACC Section .105 is functionally identical to RMBCA Section 4.01(a) and (b). There are, however, differences in content.

RMBCA Section 4.01(a)(1) requires that a corporation include as part of its name one of the traditional words or abbreviation designed to indicate corporate status. In a break with the prior Model Act and exposure draft, the final version would allow this requirement to be satisfied by the inclusion of "words or abbreviations of like import in another language. . . ." The official comment merely indicates that the change has been made. It offers no justification. At least two reasons to oppose such permission come to mind. First, I doubt that many persons would appreciate the import of initials such as "GmbH" as a signal that this was a limited liability entity. Further, even if one knew that this was a German designation for a corporation she might be fooled into belief that the entity was in fact a German entity.

RMBCA Section 4.01(c) contains provisions whereby a corporation may give written consent to the use by another entity of a name which would otherwise be deceptively similar.

The final draft of Section 4.01(b)(4) requires that a corporate name be distinct from the name of a registered nonprofit corporation. This provision is not contained in the ACC.

ACC Section .105(b) continues a 1976 amendment by the terms of which the Legislature forbade a corporation from adopting a name which contained the word "city", "borough", or "village" or otherwise implying that the corporation is a municipality. Reflecting its detachment from Alaskan concerns, RMBCA Section 4.01 contains no similar prohibition.

Section .110 RESERVATION OF CORPORATE NAME

Section .115 APPLICATION TO RESERVE CORPORATE NAME

Section .120 TRANSFER OF RESERVED NAME

ORIGIN: ACC Sections .110, .115, and .120 are reenactments without change of former AS 10.05.024, .027, and .030 which were, in turn, predicated upon Section 9 of the MBCA.

SUMMARY OF COVERAGE: ACC Sections .110, .115, and .120 set forth the natural or corporate persons who may reserve a corporate name.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 4.02 is functionally identical to these provisions of the ACC except for their substitution of the commissioner for the "secretary of state."

Section .125 REGISTRATION OF CORPORATE NAME

Section .130 USE OF SAME OR DECEPTIVELY SIMILAR NAME

Section .135 PROCEDURE FOR REGISTRATION OF CORPORATE NAME

Section .140 FEE FOR AND DURATION OF REGISTERED NAME

Section .145 RENEWAL OF REGISTERED NAME

ORIGIN: ACC Sections .125, .130, .135, .140, and .145 are reenactments of AS 10.05.033, 034, .036, .039, and .042, and are based on Sections 10 and 11 of the MBCA. Section .034 was added by the Legislature in 1966. Minor language changes have been incorporated to recognize the recently enacted scheme to allow the Department of Commerce and Economic Development to determine various fees by administrative regulation.

SUMMARY OF COVERAGE: ACC Sections .125, .130, .135, .140, and .145 provide for the registration, protection, duration, and renewal of a corporate name. Under ACC Section .130, registration of a corporate name gives the registered holder the right to seek an injunction against the use of that name or a deceptively similar name by another. The registered name must be renewed each year under ACC Section .145.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 4.03 combines the coverage of former Model Act Sections 10 and 11. Unlike ACC Section .130, RMBCA Section 4.03 does not explicitly confer exclusive right to the use of a registered corporate name, nor does it declare that a person who has registered the corporate name may enjoin the use of the same or a deceptively similar name. Section .130 clearly provides that the remedy available for abuse of a registered corporate

name is not limited to injunctive relief, but may be a cause of action for damages. RMBCA Section 4.03 contains no such provision.

Section .150 REGISTERED OFFICE AND REGISTERED AGENT

ORIGIN: ACC Section .150 is a reenactment without change of AS 10.05.045 which was based on Section 12 of the MBCA.

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

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.03 is functionally identical to ACC Section .150.

Section .155 REGISTRATION OF AGENT BY NONRESIDENT WITH CONTROLLING INTEREST

ORIGIN: ACC Section .155 is a reenactment without substantive change of AS 10.05.791 as amended in 1980. A rewording has been undertaken to make explicit that the designated agent must be within the State of Alaska.

SUMMARY OF COVERAGE: In order that the commissioner may readily establish official contact with a nonresident possessed of a controlling interest (ACC Section .955(12)), ACC Section .155 requires such a person to designate an agent within Alaska upon whom notice and process may be served.

Service on the Section .155 agent is equivalent to personal service on the controlling nonresident. Section .155(b) enforces this requirement by forbidding, in the event of noncompliance, either the controlling person or the controlled corporation use of the courts of the State of Alaska.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Again, reflective of its concern with the problems of no particular jurisdiction, the content of the Revised Model Act contains no provision requiring designation of agents by nonresidents with a controlling interest.

Section .160 FILING LIST OF REGISTERED CORPORATIONS WITH SUPERIOR COURT; UPDATING AND PUBLISHING

ORIGIN: ACC Section .160 is a reenactment of AS 10.05.048 which, has been changed to require yearly compilation and weekly updating of the stipulated information.

SUMMARY OF COVERAGE: ACC Section .160 reflects the view that

it is vital that the practicing attorney be able to quickly ascertain information concerning the corporate name, address of the registered office, and the name and address of the registered agent of both domestic and authorized foreign corporations. Both geographical and communications considerations have dictated that such information be available locally and updated frequently.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.20 contains absolutely no provision requiring that this vital information be maintained or made available.

Section .165 CHANGE OF REGISTERED OFFICE OR AGENT

ORIGIN: ACC Section .165 is a reenactment of AS 10.05.051 which was, in turn, predicated upon Section 13 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .165 establishes the procedure whereby a domestic or foreign corporation may change its registered office or agent.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.02(a) is identical to ACC Section .165. Subsection (b) differs only in that the ACC has a uniform provision on filing with the commissioner which is not reflected in the RMBCA.

Section .170 CHANGE OR RESIGNATION OF REGISTERED AGENT

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

SUMMARY OF COVERAGE: ACC Section .170 establishes the procedure by which a registered agent may change address or resign. Unless and until the registered agent follows these statutory procedures, the commissioner may continue to regard the last address of record as effective for all notice provisions under the ACC.

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

counting to the commissioner.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.03 does not provide for a shortened effective date if the corporation appoints a successor registered agent. The minimum information to be contained in the written resignation is governed by Section 5.02. The "circularity problems" noted in the official comment to RMBCA Section 5.03 have been directly solved by ACC Section .170(b). The commissioner is directed to mail a copy of the written notice of resignation to "the corporation at its principal office."

Section .175 SERVICE OF PROCESS ON CORPORATION

ORIGIN: ACC Section .175(a), (c), and (d) are a reenactment of AS 10.05.057, and are based on Section 14 of the MBCA. ACC Section .175(b) is new to the law of Alaska. It is taken from Section 57.075(3) and (4) of the Oregon Revised Statutes and eliminates the commissioner's burden under prior law to transmit process served on the commissioner given the default of a registered agent. Under ACC Section .175(b), that burden is placed upon the party seeking to initiate litigation against the corporation.

SUMMARY OF COVERAGE: To assure that notice sent to a corporation without a registered agent is the best available under the circumstances, ACC Section .175(b)(2)(B) requires that the moving party send notice to such address as it knows or, on the basis of reasonable inquiry, has reason to believe is most likely to result in actual notice. Under ACC Section .175(b)(3), the moving party is obliged to file proof of the attempted service in the appropriate superior court or other tribunal.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 5.04 admits that there were substantial problems with the provisions of former MBCA Section 14. It, too, eliminates the burden formerly placed upon a state official to serve the substitute process. Unlike the Oregon law and the ACC, RMBCA Section 5.04(b) does not require that a best effort be made to find the actual address of the corporation. It is content if the notice is mailed to the principal office. Given the official comment's express solicitude that actual notice be communicated to the foreign corporation, it would appear that the Oregon/ACC approach is superior.

Notes

ARTICLE 3. FORMATION OF CORPORATIONS

Section .205 INCORPORATORS

ORIGIN: ACC Section .205 is a reenactment with one change of AS 10.05.252 as amended in 1976 by the Legislature.

SUMMARY OF COVERAGE: The minimum age for an incorporator has been reduced from 19 to 18 to bring Section .205 into conformity with Alaska's general policy on legal majority. ACC Section .205 varies from Section 53 of the MBCA in the requirement that incorporators be natural persons. This is a continuation of prior Alaska law.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.01 differs from ACC Section .205 and existing Alaska law by permitting artificial persons (including unincorporated associations, partnerships, trusts, estates, and governments) to act as incorporators. There is no minimum age for natural persons to so function. Further, the requirement that the incorporators sign a verified copy of the articles has been eliminated.

Section .208 ARTICLES OF INCORPORATION

Section .210 ARTICLES OF INCORPORATION; OPTIONAL PROVISIONS

ORIGIN: ACC Section .208 subsections (1),(2), and (3) are predicated upon AS 10.05.255(1), (3), and (10), which were derived from Section 54 of the MBCA. Subsections (4) and (5) are taken from Section 202 of the GCL. Subsection (6) reenacts AS 10.05.255(13) as amended. The provision of the ACC governing the content of the articles is modeled upon Sections 202 and 204 of the GCL. ACC Section .210 is based upon GCL Section 204, Delaware Section 102(b)(4) and (5), and AS 10.05.255.

SUMMARY OF COVERAGE: In addition to the specific changes noted, Sections .208 and .210 make vital a drafting decision which was unimportant under prior Alaska law. The goal of the ACC is to follow California's example requiring that the articles of incorporation function as the fundamental agreement which structures the basic purpose of the corporation, the prerogatives of management, and the rights of shareholders. Section .208 requires that several fundamental decisions be addressed in the articles. While the provisions may be amended by following the procedures outlined in the ACC, at all times the subject matter content of Section .208 must

be defined in the current corporate articles. Section .210 enumerates provisions which are optional as contents of the articles. The critical point is that if the subject matters enumerated in Section .210(1) are not settled by the initial or amended provisions of the articles, they may not be resolved or governed by the bylaws, shareholder agreements, or any other form of treaty.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: An initial comparison between RMBCA Section 2.02 and ACC Sections .208 and .210 would suggest significant differences. It would be misleading. It is true that RMBCA Section 2.02(a) has a rather short list of mandatory provisions when contrasted with ACC Section .208. In part this is because ACC Section .208(4) reflects Alaska's concern for identification of alien affiliates, a concept unknown to the Model Act. Further, there is no single provision in the RMBCA which is comparable to ACC Section .210 in gathering into one convenient place all of the optional decisions which cannot be made effective unless they are reflected in the articles. The MBCA does have such requirements, only they are scattered throughout the act. See the official comment to RMBCA Section 2.02 at page 2-9,10.

The topics which are conveniently gathered in ACC Section .210(1) and scattered throughout the lengthy text of the RMBCA are not identical. In general, it may be said that the ACC is more protective of the interests of shareholders (both actual and potential) and their interest in locating in one document a definitive statement of these basic decisions. Under the RMBCA, such decisions could be found in extrinsic resolutions or agreements which might be known and available to some but not to others.

Section .213 FILING OF ARTICLES OF INCORPORATION

ORIGIN: ACC Section .213 continues the policy of AS 10.05.258, which had been predicated upon Section 55 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .213 also reflects the general scheme of the ACC to standardize the procedures for filing with the commissioner as set forth in ACC Section .910.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.03 suggests to the legislatures of the several states that they abolish the concept and practice of a "certificate of incorporation." Instead, filing is completed upon delivering a copy of the articles to the secretary of state and having it "stamped and filed." There is to be no certificate of incorporation. Elimination of the certificate of incorporation would destroy the "bright line" event selected by the Commission for fixing the de jure commencement of corporate existence.

Section .215 DISCLOSURE OF CORPORATE PURPOSES

ORIGIN: ACC Section .215 is a reenactment without change of AS 10.05.259, as amended in 1980.

SUMMARY OF COVERAGE: ACC Section .215 perpetuates a decision of the Legislature made in 1980 which requires that a corporation disclose to the Department of Commerce and Economic Development the activities in which it will initially engage. This is not done for the purpose of limiting corporate activity. Under the ACC, incorporation can still be as general as the pursuit of "any lawful purpose." The information is elicited so that the state may obtain a clearer idea of the dimension of economic activity.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: Again, reflecting its lack of familiarity with the aspirations of the Alaska Legislature, the standard recommended text of the RMBCA contains no provision requiring disclosure of corporate purposes. ✓ 2

Section .218 EFFECT OF ISSUANCE OF CERTIFICATE OF INCORPORATION

ORIGIN: ACC Section .218 is derived from AS 10.05.810.

SUMMARY OF COVERAGE: ACC Section .218 fixes the issuance of the certificate of incorporation as the point in time when the de jure existence of a corporation commences. In adopting this "bright line" rule, the ACC goes beyond Section 56 of the MBCA and AS 10.05.810 to expressly abolish the common law doctrines of de jure compliance, de facto incorporation, and corporation by estoppel.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.03 would also create a "bright line" event fixing the initial existence of a corporation. Under RMBCA Section 2.03, that event is "the secretary of state's filing of the articles of incorporation. . . ."

RMBCA Section 2.04 leaves the current body of conflicting and confusing common law on de facto incorporation and corporation by estoppel unreformed. This notwithstanding the official comment that: "Incorporation under modern statutes is so simple and inexpensive that a strong argument may be made that nothing short of filing articles of incorporation should create the privilege of limited liability." ACC Section .218 adopts that "strong argument".

Section .220 ASSUMPTION OF PURPORTED POWERS OF NONEXISTENT CORPORATION: LIABILITY

ORIGIN: ACC Section .220 is a modification of former AS 10.05.810, which had been predicated upon Section 146 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .220 determines the liability consequences of persons who assume to act as a corporation for which there has been no issuance of a certificate of incorporation (Section 218). Unless there is a written agreement, wherein a third party agrees to deal on a limited liability basis with individuals purporting to act for a corporation for which no certificate has been issued, those persons are jointly and severally liable.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.04 imposes joint and several liability on all persons purporting to act as or on behalf of a corporation who knew that there was no incorporation [effective filing with the secretary of state]. It does nothing to relieve the conflicting interpretations given to prior Model Act provisions dealing with the consequences of defective incorporation. See, e.g., Sherwood & Roberts-Oregon, Inc. v. Alexander, 269 Or. 389, 525 P.2d 135 (1974), which is in direct conflict with Heintze Corp. v. Northwest Tech-Manuals, Inc., 7 Wash. App. 759, 502 P.2d 486 (Div. One. 1972).

Section .223 ORGANIZATION MEETING

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

SUMMARY OF COVERAGE: ACC Section .223 defines the transition by which the entity being formed passes from the control of incorporators to that of the initial board of directors. In a reform designed to facilitate corporate formation, the articles are competent to name initial directors in which case they, and not incorporators, hold the initial meeting.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.05 parallels the ACC and permits the articles to name the initial directors.

Section .225 POWERS OF INCORPORATORS BEFORE DIRECTORS' ELECTION

ORIGIN: ACC Section .225 is new to Alaska law being predicated upon Section 210 of the GCL and Section 107 of the

General Corporation Law of the State of Delaware.

SUMMARY OF COVERAGE: Since the naming of initial directors in the articles is optional, Section .255 defines the powers which incorporators shall have in the event that they, and not the initial directors, shall hold the organizational meeting.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 2.05(2) is in substantial accord with the California, Delaware, and ACC innovations.

Section .228 BYLAWS: ADOPTION, AMENDMENT OR REPEAL

ORIGIN: ACC Section .228 is taken from Section 211 of the GCL and works a major change in AS 10.05.135.

SUMMARY OF COVERAGE: Under current Alaska law the power to adopt, amend, and repeal provisions of the bylaws is vested exclusively in the board unless reserved to the shareholders in the articles of incorporation.

Absent provisions in the articles, ACC Section .228 vests equal powers in the board and the shareholders with respect to determining the content of the bylaws. However, the articles are competent to restrict or eliminate the power of either the board or the outstanding shares. There are thus three possibilities: (1) concurrent, independent power in the board and the outstanding shares (the default rule); (2) an article provision restricting or eliminating the power of the board; or, (3) an article provision restricting or eliminating the power of the outstanding shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 10.20 provides a default rule identical to ACC Section .228. In the absence of a provision in the articles, the power to adopt, amend, or repeal bylaws is shared by the directors and shareholders. The RMBCA does not use the term "adopt", but the official comment makes explicit that it is to be included within the meaning of "amend." Under RMBCA Section 10.20(a)(1), the articles are competent to extinguish the power of the board. Apparently they cannot extinguish the power of the shareholders who, under RMBCA Section 10.20(b), are guaranteed power over the content of the bylaws. Thus the flexibility available under California, Delaware, and ACC provisions is not attainable under the RMBCA.

The ACC's concern that shareholders ultimately control the corporation is manifested in Section 460 wherein they are given the right to remove any or all of the directors at any time for any reason.

Section .230 BYLAWS: NUMBER OF DIRECTORS AND OTHER CONTENT

ORIGIN: ACC Section .230 is predicated upon Section 212 of

makes a written request.

AS 10.05.237 through .249 cover the content of ACC Section .233, but do not clearly obligate a foreign corporation to make a copy of its bylaws available to requesting shareholders who are citizens of Alaska.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains a similar requirement although it is somewhat difficult to locate. Section 16.02 directs that a corporation keep copies of the records required in Section 16.01(c). One of the items set forth in in Section 16.01(c) is a copy of the corporate bylaws.

Notes

ARTICLE 4. CORPORATE FINANCE

Section .305 CREATION, CLASSES, AND ISSUANCE OF SHARES

ORIGIN: ACC Section .305 is premised upon GCL Section 400, with modifications to accommodate MBCA Sections 15 and 16, which were the basis of AS 10.05.060 and .069. Section .305(a) replaces AS 10.05.060 without substantive change, and Section .305(b) replaces AS 10.05.069 without substantive change.

SUMMARY OF COVERAGE: ACC Section .305 permits great flexibility to the corporation in creating distinctions as among various classes or series of shares with respect to voting rights, as well as preferences or privileges regarding distributions during the life or at the dissolution of the entity.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.01 is functionally identical to ACC Section .305. ACC Section 210(6)'s warning that the rights, privileges, and limitations on classes of stock must be contained in the articles is reflected in RMBCA Section 6.01(b).

Section .308 ISSUANCE OF PREFERRED OR SPECIAL CLASSES OF SHARES

ORIGIN: ACC Section .308 is largely a reenactment of AS 10.05.063, which was predicated upon Section 15 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .308 allows the establishment of classes and series with varying rights and liabilities. ACC Section .308 specifies a number of particulars which may be the subject of variation between different classes. This list should aid the practitioner in discussing with clients the variations possible in such areas as redemption, dividend preferences, liquidation preferences and conversion options.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.02 is functionally identical to ACC Section .308.

Section .310 ISSUANCE OF SHARES IN SERIES

Section .313 VARIATION IN RIGHTS AND PREFERENCES OF SHARES

Section .315 SERIES RIGHTS AND PREFERENCES ESTABLISHED BY BOARD

Section .318 MANNER OF ESTABLISHING SERIES

Section .320 FILING OF STATEMENT BEFORE ISSUANCE OF SERIES

ORIGIN: ACC Section .310 is based upon AS 10.05.066 and MBCA Section 16 without substantive change.

MBCA Section 16 and AS 10.05.069 form the basis for ACC Section 313. Subsection (7), which permits a variation in voting rights in preferred or special classes, is new to Alaska law. The provision was added to MBCA Section 16 in 1966, after enactment of AS 10.05.069. This section thus represents an updating of Alaska law to conform to the Model Act.

ACC Section .315 is predicated upon MBCA Section 16 and reenacts AS 10.05.072 without substantive change.

ACC Section .318 is a reenactment without substantive change of AS 10.05.075 and MBCA Section 16.

ACC Section .320 is essentially a reenactment of AS 10.05.078, which was predicated upon MBCA Section 16. A modification has been made to the language of Section .320(a) to accord with the broader power of delegation to the board to fix by resolution an unissued class.

ACC Section .323 is a reenactment of AS 10.05.084, which was modeled upon Section 16 of the MBCA. A wording change has been made to reflect the broader power of a board to fix by resolution the rights and privileges of an authorized but wholly unissued class.

SUMMARY OF COVERAGE: ACC Section .310 makes clear that preferred and special classes of shares may be divided into series.

ACC Section .313 enumerates the rights and preferences which may vary between series of the same preferred or special class of shares.

ACC Section .315 specifies that the board may be granted the power by the articles to divide a class into series and fix the relative rights and preferences of the shares of a series. This power is subject to any limitation placed upon it by the articles or by ACC Sections 305-323.

ACC Section .318 specifies the procedure for establishing a series.

ACC Section .320 vindicates the interest of the state in securing information as to the equity interests outstanding for Alaska corporations. This information is supplied by the articles or any amendment thereto in cases not involving board power to fix the relative rights and preferences. However, when the power has been delegated to the board (ACC Section .208(5)(B)(C)), Section 320 requires that this information be filed with the commissioner.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.03 establishes with fewer guidelines to the practicing lawyer, the authority, scope, manner, and steps which must be taken to create series within a class of preferred shares and

to report the same to the secretary of state.

RMBCA Section 6.03 departs from prior provisions of the Model Act and the statutory law of all states, including Alaska, by permitting creation of a repurchase obligation in the corporation with respect to all or a part of a series. This precedent breaking suggestion would create a "put" in the hands of the holders of such shares to force the corporate issuer to reacquire the stock.

**Section .325 REDEMPTION OF SHARES; CREATION OF SINKING FUND;
REPURCHASE AGREEMENTS**

ORIGIN: ACC Section .325 is new and has no precedent in Alaska law. It is taken from GCL Section 402(a), (b), and (d).

SUMMARY OF COVERAGE: ACC Section 325 covers three crucial questions: (1) it establishes the right of the corporation to create classes or series of shares which are redeemable at the option of the corporate issuer; (2) it forbids (subject to an exception for an open-end investment company) the creation of shares which vest a right to demand redemption in the shareholders; and, (3) it permits the creation a sinking fund or similar provision, or an agreement outside of the articles which covers the subject of redemption.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.01(d) covers the topics addressed in ACC Section .325. Under the RMBCA, the extent of redemption rights, if any, must be authorized in the articles. It would thus appear that the flexibility attainable under ACC Section .325(c) is not possible under the RMBCA.

Section .328 IRREVOCABILITY OF SUBSCRIPTIONS FOR SHARES

ORIGIN: This section is a verbatim reenactment of AS 10.05.087, modeled after MBCA Section 17.

SUMMARY OF COVERAGE: A subscription for shares of a corporation to be organized is basically a promise to buy shares under specified terms. Many common law cases have held that a subscription is deemed an offer and as such inherently revocable at any time prior to acceptance. These holdings cast doubt upon the ability of promoters to insure an adequate financial start for a fledgling corporate entity. In order to settle the issue of the nature of a subscription, provide a fair result to those who act in reliance on subscriptions, and put an end to any litigation over the question of revocability, ACC Section .328 makes a subscription irrevocable for a period of six months.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.20(a) is identical to ACC Section .328.

Section. 330 PAYMENT OF SUBSCRIPTION FOR SHARES

ORIGIN: ACC Section .330 is in substance a reenactment of AS 10.05.090. Minor changes in language have been made to conform Alaska law to MBCA Section 17.

SUMMARY OF COVERAGE: ACC Section .330 places the power to determine the time of payment for subscriptions with the board. A call for payment by the board must be uniform as to all shares of the same class or series.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.20(b) and (c) is identical to ACC Section .330. Section 6.20 controls share subscriptions issued before incorporation. The initial board is given complete control over their disposition. Section 6.20(f) states that subscriptions entered into after incorporation are treated as a contract between the corporation and the subscriber and governed by Section 6.21. Unless the shareholders reserve powers granted under Section 6.21, the board has the power to control the disposition of post incorporation subscriptions.

Section .333 FORFEITURE OF SHARES FOR DEFAULT IN PAYMENT

ORIGIN: ACC Section .333 reenacts AS 10.05.093, which was based upon MBCA Section 17. The terms "penalties" and "penalty" have been changed to "remedies" and "remedy" to reflect the approved case law construction.

SUMMARY OF COVERAGE: ACC Section .333 establishes the general rights of the corporate issuer in the event of default in the payment obligation for shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.20(d) and (e) are identical to ACC Section .333.

Section .335 CONSIDERATION FOR SHARES

Section .338 PAYMENT FOR SHARES

Section .340 JUDGMENT OF BOARD OR SHAREHOLDERS AS TO VALUE OF CONSIDERATION CONCLUSIVE

ORIGIN: ACC Section .335 retains the essence of AS 10.05.096, which was derived from MBCA Section 18. Much of the former section has been deleted in the wake of the new financials (ACC Sections .358 to .370), which eliminate the concepts of par value, treasury shares, stated capital, and surplus accounts.

ACC Section .338 is a verbatim reenactment of AS

10.05.099, which was derived from Section 19 of the MBCA.

ACC Section .340 is a reenactment of AS 10.05. 102, which was modeled upon Section 19 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .335 recognizes two modes for fixing the amount of consideration (expressed in dollars) for the issuance of shares. Unless the power has been reserved to the shareholders in the articles (ACC Section .210(1)(H)), it is vested in the board. The exercise of this power is subject to the fraud standard articulated in ACC Section .340.

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

ACC Section .340 sets proof of fraud as the standard necessary to overturn a determination of the value of consideration received by the corporate issuer. The most common victim of an improper consideration exchanged for shares is the corporate creditor whose claims against the entity go unsatisfied in the wake of corporate bankruptcy, dissolution, or simple door-closing. The ACC provides considerable protection to creditors in its provision on financials and in ACC Section .488 on secondary liability of officers and directors. These provisions substantially mitigate the harshness to creditors of the fraud standard provided in ACC Section .340.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.21 is functionally identical to ACC Sections .335, .338, and .340.

Section .343 STOCK RIGHTS AND OPTIONS

ORIGIN: ACC Section .343 is new to Alaska law and is predicated upon Section 20 of the MBCA with one modification. This section eliminates the final sentence of the Model Act provision to conform to the financial provisions of the ACC. This section was adopted to clarify and regulate the exercise of the the corporation's right to issue stock rights and options under the general power to contract.

SUMMARY OF COVERAGE: Unless otherwise defined or restricted in the article, ACC Section .343 gives the corporation acting through its board broad powers to create and issue rights or options covering authorized but unissued shares of any class or classes. The only substantive command of ACC Section .343 is that if such rights or options are to be made available to directors, officers, or employees of the corporation, or to any subsidiary but not to the shareholders generally, issuance shall not be licit until the plan is approved by the

outstanding shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.24 is identical to ACC Section .343, except that it does not protect shareholders by requiring their prior approval for a plan which would grant share rights and options to directors, officers, or employees only. The omission of this protection from the RMBCA is unprecedented in existing law and at variance with the Model Act. It may also contravene the rules of the New York Stock Exchange. See, Section A-25 of the Company Manual. The official comment state that shareholder approval of such a plan may be required in order to comply with SEC regulations.

Section .345 EXPENSES OF ORGANIZATION, REORGANIZATION, AND FINANCING

ORIGIN: ACC Section .345 is a reenactment of AS 10.05.111 with a minor language modification in order to parallel MBCA Section 22.

SUMMARY OF COVERAGE: ACC Section .345 recognizes that there are costs incurred in the issuance and marketing of shares, and protects the purchasers from further liability on the theory that since it received only the "net amount" from the gross price paid, the shares are not "fully paid" and thus "assessable."

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.28 is identical to ACC Section .345 except that it does not contain the express protection for purchasers precluding a claim that their shares are assessable. The framers of the tentative draft recognize that this language is standard in nearly all state codes, but feel that the problem has rarely arisen and the language is thus surplusage.

Section .348 CERTIFICATES REPRESENTING SHARES

Section .350 INFORMATION REQUIRED TO BE STATED ON CERTIFICATE

ORIGIN: ACC Section .348 is a verbatim reenactment of AS 10.05.114, and is modeled upon MBCA Section 23.

ACC Section .350 is a verbatim reenactment of AS 10.05.117 with the deletion of paragraph (4) regarding par value, which is no longer a matter of consequence under the ACC. With this modification Section .350 is predicated upon MBCA Section 23.

SUMMARY OF COVERAGE: ACC Section 348 is designed to facilitate the trend toward electronic substitutes for the traditional share certificate by permitting the seal of the corporate issuer to be affixed in a facsimile form, and to permit the signatures of the corporate officers to be facsimiles so

long as the "certificate" is countersigned by a transfer agent or a registrar who is not an employee of the corporation.

ACC Section .350 recognizes that information regarding the rights, preferences, and limitations of the shares is of importance to shareholders. If the corporation is authorized to issue only one class of stock, such shares enjoy all attributes of participation, control, and ownership defined by the ACC. However, if the corporate articles authorize the issuance of more than one class, it is both possible and likely that the relative rights, privileges, preferences, and limitations of the classes will differ. In this instance, ACC Section .350(a) requires that the corporation furnish to each shareholder either a statement or summary of the designations, preferences, limitations, and relative rights of shares of the class she has purchased, and similar basic information regarding the shares of any other authorized class. This information may be printed on the certificate, or the certificate may be imprinted with a legend that the corporation will furnish the information without charge.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: In yet another break with the prior act and the statutory content of Alaska and other states, the framers of the tentative draft recommend that the issuance of share certificates be optional with the board. This suggestion allows the corporation the ability to decide that it will issue shares which have no tangible expression at all. If the corporation does opt for share certificates, RMBCA Section 6.25(b) sets forth a minimum content which is identical to that of ACC Section .350(b). RMBCA Section 6.25(c) is functionally identical to ACC Section .350(a).

If the corporation opts to issue shares without certificates, RMBCA Section 6.26(b) requires that it send the "shareholder a complete written statement of the information required on certificates by Section 6.25(b) and (c)." As a result of this last provision, the only accomplishment of the suggested innovation would be to place the owners of "uncertificated shares" in grave danger that they would have no tangible evidence of their interest in the corporation. Should such an individual die, the burden of one charged with marshalling the assets of the estate would be obvious.

Section .353 FULL PAYMENT REQUIRED FOR CERTIFICATE

ORIGIN: ACC Section .353 is a reenactment of AS 10.05.120, which is predicated upon Section 23 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .353 continues the Alaska policy of insisting that a share certificate may not be issued until the agreed consideration has been fully paid.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: This classical restriction from Section 23 of the original Model Act is

repeated in a rather obscure manner in the RMBCA. In Section 6.21(c) and (d) shares are deemed non assessable when fully paid. Further, the corporation is empowered to escrow shares for which the full consideration has yet to be received.

Section .355 ISSUANCE OF FRACTIONAL SHARES OR SCRIPT

ORIGIN: ACC Section .355 is a verbatim reenactment of AS 10.05.123, and as such is a modification of Section 24 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .355 provides two basic options to the board under which it may deal with claims to fractional share ownership. The board may issue a certificate for a fractional share in which case the holder is entitled to the privileges conferred by shares of that class; or, the board may issue scrip entitling the holder to receive a certificate for a full share upon surrender of scrip aggregating a full share. If the second alternative is selected, the holder of the scrip is not entitled to the privileges of share ownership until the exchange of scrip aggregating a full share. Under subsection (c), the board may establish machinery to eliminate the outstanding scrip so long as it is noticed on the scrip at the time of issuance.

ACC Section .355 continues the Legislature's prior determination that it would not follow the Model Act which gives the board a third option, under which it could eliminate fractional shares by simply paying their fair market value. Given the difficulties experienced with that Model Act provision (see, e.g., Teschner v. Chicago Title & Trust Co., 59 Ill.2d 452, 322 N.E.2d 54 (1974)), that decision seems wise. A further reason for opting to continue prior Alaska policy is to prevent the use of this "cash out" option to facilitate management strategies to eliminate outside shareholders in a move to "go private". The technique is a board ordered reverse stock split that is calculated to reduce outsider shareholdings to fractions which can then be cashed out irrespective the wishes of those shareholders.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.04 is functionally similar to ACC Section .355, except that it grants the third, or "cash out", option previously rejected by the Alaska Legislature.

Section .358 DISTRIBUTIONS; CONDITIONS

Section .360 PROHIBITED DISTRIBUTION; INABILITY TO MEET MATURING DEBTS AND LIABILITIES

Section .363 PROHIBITED DISTRIBUTION OF JUNIOR SHARES; LIQUIDATION PREFERENCE

Section .365 PROHIBITED DISTRIBUTION TO JUNIOR SHARES; RATIO OF

RETAINED EARNINGS

ORIGIN: ACC Section .358 supplants the earned surplus test of AS 10.05.204(1) (payments of dividends) and .012 (repurchase of shares). With the additions and deletions noted in the Official Comment, it is premised upon the amended version of Section 500 of the GCL.

ACC Section .360 replaces AS 10.05.201 and is based on GCL Section 501.

ACC Section .363 is taken from GCL Section 502, and replaces AS 10.05.207(4).

ACC Section .365 adopts the language of GCL Section 503, and supplants AS 10.05.207(3).

SUMMARY OF COVERAGE: In general: ACC Sections .358 through .368 contain the essence of a major reform, in which antiquated and unworkable concepts of "balance sheet" and "earned surplus" (with the myriad of exceptions) are replaced by a simple ratio of assets to liabilities in determining the circumstances in which the board of directors has discretion to declare and pay distributions of corporate assets to shareholders. With minor modifications they are predicated upon the 1977 California General Corporations Law.

Pending passage of CSSB 246/HB 343, Alaska continues to rely upon a mid-1950's version of the Model Act. To its credit, the Alaska Legislature did not authorize certain aspects of Section 45 of the Model Act, which would have further enhanced the circumstances in which the board could dissipate corporate assets to the prejudice of creditors and the holders of preferred and other senior shares. Alaska, for instance, did not adopt a "nimble dividends" provision such as that suggested by alternative Section 45(a) of the Model Act. Further, if the distribution had to be charged to "capital accounts", Alaska insisted upon a two-thirds authorization of the shareholders rather than the simple majority suggested by the Model Act.

Notwithstanding these prudential rejections of Model Act suggestions, Alaska was committed to a system predicated upon an equitable insolvency test supplemented by an exception ridden earned surplus test. Though not as weak as the system in some states, this scheme is still premised upon unsound norms of "legal accounting" and mired in statutory and common law exceptions which make it nearly impossible to draw sensible limits upon the power of the board. Such a status quo is objectionable not only because it fails to deter those bent upon abusing corporate creditors, but for the more important reason that it fails to guide the honest director who is seeking maximum, licit flexibility.

In the mid-1970's, the California Legislature joined the bar association of that state in the creation of a committee to study, with a view toward revision, the California Corporations Code. At that time, California law relied upon the earned surplus test burdened by the possibilities of reduction surplus and nimble dividends. Two irrefutable

criticisms set the stage for reform: (1) the existing restraints upon dissipation of corporate assets afforded insufficient protection to corporate creditors; and, (2) the language of the law meant little to accountants who were relied upon to prepare and audit the books and records. After a substantial debate, the 1977 California Corporations Code was framed in a manner designed to meet both of these problem areas. The earned surplus test was junked. Also discarded were the concepts of par value, stated capital, and all manner of capital surplus. In their place the statute articulated a simple test of the ratio of assets to corporate liabilities. For the purpose of complying with this test, the corporate books were to be kept in accordance with Generally Accepted Accounting Principles (GAAP).

In 1980, the Alaska Code Revision Commission concluded that both the substantive scheme and deference to the accounting profession pioneered in California were worthy models for a new Alaska Corporations Code. Accordingly, with the modifications hereinafter noted, Alaska is presented with the opportunity to become the second state to adopt the ratio/assets surplus test.

Protection of Creditors: Protection for the legitimate interests of corporate creditors begins with ACC Section .360's injunction that no distribution (defined by ACC Section .990(17) as a transfer of cash or property by a corporation to its shareholders without consideration) may be undertaken when the result would produce equitable insolvency. The content of this equitable insolvency restraint has been altered in several particulars:

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

Two significant changes are incorporated in this formulation of the equitable insolvency standard.

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

The inclusion of subsidiaries is the second reform. A parent corporation and its subsidiaries are to be considered as a unit; the various corporate shells are disregarded in favor of viewing the financial position of the total operations of an affiliated group. For a definition of "subsidiary" see ACC Section .990(42).

Assuming that insolvency within the meaning of ACC Section .360 is not threatened, ACC Section .358 establishes two circumstances under which the board enjoys discretion to

declare and pay a distribution to shareholders.

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

Distributions in partial liquidation are within the discretion of the board if a two part test is met.

The first requirement is that the assets of the corporation which would remain after the distribution are at least equal to 1.25 time liabilities. Compliance with this ratio guarantees a minimum cushion to creditors in that the corporation must continue to hold five dollars of assets for every four dollars of liabilities.

The second requisite focuses upon current liquidity of the corporation. The general rule is that the corporation's current assets be at least equal to current liabilities. Both current assets and current liabilities are defined by Generally Accepted Accounting Principles. Special concern is manifest for corporations which have a recent history of paying more in interest on their debt than their earnings would reflect if interest and taxes were not deducted in computing net profits. Such corporations must comply with a further requirement that current assets be at least 1.25 times current liabilities.

Protecting the interests of senior shares: The basic thrust of both classical and the ratio/assets restraints upon distributions has been the protection of creditors. This emphasis is natural, for by definition the creditor is an "outsider" precluded from any direct voice in corporate management. The ACC also attempts to accommodate a second source of recurrent tension respecting distribution: the interests of quasi-outsiders who have purchased shares with either a dividend or liquidation preference.

"Senior shares" achieve this status by dint of a contract between the corporate issuer and the holder of the securities. The specific terms used to identify this arrangement is "the indenture." While the content of an indenture may reflect specific understandings between the potential investors and the corporation, most are comprised of either or both of the following elements: (1) a "dividend preference" (the holders of this class of stock are "guaranteed" a dividend preference over subordinated or "junior" classes of stock); and (2) a "liquidation preference" (in the event of dissolution, the holders are guaranteed a preferential claim to assets which exceed the claims of all creditors). Neither of these guarantees is chiseled in stone. Performance is permitted only if the corporation can otherwise meet its legal obligations. Thus if the distribution

would threaten the security of creditors mandated by ACC Section .358, it cannot be made to even senior shares.

Adding to the vulnerability of the holders of these securities is a third classical feature of their status: they normally do not enjoy a right to elect members to the board of directors. The directors are, instead, elected by the owners of the junior, or "common", shares. Unless restrained by easily understood guidelines, there is danger that the directors will advance the interests of their constituents at the expense of the non-voting senior shares.

AS 10.05.207 and .210 show that the Legislature has long been interested in affording protection to senior shares. ACC Section .365 continues this policy by restricting the board's authority so that there can be no distribution to junior shares unless the amount of retained earnings immediately prior thereto equal or exceeds the amount of the proposed distribution plus the aggregate amounts of cumulative dividends in arrears on all shares having a dividend preference. The net effect of ACC Section .365 is to foreclose the use of payments in partial liquidation to holders of junior shares so long as the indenture obligations to senior shares are unmet.

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

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: If supporters could be found for a continuation of the baroque concepts of "legal accounting" contained in current Alaska law, they will find no comfort in the RMBCA. The official comment to RMBCA Section 6.40 makes it clear that it is intended to "sweep away all the distinctions among the various types of surplus and impose realistic restrictions on distributions build around the equity insolvency test of earlier statutes." (p. 6-60). The RMBCA also follows the California/ACC approach and yields all notions of legal accounting. It stops short, however, of requiring that books and records according to generally accepted accounting principles. While it expects that ". . . their use will be the basic rule in most cases. . . ." the final judgment is left within the business judgment of the board. (6-78).

There are differences between the existing California and proposed Alaska statutes and RMBCA Section 6.40. While the former use the equity insolvency test as the first of a two prong concept, RMBCA Section 6.40 relies upon it almost exclusively. Put most simply, the cushion of \$5 in assets to every \$4 in liabilities is not mandatory under RMBCA Section 6.40. The standard is explicit under the proposed content of the ACC. It would present a moving target under the RMBCA. A miss would ensure harm to creditors and promote litigation against the directors and shareholders of the defaulting

entity. Neither seems a desirable outcome.

RMBCA Section 6.40(c)(2) does contain protection for the holder of senior securities which is similar in object to ACC Section .360.

Section .368 EXCEPTION FOR PURCHASE OR REDEMPTION OF SHARES OF DECEASED SHAREHOLDER

ORIGIN: ACC Section .368 is new to Alaska law; it is taken verbatim from GCL Section 503.1.

SUMMARY OF COVERAGE: It is often desirable in smaller corporation to provide for the death of a shareholder with a plan permitting the corporation to purchase or redeem the shares of the deceased. Such a plan prevents the potentially troublesome problems of having the deceased's heirs participating in the business. A common method used in effecting such plans is a corporate purchase of insurance on the shareholder's life. The insurance proceeds are to be used for the purchase or redemption. ACC Section .368 provides that, notwithstanding an inability to comply with Sections 358 through .365, the amount of the proceeds from the policy in excess of the total amount of premiums paid may be used to purchase or redeem the decedent's shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no explicit provision enabling such limited repurchase plans.

Section .370 INAPPLICABILITY TO REGULATED INVESTMENT COMPANY

ORIGIN: ACC Section .370 is new to Alaska law, and is derived from GCL Section 504.

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

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA appears to have no comparable exception, although the result would doubtless be reached through litigation.

Section .373 SHARE DIVIDENDS: RESTRICTIONS

ORIGIN: This section is a reenactment without change of AS 10.05.204(5), and is predicated upon Section 45(e) of the MBCA.

SUMMARY OF COVERAGE: Share dividends present no direct threat to creditors who are protected by the ratio/assets surplus test of ACC Section .358. However, if the corpo-

ration has more than one class of shares, the power of the board to distribute shares of the "senior" or "preferred" class to the common shareholders as a dividend is a direct threat to their proportional interest in the corporation. ACC Section .373 continues Alaska law by prohibiting the board from taking such a step unless it is authorized in the articles or is the subject of a majority vote of the holders of the senior shares.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.23 is functionally identical to ACC Section .373.

Section .375 ADDITIONAL RESTRICTIONS IN ARTICLES, BYLAWS, INDEMTURES OR AGREEMENTS

ORIGIN: This section does not change prior Alaska law; it merely makes the law explicit.

SUMMARY OF COVERAGE: ACC Section .375 makes it explicit that the provisions of the ACC on the declaration of dividends and purchase or redemption of shares do not "occupy the field" and thereby prevent further regulation by the articles, by-laws, indentures or agreements.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.40 contains a prefatory clause which accomplishes the same result as ACC Section .375.

Section .378 LIABILITY OF SHAREHOLDERS RECEIVING PROHIBITED DISTRIBUTIONS; SUIT AGAINST SHAREHOLDERS

ORIGIN: ACC Section .378 is new to Alaska law, and is derived from GCL Section 506. It supplements ACC Section .480(b), itself a reenactment of AS 10.05.225.

SUMMARY OF COVERAGE: ACC Section .378 provides a non-exclusive remedy against shareholders who have received any distribution with knowledge that it is illicit. The remedy runs to the corporation and may be asserted to the use of the corporation by any non-consenting creditor for violation of Sections .358 or .360, provided that the creditor's claim had arisen prior to the distribution. Under subsection (b), non-consenting holders of senior shares may commence the action for violation of Section .363 or .365 provided that the senior shares were held at the time of the distribution.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.33(b)(2) achieves the goal of ACC Section .378 by indirection. Shareholders are rendered liable for contribution to a director sued for an illicit distribution to the extent that they knew it to be in violation of the act or provisions of the articles.

Section .380 IDENTIFICATION OF DISTRIBUTION IN NOTICE TO SHAREHOLDERS

ORIGIN: ACC Section .380 is taken from GCL Section 507. It replaces AS 10.05.207(5).

SUMMARY OF COVERAGE: In order to set the stage for recovery of illicit distributions and to inform shareholders when a dividend represents a partial liquidation (as opposed to a distribution of profits), ACC Section .380 requires that management identify the source and accounting treatment of a dividend charged against any source other than the retained earnings account. Such a policy is consistent with current Alaska practice. AS 10.05.207(5) requires identification of distributions in partial liquidation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.40 does not require that shareholders be given this prudential information. Omitting such a step fails to alert Alaskans of potentially favorable tax treatment of the dividend on their federal returns.

Section .383 INAPPLICABILITY TO WINDING UP AND INVOLUNTARY OR VOLUNTARY DISSOLUTION

ORIGIN: ACC Section .383 is taken from GCL Section 508.

SUMMARY OF COVERAGE: The provisions of Article 9 for the winding up of corporate affairs and the involuntary or voluntary dissolution of the corporation are plenary in their coverage. No additional law is required to protect the interest of creditors and holders of senior shares. Thus, the provisions of Sections .358 through .365 are made inapplicable to such procedures by ACC Section .383.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: There is no comparable provision in the RMBCA.

Section .385. REDEMPTION OF SHARES AT THE OPTION OF CORPORATION; MANNER

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

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

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.31 empowers a corporation to acquire its own shares. However, the RMBCA does not appear to contain any provision defining the manner of taking such a step.

Section .388 ACQUISITION OF CORPORATION'S OWN SHARES; REISSUANCE OR RETIREMENT

ORIGIN: ACC Section .388 is taken from GCL Section 510. It continues existing Alaska law (AS 10.05.312 to .345) in requiring a filing with the commissioner of an amendment to the articles. It departs from and simplifies existing law by the elimination of the concept of "treasury shares".

SUMMARY OF COVERAGE: ACC Section .388 specifies the treatment to be given redeemed or repurchased shares. They return to the status of authorized but unissued shares unless the articles prohibit reissuance. If reissuance is prohibited, the articles stating the number of authorized shares must be amended to reflect the lower number. Such an amendment must be filed with the commissioner. Shareholder approval of the required amendment is unnecessary.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.31 is functionally identical to ACC Section .388

Section .390 CAPITALIZATION OF RETAINED EARNINGS

ORIGIN: ACC Section .390 continues the policy of existing Alaska law, which permits directors to increase either the stated capital (AS 10.05.108) or the capital surplus (AS 10.05.366) accounts by charging the earned surplus account. There is no corresponding provision in the GCL financials.

The accounting provisions of existing law require that an amount equal to the total par value of shares distributed as dividends be transferred to the stated capital account from a surplus account (AS 10.05.204(4)(A)). No such accounting treatment is required under the ACC since the use of par value has been eliminated.

SUMMARY OF COVERAGE: ACC Section .388 permits the board to pass a resolution which transfers amounts properly allotted to the retained earnings account into the paid-in account. The effect of such a transfer would limit the ability of the board in future to make distributions under ACC Section .358(a).

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no similar provision.

Notes

ARTICLE 5. MEETINGS OF SHAREHOLDERS

Section .405 MEETINGS OF SHAREHOLDERS

ORIGIN: ACC Section .405 is predicated upon Section 28 of the MBCA and Section 600(d) of the GCL. It replaces AS 10.05.138.

SUMMARY OF COVERAGE: ACC Section .405 requires that shareholders of any corporation organized under or subject to this Chapter meet at least once annually. For the first time in Alaska law, a shareholder is provided with standing to seek a summary court order to convene an annual meeting if such a meeting has not been held within the prior thirteen month period. ACC Section .405(c) differs from the Model Act in conferring the power to summon special meetings of the shareholders upon the chairman of the board and the president of the corporation. AS 10.05.138 confers such power upon the president, but does not reach the chairman of the board.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The content of ACC Section .405 is paralleled in RMBCA Sections 7.01, 7.02, and 7.03. RMBCA Section 7.01 requires an annual meeting of shareholders. RMBCA Section 7.03(a)(1) is similar to ACC Section .405(b) in authorizing aggrieved shareholders summary access to a court ordered meeting in the event the annual meeting is not held. Special meetings may be called by shareholders under both ACC Section .405(c) and RMBCA Section 7.02. The ACC continues current Alaska law and the original recommended content of the Model Act by requiring that 10% of the voting shares are needed to call a special meeting. In the exposure draft Section 7.02(a)(2) recommended that the minimum be lowered to 5%. In the final draft the figure was restored to the traditional 10%.

Section .408 CLOSING OF TRANSFER BOOKS AND FIXING RECORD DATE

ORIGIN: ACC Section .408 is predicated upon Section 30 of the MBCA with two modifications. In both subsections (a) and (b), the Model Act's ten day minimum period before the action is taken has been extended to twenty days, to further the use of the twenty day notice periods found throughout the ACC. AS 10.05.144 utilizes a ten day period. Also, sixty day limitations have replaced the fifty day formula now found in Alaska law respecting the closing of transfer books or fixing of a record date. Finally, the ACC follows the Model Act in making a shareholder list compiled from the closed transfer

books or by virtue of the record date effective as to any adjournment of the meeting.

SUMMARY OF COVERAGE: ACC Section .408 provides three alternatives for effecting a determination as to shares entitled to vote in an annual or special meeting, or to participate in a distribution. Under the first alternative, the board may simply close the stock transfer books. A second alternative is for the board to declare a "record date" for such determination. Finally, the default mode for determining the shareholders if the board has not exercised its options under the first or second alternative is to adopt the date on which the notice of the meeting is called, or the date that the resolution of the board declaring the distribution is adopted.

COMPARISON WITH THE FINAL DRAFT DRAFT OF THE RMBCA: RMBCA Sections 7.07 and 7.05(d) contain the three alternatives specified in ACC Section .408 with slightly differing minimum and maximum times.

Section .410 NOTICE OF SHAREHOLDERS' MEETING

ORIGIN: ACC Section .410 is predicated upon MBCA Section 29 and AS 10.05.141. The only change is to set a twenty day minimum for delivery of notice, a general policy running throughout the ACC.

SUMMARY OF COVERAGE: ACC Section .410 establishes the minimum content and the minimum and maximum time restraints on written or printed notice for annual or special meetings. The notice must be "delivered" not less than twenty nor more than fifty days before the date of an annual or special meeting, and in every instance, the notice must state the place, day, and hour of the meeting. For special meetings only, the notice must also declare the purpose(s) for which the meeting is being convened.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.05 is in substantive accord with ACC Section .410. The RMBCA does propose a minimum of 10 and a maximum of 60 days for notice. The ACC uses 20 and 50.

Section .413 VOTING LIST; LIABILITY

ORIGIN: ACC Section .413 is predicated upon AS 10.05.147, which was based upon the pre-1962 version of Section 31 of the MBCA. ACC Section .413(c) is based upon MBCA Section 31 and AS 10.05.150.

SUMMARY OF COVERAGE: ACC Section .413 mandates that at least twenty days prior to each meeting of shareholders, the officer or agent having charge of the stock transfer books make a list of all shareholders entitled to vote. This list must be

kept open and subject to inspection by a shareholder at any time during usual business hours for a period of twenty days prior to the meeting. This right of inspection prior to the meeting may be exercised by an agent or attorney of the shareholder.

ACC Section .413(c) imposes a civil liability upon an officer or agent having charge of the stock transfer books who fails or refuses to exhibit such a list as above provided. Such a liability runs to any shareholder able to establish damage as a consequence of this failure or refusal, in an amount determined by the court's discretion.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.20 substantially mirrors the provisions of ACC Section .413. RMBCA Section 7.20(d) sanctions a summary court ordered inspection in the case that the access to the shareholder list mandated is denied. A similar provision is found in ACC Section .430(d). RMBCA Section 7.20 does not establish any potential civil liability in the event of a denial of inspection rights. In his address to the Alaska Bar Association Convention Professor Hamilton stated the view that personal liability sanctions are rarely imposed and thus do not serve as a pragmatic deterrent.

Section .415 QUORUM OF SHAREHOLDERS

ORIGIN: ACC Section .415(a) is predicated upon MBCA Section 32 and AS 10.05.153, and reflects no change in existing Alaska law. ACC Section .415(b) is predicated upon GCL Section 602(b), and is unprecedented in Alaska law.

SUMMARY OF COVERAGE: Absent a provision in the articles or bylaws, the default quorum requirement is the presence, in person or by proxy, of an absolute majority of the shares entitled to vote. The articles or the bylaws may establish a greater than majority quorum requirement. Only the articles are competent to establish a less than majority quorum requirement, which may not be less than one-third of the voting shares. The affirmative vote of the majority of the shares represented at which a quorum is present is the act of the shareholder. Once a quorum has been established, it is not possible for a disgruntled minority to defeat the capacity of the majority to transact business by simply "walking out" of the meeting.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.25 is functionally identical to ACC Section .415.

Section .418 PROXIES

ORIGIN: ACC Section .418 is taken from GCL Section 705, with a modification to eliminate Section 705(e)(3) (rights of creditors). Section .418 replaces AS 10.05.159 and .168,

which had been based on Section 33 of the MBCA. The explicit treatment of the question of "revocation" and the circumstances under which a proxy may be made "irrevocable" by agreement are unprecedented in Alaska law.

SUMMARY OF COVERAGE: ACC Section .418 permits a shareholder to create a legal power in a nominee to vote his or her shares, the life of which can not exceed eleven months. A revocable proxy is treated as destructible at the will of the proxy giver. This Section regulates the circumstances or acts which will "revoke" the proxy, thus disabling management from recognizing the power of the nominee to cast the votes represented by the shares. Finally, for the first time, Alaska law contains explicit provisions defining the circumstances under which a proxy may be made irrevocable.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.22 is identical to ACC Section .418.

Section .420 VOTING OF SHARES

ORIGIN: ACC Section .420 is predicated upon MBCA Section 33, with the exception of subsections (d) and (i). Section .420(d) is predicated upon GCL Section 708(a), and replaces AS 10.05.156 to .168. Section .420(i) is new and unprecedented in Alaska law. It is based upon GCL Section 509(d).

SUMMARY OF COVERAGE: ACC Section .420 establishes a cumulative voting scheme designed to enhance the opportunity for minority share interests to obtain representation on the board. Section .420(d) makes cumulative voting optional and presumptive unless eliminated by a provision of the articles. It goes beyond the Model Act to provide that if elimination of cumulative voting is sought via amendment to the articles, such an amendment shall not be effective if a sufficient number of votes are cast against it as would elect a single director if voted cumulatively in an election for the entire board. Shares held by the corporation or its controlled subsidiary may not be voted or counted towards the outstanding shares entitled to vote.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.21, 7.14, and 7.28 cover the subject matter addressed in ACC Section .420. There is substantial accord except with respect to the presumptive status of cumulative voting. Cumulative voting rights exist under ACC Section .420(d) unless extinguished in the articles. This is a continuation of historic Alaska practice and reflects a Legislative solicitude for representation of minority share interests on the board. Under RMBCA Section 7.28(a) such rights do not exist unless the articles make affirmative provision.

Section .423 ACTIONS TAKEN WITHOUT MEETING: WRITTEN CONSENT;

REVOCATION OF CONSENT

ORIGIN: ACC Section .423(a) is predicated upon Section 145 of the MBCA and AS 10.05.807, with language added to make it clear that the written consents are invalid unless of identical content as to all shareholders. Section .423(b) is adapted from GCL Section 603(c), and is unprecedented in Alaska law.

SUMMARY OF COVERAGE: ACC Section .423 provides for informal action by shareholders, as long as the action is taken by the unanimous, written consent of the shares. The Commission considered and rejected the California and Delaware positions which would tolerate informal action by less than unanimous consent, believing that the unanimous consent requirement was a valid trade-off for the abolition of a formal meeting. This presumption for informal action may be extinguished by the articles or the bylaws.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.04 is in substantial accord with ACC Section .423. The prudential requirement that the consents be identical in content is not contained in Section 7.04. The official comment (7-17, 18) makes it clear that, like the Code Revision Commission, the framers of the RMBCA do not advocate adopting a position wherein informal action may be taken by less than the unanimous consent of the voting shares.

Section .425 VOTING TRUSTS AND AGREEMENTS AMONG SHAREHOLDERS

ORIGIN: ACC Section .425(a) is taken from MBCA Section 34 and AS 10.05.171. Unlike existing Alaska law, Section .425(a) has adopted the Model Act's language designed to require disclosure of the terms and identity of voting trusts. Section .425(b) is taken from GCL Section 706(d), and is unprecedented in Alaska law.

SUMMARY OF COVERAGE: ACC Section .425 permits a voting trust, regulates its duration, and mandates disclosure of its terms and members. Shares committed to a voting trust must be surrendered to the trustee in exchange for trust certificates, while all incidents of share ownership other than voting rights remain with the shareholder/participant. The Model Act language on the extension of voting trusts has not been adopted, in the belief that at the end of the ten year maximum life, the parties are capable of forming a new trust. Section 425(b) tolerates other agreements such as pooling agreements and share classification, leaving to common law any limitations upon their use.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Sections 7.30 and 7.31 cover the subject of voting trusts and voting agreements among shareholders. Their content is in substantial accord with ACC Section .425, except for the provision

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COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Sections 7.30 and 7.31 cover the subject of voting trusts and voting agreements among shareholders. Their content is in substantial accord with ACC Section .425, except for the provision

on extending the period of time for a voting trust.

Section .428 SHAREHOLDERS' PREEMPTIVE RIGHTS

ORIGIN: ACC Section .428 is predicated upon MBCA Section 26A and replaces AS 10.05.129. Existing Alaska law contains no provision comparable to Section .428's presumptions as to shares or offerings to which preemptive rights are not extended.

SUMMARY OF COVERAGE: Unless limited or denied by provisions of the articles, ACC Section .428 establishes preemptive rights in certain shareholders to acquire under fair and reasonable terms unissued shares or convertible securities. Preemptive rights do not exist in holders of any class of preferred shares, nor do common shareholders have preemptive rights to the issuance of nonconvertible preferred shares. If a majority of the shares approve, preemptive rights do not exist as to shares issued to directors, officers, or employees. This provision is intended to facilitate the implementation of qualified deferred compensation schemes under the Internal Revenue code. Section .428 expressly recognizes that the articles are competent to enlarge or diminish the scope of preemptive rights.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.30 reverses the statutory presumption on preemptive rights. Under ACC Section .428 such rights exist unless limited or extinguished in the articles. Under RMBCA Section 6.30(a), such rights do not exist unless affirmatively provided in the articles. Assuming the presence of such rights, the balance of RMBCA Section 6.30 is in accord with the provisions of ACC Section .428.

Section .430 BOOKS AND RECORDS

ORIGIN: ACC Section .430 is based upon Section 52 of the MBCA and AS 10.05.237 to .249.

Section .430(a) continues the content of AS 10.05.237 with added provisions for minutes of meetings of board committees and for electronic processing. Section .430(b) continues the policy of AS 10.05.237(b), but has eliminated the durational and numerical qualifications of AS 10.05.240. Section .430(c) continues the policies of AS 10.05.243, with the modification of imposing a minimum liability of \$5000. Section .430(d) has modified AS 10.05.246 in view of the standing requirements eliminated under Section .430(b). Section .430(e) adopts without change the content of AS 10.05.249 regarding the right to demand a copy of the most recent financial statement.

SUMMARY OF COVERAGE: ACC Section .430(a) creates the obligation for any corporation organized under this Chapter to keep

specified books and records of account, minutes of proceedings, and a record containing the names and addresses of all shareholders and the number and class of shares held by each. This subsection facilitates the collection and keeping of such data by electronic processing so long as such data can be reduced to writing.

Subsection .430(b) creates the right of inspection and vests that right in any shareholder and the Department of Commerce and Economic Development. The shareholder must make written demand and state the purpose(s) for which inspection is demanded. The inspection may be made in person or by agent or attorney, and at a reasonable time and for a proper purpose.

Subsection .430(c) creates personal liability in any officer or agent who denies a right of inspection which the shareholder can establish was properly demanded, with certain affirmative defenses available to defeat this liability.

Subsection .430(d) affirms the power of a competent court to enforce a right of inspection properly demanded.

Subsection .430(e) gives the shareholder a right to receive, upon written request, a copy of the corporation's most recent financial statement.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.20 requires that the corporation maintain and make available for inspection a list of the names and addresses of its shareholders. RMBCA Section 16.01 requires the keeping of books, records of account and minutes of the proceedings of all shareholder, board and board committee meetings. RMBCA Section 16.02 creates a right of inspection in shareholders asserting a proper purpose to inspect reasonably related portions of the Section 16.01 materials. RMBCA Section 16.04 details the circumstances under which a court may order observance of the Section 16.03 inspection rights. In total, these provisions accord with those of ACC Section .430, except that they do not expressly allow for civil liability on the part of the officer or agent who wilfully frustrates what are later determined to have been valid assertions by shareholders of inspection rights.

Section .433 ANNUAL REPORT TO SHAREHOLDERS: CONTENT; FINANCIAL STATEMENT ON REQUEST

ORIGIN: ACC Section .433 is new and without precedent in Alaska law. It is adapted from Sections 1501 and 2000 of the GCL. GCL Section 1501(g) on attorney fees and costs was omitted from Section .433.

SUMMARY OF COVERAGE: ACC Section .433 establishes the obligation of the board to send an annual report to shareholders within 180 days after the close of the fiscal year. The report must contain a balance sheet and an income statement prepared according to generally accepted accounting principles. The report need not be prepared by independent ac-

countants, but if so prepared it must be certified by the independent accountant.

If the corporation has fewer than 100 shareholders the articles are competent to waive the obligation to provide an annual report.

If the corporation has more than 100 shareholders the content of the annual report is expanded to include a brief description of all "insider transactions" (transactions, other than compensation, in which the corporation has engaged with one of its officers, directors, or a controlling shareholder) involving an amount in excess of \$40,000. Corporations reporting under Section 12 of the Federal Securities and Exchange Act, and those reporting under Sections 7(c), 8(c), and 28 of the Alaska Native Claims Settlement Act are exempted from ACC Section .433(b) on the grounds that their federal reporting obligations cover these important items.

Section .433(c) permits shareholders holding at least 5% of the outstanding shares of any class to make written requests for periodic income statements.

Section .433(f) establishes the penal consequences of any failure, refusal, or neglect to make or disseminate the reports and statements required by this section, and also provides that a competent court may specifically enforce these rights.

Section .433(g) makes this section applicable to foreign corporations with principal executive offices in or meetings held in Alaska.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 16.20 follows the California/ACC example and imposes an annual reporting obligation upon corporations. It does not contain any exemption for small corporations and the comment (16-20) makes it clear that it will have ". . .its principal impact on small, closely held corporations. . . ." Corporations which report under federal law would not be exempt from the RMBCA Section 16.20 obligation. Thus Native Corporations would face the duplicative burden of reporting.

RMBCA Section 16.21 requires that some of the "insider transactions" addressed in ACC Section .433(b) be reported to shareholders. In general, it does not require disclosure of major transactions with directors, officers or controlling shareholders. Yet it would require special reports of every instance of advances or indemnification. ACC Section .433(b)(2) requires this only if the instances aggregate more than \$10,000 to an individual officer or director during the fiscal year.

The RMBCA does not guarantee access on the part of shareholders holding at least 5% of the outstanding shares to quarterly financial statements. Nor does it contain any express sanction for defiance of the reporting obligations it does impose. This last point reveals a distinction between the attitudes of the framers of the two statutes. The Alaska Code Revision Commission felt that it is unwise for a statute to create any positive obligation and then fail to spell out the consequences of a refusal on the part of affected persons

demand upon the outstanding shares.

Section .435(h) enables a corporation or the actual defendants to move the court at any time before final judgment to require the plaintiffs to give security for the reasonable expenses, including attorney fees, that may be incurred by the petitioners. The amount of security shall be determined by the court in its discretion, except that if the plaintiff shareholder(s) hold 5% or more of any class of outstanding shares or voting trust certificates representing shares, there shall be no security for expenses requirement.

Section .435(i) forbids any form of "out of court settlement" of a derivative action without court approval.

Section .435(j) provides that any recovery should be accounted for to the corporation, however, the court may award the prevailing party reasonable expenses, including attorney fees.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.40 accords with the Commission's recommendation that demands upon shareholder be eliminated. However, RMBCA Section 7.40 also would eliminate the security for expenses provided by ACC Section .435(h). Finally, the official comment to RMBCA Section 7.40 (7-85) make it clear that it takes no position on the question of the power of independent directors to seek dismissal of the derivative action on the ground that, in their collective business judgment, it is not in the best interests of the corporation. Such matters are resolved by ACC Section .435.

Section .438 LIABILITY OF SHAREHOLDERS AND SUBSCRIBERS

ORIGIN: ACC Section .438 is predicated upon MBCA Section 25 and AS 10.05.125.

SUMMARY OF COVERAGE: ACC Section .438 establishes the basic proposition of limited liability of shareholders, except for their liability to pay the full consideration for the shares which runs to designated classes of successors in interest.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 6.22 is functionally identical to ACC Section .438 except that it does not clarify the non-liability of executors, administrators, conservators, guardians, trustees, assignees for the benefit of creditors, receivers or pledgees.

Notes