

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988

5342 SJUD

HB 322

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## ARTICLE 10. FOREIGN CORPORATIONS

### Section .705 ADMISSION OF FOREIGN CORPORATION

ORIGIN: ACC Section .705 is a reenactment of AS 10.05.597, which is based upon Section 106 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .705 conditions entry of a foreign corporation for the purpose of transacting business within Alaska. It is intended to exercise to the fullest the police power of the state while respecting the equal protection guarantees made obligatory by the Fourteenth Amendment to the Constitution of the United States.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.01(a) parallels ACC Section .705 in requiring a certificate of authority as a precondition to a foreign corporations ability to transact business within a host state.

### Section .708 APPLICATION TO CORPORATIONS NOW AUTHORIZED TO TRANSACT BUSINESS IN THE STATE

ORIGIN: ACC Section .708 is a reenactment without change of AS 10.05.687 and is based upon Section 123 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .708 reflects the determination of the legislature to grant to foreign corporations, irrespective of their date of entry, the equal protections of the laws of Alaska including the imposition of all limitations, restrictions, liabilities, and duties prescribed in the ACC.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 17.02 parallels ACC Section .708 in extending the provisions of a new corporations code to foreign corporations currently qualified to transact business in the host state.

### Section .710 LIABILITY FOR TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY

ORIGIN: ACC Section .710 is a reenactment of AS 10.05.696 and is based upon Section 124 of the MBCA.

SUMMARY OF COVERAGE: In order to enforce the requirement that a foreign corporation obtain a certificate of authority prior to transacting business within Alaska, ACC Section .710

imposes a penalty of up to \$10,000 per year or portion thereof during which such intrastate business was transacted without compliance with ACC Section .705. In addition, such a foreign corporation is made liable for all fees and taxes which would have been paid if there had been full compliance with the ACC.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.02(d) authorizes the imposition of a penalty for transacting business without a certificate of authority.

Section .713 TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY AS BAR TO RIGHT TO SUE

ORIGIN: ACC Section .713 reenacts AS 10.05.690 and is based upon Section 124 of the MBCA.

SUMMARY OF COVERAGE: Among the disciplinary consequences of a foreign corporation's transaction of business within Alaska without compliance with ACC Section .705 is the denial of its right to maintain any action, suit, or proceeding in Alaska state courts.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.04(a), (b), and (c) creates identical consequences to those set forth in ACC Section .713.

Section .715 TRANSACTING BUSINESS WITHOUT CERTIFICATE OF AUTHORITY NOT AFFECTING CONTRACTS AND RIGHT TO DEFEND ACTION

ORIGIN: ACC Section .715 is a reenactment without change of AS 10.05..693.

SUMMARY OF COVERAGE: ACC Section .715 confines the disciplinary consequences of the transaction by a foreign corporation of intrastate business within Alaska without a certificate of authority to those imposed by the ACC. It does not generate grounds for a contracting party to assail the validity of a contract or transaction with a noncomplying foreign corporation. Finally, although precluded by ACC Section .713 from initiating any action, suit, or other proceeding, a noncomplying foreign corporation is not precluded from defending itself in proceedings commenced by others in Alaska courts.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.02(e) accords with the provisions of ACC Section .715.

Section .718 ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS IN THIS STATE

ORIGIN: ACC Section .718 is a reenactment of AS 10.05.600, and is based upon Section 106 of the MBCA.

SUMMARY OF COVERAGE: Under the interstate commerce clause and common law comity principles, a foreign corporation may engage in certain activities within a state without being required to first obtain a certificate of authority. In an effort to reduce litigation and clarify a murky body of decisional law precedent, ACC Section .718 enumerates activities which a foreign corporation may pursue without the necessity of obtaining a certificate of authority under ACC Section .705.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.01(b) is substantively identical to ACC Section .718.

Section .720 CORPORATE NAME OF FOREIGN CORPORATION

Section .723 ASSUMED CORPORATE NAME

Section .725 CHANGE OF NAME BY FOREIGN CORPORATION

ORIGIN: ACC Section .720 represents a modified content of AS 10.05.606 and is based upon Section 108 of the MBCA.

ACC Section .723(a) is based upon AS 10.05.607 and predicated upon Section 108(c)(12) of the MBCA. Wording changes have been made in order to avoid any confusion in coordinating this section with ACC Section .720. Section .723(b) is new and replaces the requirement that a corporation using an assumed name identify its true corporate name in all advertising, contracts, and other legal documents with a scheme whereby any interested party may resort to records maintained by the commissioner which references the actual and assumed names of foreign corporations.

ACC Section .725 reenacts AS 10.05.609, and is based upon Sections 109 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .720 imposes upon foreign corporations seeking a certificate of authority the same limitations with respect to a corporate name which are imposed upon domestic corporations by ACC Section .105.

In order to accommodate a foreign corporation while at the same time vindicating the policies of Alaska law, ACC Section .723 permits a corporation disabled from using its actual name to adopt an assumed name which, if it is permissible under ACC Section .720, is the name under which it elects to do business in Alaska.

ACC Section .725 furthers the policy with respect to permissible and impermissible content of corporate names by providing that a foreign corporation will have its right to transact business suspended were it to adopt an impermissible name.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.06 is functionally equivalent to ACC Sections .720, .723, and .725.

Section .728 APPLICATION FOR CERTIFICATE OF AUTHORITY

Section .730 CONTENTS OF APPLICATION

Section .733 FILING OF APPLICATION FOR CERTIFICATE OF AUTHORITY

ORIGIN: ACC Section .728 is a straight reenactment of AS 10.05.612.

ACC Section .730 is a reenactment of AS 10.05.615 as amended. It is predicated upon Section 110 of the MBCA.

ACC Section .733 is identical to AS 10.05.618 and .621 and is premised upon Section 111 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .728 provides that the foreign corporation's application to do business in Alaska shall be filed with the commissioner.

ACC Section .730 specifies the subject matter and information which must be included in an application for a certificate of authority. Three of the required items are non-uniform: Section .730(5) goes beyond the statement of purpose to require selection from the identification code established under ACC Section .950; Section .730(12) mandates disclosure of the names and address of each alien affiliate; and, Section .730(13) requires that the application state the name and address of any person(s) owning at least 5% of the shares or any class of shares and then disclose the percentage owned by such individuals.

ACC Section .733 specifies that the application shall be on forms furnished by the commissioner.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.01(a) is identical to ACC Section .728. RMBCA Section 15.01(b) is similar to ACC Section .730 with the exception of the three items added by the Alaska legislature and information regarding the capitalization of the applicant.

Section .735 EFFECT OF CERTIFICATE OF AUTHORITY

ORIGIN: ACC Section .735 is a reenactment of AS 10.05.624 and based upon Section 112 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .735 parallels ACC Section .218 by establishing a "bright line" event upon which the authority to transact intrastate business is granted by the State of Alaska.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.05(a) is the functional equivalent of ACC Section .735.

The balance of the RMBCA section contains recitations that in granting a certificate of authority the host state does not intend to meddle in the internal affairs of the foreign corporation.

#### Section .738 AMENDED CERTIFICATE OF AUTHORITY

ORIGIN: ACC Section .738(a) is a reenactment of AS 10.05.657. Section .738(b) is new and conforms the entire section to MBCA Section 118.

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

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.04 is similar to ACC Section .738 except that there is no interest in the purpose(s) which the applicant corporation proposes to pursue in the host state.

#### Section .740 POWERS OF FOREIGN CORPORATION

ORIGIN: ACC Section .740 reenacts AS 10.05.603 and is premised upon Section 107 of the MBCA.

SUMMARY OF COVERAGE: Consonant with Alaska's obligation to extend the equal protection of her laws, ACC Section .740 establishes that an authorized foreign corporation shall have the same powers as would a domestic corporation organized for the purposes stated in the application for or amendment to the certificate of authority.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.05(b) is functionally identical to ACC Section .740.

#### Section .743 REVOCATION OF CERTIFICATE OF AUTHORITY

#### Section .745 LIMITATIONS ON REVOCATION OF CERTIFICATE OF AUTHORITY

#### Section .748 ISSUANCE OF CERTIFICATE OF REVOCATION

#### Section .750 EFFECT OF CERTIFICATE OF REVOCATION

ORIGIN: ACC Sections .743, .745, .748, and 750 are reenactments without change of AS 10.05.675, .678, .681, and .684. They are based upon Sections 121 and 122 of the MBCA.

SUMMARY OF COVERAGE: ACC Sections .743, .745, .748, and .750 authorize, regulate, and determine the effect of a certificate of revocation issued by the commissioner. The power of revocation under Section .743 is similar to the commissioner's power to involuntarily dissolve a domestic corporation under ACC Section .630. The sixty day notice and grace period established by ACC Section .745 is also similar to the procedures limiting the commissioner's power to effect involuntary dissolution. If the certificate of authority is revoked pursuant to ACC Section .748, Section .750 declares that the foreign corporation is no longer authorized to transact intrastate business in Alaska.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.30 stipulates the grounds for revocation. They are similar to those set forth in ACC Section .743, except that the RMBCA lists as a ground for revocation that the foreign corporation has ceased to exist or been involved in an organic change. The ACC adds involvement in an illegal combination in restraint of trade as a ground for revocation. RMBCA Section 15.31(a) and (b) are similar to ACC Section .745 creating a grace period in which the foreign corporation can correct what would otherwise serve as a ground for revocation. This section also comports with ACC Section .748 on the issuance of a certificate of revocation and the effective date at which the authority of the foreign corporation to transact intrastate business ceases.

Section .753 REGISTERED OFFICE AND REGISTERED AGENT OF FOREIGN CORPORATION

Section .758 CHANGE OF REGISTERED OFFICE OR REGISTERED AGENT OF FOREIGN CORPORATION

Section .760 FILING OF STATEMENT OF CHANGE

ORIGIN: ACC Sections .753, .758, and .760 are reenactments without change of AS 10.05.627, .633, and .635. They reflect the content of Sections 113 and 114 of the MBCA.

SUMMARY OF COVERAGE: ACC Sections .753, .758, and .760 parallel Sections .150., 165., and .170 respecting domestic corporations. They oblige 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.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.07 is identical to ACC Section .753 creating the obligation on the part of a foreign corporation to maintain a registered office and agent in the host state. RMBCA Section 15.08 is functionally identical to ACC Sections .758 and .760 respecting the procedures for changing either the agent or office and providing notification to the state.

Section .763 SERVICE OF PROCESS ON FOREIGN CORPORATION

Section .765 SERVICE ON COMMISSIONER

Section .768 RECORDS KEPT BY COMMISSIONER

Section .770 PROCEDURE NOT EXCLUSIVE

ORIGIN: ACC Sections .763, .765, .768, and .770 reiterate the content of AS 10.05.639, .642, and .648. They are based upon Section 115 of the MBCA. They have been modified to accord with the holding of the Supreme Court of Alaska in Northern Supply, Inc. v. Curtiss-Wright Corporation, 397 P.2d 1013 (1965), that the long-arm jurisdiction of the state courts is not dependent upon the statutory criteria requiring a certificate of authority.

SUMMARY OF COVERAGE: ACC Sections .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.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.10 accords with ACC Section .763 in making the registered agent the proper party upon whom service of process may be served in the host state. If a foreign corporation does not designate or maintain a registered agent, Section 15.10(b) differs from the prior provisions of the Model Act and the historic and recommended content of Alaska law. Rather than utilizing the commissioner as an agent of last resort for the service of process, Section 15.10(b) directs the plaintiff to effectuate service by registered or certified mail sent to the address of the foreign corporation at its principal office as shown on the certificate of authority or most recent annual report.

Section .773 AMENDMENT TO ARTICLES OF INCORPORATION OF FOREIGN CORPORATION

ORIGIN: ACC Section .773 is a reenactment of AS 10.05.651. It is predicated upon Section 116 of the MBCA.

SUMMARY OF COVERAGE: ACC Section .773 requires that the commission be noticed of amendments to the articles of foreign corporations which have sought and are enjoying a certificate of authority.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no coverage on this point.

Section .775 ORGANIC CHANGE OF FOREIGN CORPORATION

ORIGIN: ACC Section .775 recapitulates the content of AS 10.05.654 and reflects the content of Section 117 of the MBCA with terminology changes to clarify the scope of the section and conform to the style of the ACC.

SUMMARY OF COVERAGE: Whenever an authorized foreign corporation is involved in an organic change (defined in ACC Section .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.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The only related coverage in the RMBCA is Section 11.07 which requires a foreign corporation to file articles of merger with the secretary if the foreign corporation has merged with a domestic corporation with the foreign corporation as the surviving entity.

Section .778 WITHDRAWAL OF FOREIGN CORPORATION

Section .780 CONTENTS OF APPLICATION FOR WITHDRAWAL

Section .783 FORM OF APPLICATION FOR WITHDRAWAL

Section .785 FILING OF APPLICATION FOR WITHDRAWAL

Section .788 EFFECT OF CERTIFICATE OF WITHDRAWAL

ORIGIN: ACC Sections .778, .780, .783, .785, and .788 reenact AS 10.05.660, .663, .666, .669, and .672. They are based upon Sections 119 and 120 of the MBCA. ACC Section .785 has been restated to observe the consolidation of procedures effected by ACC Section .910.

SUMMARY OF COVERAGE: ACC Sections .778, .780, .783, .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 ACC Sections .785 and .788 are not observed, the corporation would have a continued liability for taxes and fees.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 15.20 is identical to ACC Section .778 on the procedure for withdrawal. It differs from ACC Section .780 specification of the contents of the application reflecting the RMBCA's indifference to disclosure of the financial structure of a foreign corporation. The RMBCA does not require the state to prepare a form for the application to withdraw as does ACC Section .783. The other distinctions between 15.20 and ACC Sections .785 and .788 reflect the distinction between uti-

lizing the secretary of state and the commissioner to interact with domestic and foreign corporations.

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ARTICLE 11. REPORTS, FEES, AND PENALTIES

Section .805 BIENNIAL REPORT OF DOMESTIC AND FOREIGN CORPORATIONS

Section .808 CONTENTS OF BIENNIAL REPORT

Section .811 FILING OF BIENNIAL REPORT

ORIGIN: ACC Sections .805, .808, and .811 are predicated upon AS 10.05.699, .702, and .705 as amended in 1980. These provisions of the Alaska Statutes were based upon MBCA Sections 125 and 126. ACC Section 811(d) is new, and was suggested by the Department of Commerce and Economic Development.

SUMMARY OF COVERAGE: ACC Sections .805, .808, and .811 establish an obligation on the part of each domestic and authorized foreign corporation to file a biennial report with the Department of Commerce and Economic Development, thus continuing the policy set by the 1980 legislature.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 16.22 differs from ACC Section .808 in three particulars. It would require an annual as opposed to biannual report. That report would not include identification of alien affiliates or of control persons. The requirements for timely filing are similar in both provisions as is the opportunity for correction with incursion of penalties for tardy filing.

Section .813 FILING NOTICE OF CHANGE OF OFFICERS, DIRECTORS, FIVE PERCENT SHAREHOLDERS, AND ALIEN AFFILIATES

ORIGIN: ACC Section .813 is predicated upon AS 10.05.706 as enacted in 1980.

SUMMARY OF COVERAGE: This section reflects the intense concern of the state that it be informed as to the identity of current officers, directors, five percent shareholders, and alien affiliates.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no provision on this important issue.

Section .815 PENALTY FOR FAILURE TO FILE BIENNIAL REPORT

ORIGIN: ACC Section .815 is predicated upon AS 10.05.771 as amended in 1980, which was based upon MBCA Section 135.

**SUMMARY OF COVERAGE:** ACC Section .815 imposes a sanction applicable to any failure or refusal to file a biennial report required by this chapter, employing a strict liability standard.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** The RMBCA does not appear to contain a provision dealing with the consequences of late filings. The official comment (16-30) observes ". . . failure to file the annual report. . . is a ground for administrative dissolution or revocation of the certificate of authority to transact business."

**Section .818 INTERROGATORIES BY COMMISSIONER; JUDICIAL PROCEEDING TO CONTEST**

**ORIGIN:** ACC Section .818(a), (b), and (c) is predicated upon AS 10.05.777 and Section 137 of the MBCA. Subsection (d) is modeled after AS 45.52.210(f).

**SUMMARY OF COVERAGE:** ACC Section .818 grants broad powers to the commissioner to utilize interrogatories reasonably necessary to ascertain compliance with or violations of this Chapter. Subsection (d) permits either a corporation or an individual to challenge judicially the method, scope, or confidentiality of the interrogatory.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** For unexplained reasons, the RMBCA has abandoned this useful practice.

**Section .820 CONFIDENTIALITY OF INFORMATION DISCLOSED BY INTERROGATORIES**

**ORIGIN:** ACC Section .820 is a reenactment of AS 10.05.780, and is based upon MBCA 138.

**SUMMARY OF COVERAGE:** This section exempts the answers to interrogatories from the disclosure requirements of AS 09.25.110 and .120, which provide that state agency records are public records unless specifically provided otherwise by state law. ACC Section .820 specifically provides otherwise.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** Since, in contravention of former Model Act policy, the RMBCA does not provide for administrative interrogatories, it contains no provision making answers confidential.

**Section .823 FAILURE TO ANSWER INTERROGATORIES**

**ORIGIN:** ACC Section .823 combines provisions of AS 10.05.783, .786, and .777, which were predicated upon Sec-

tions 135, 136, and 137 of the MBCA. No substantive change is worked in existing Alaska law.

**SUMMARY OF COVERAGE:** ACC Section .823 provides that any corporate or natural person who fails or refuses to make a timely, full, and truthful answer to interrogatories shall be guilty of a misdemeanor. Further, the commissioner does not have to file any document to which the interrogatories relate until they have been properly answered.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** The RMBCA contains no coverage on this point.

#### Section .825 PENALTIES IMPOSED UPON OFFICERS AND DIRECTORS

**ORIGIN:** ACC Section .825 represents a modification of AS 10.05.786 as amended in 1980. AS 10.05.786 was predicated upon MBCA Section 136.

**SUMMARY OF COVERAGE:** ACC Section .825 goes beyond Section .823, to impose further misdemeanor consequences upon any officer or director who signs any articles, statement, report, application, or other document filed with the commissioner, the content of which is known to be false.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** RMBCA Section 1.29 contains a generic provision on the consequences a knowingly signing a false statement which is to be filed with the state. It must be customized by the adopting jurisdiction.

#### Section .828 INCORPORATION OR FILING FEES

**ORIGIN** ACC Section .828 is a modified version of AS 10.05.708 (Section 130 of the MBCA) as amended in 1980. The provision fixing a filing fee for non-stock corporations organized under AS 21.69 is new, and designed to coordinate the specific provisions of Chapter 21 with the general cross reference to Chapter 10.05.

**SUMMARY OF COVERAGE:** ACC Section .828 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, with the mandate that the fee be fixed with reference to the amount of authorized capital stock of the corporation. The authority of the department is further subject to the provision of Section .860, which limits increases in fees to an amount that does not exceed the rise in the consumer price index for Anchorage.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** RMBCA Section 1.22(a) recommends that the legislature set filing, service and copying fees. ACC Section .828 grants authority to the

commissioner to set the fees within legislatively prescribed limits tied to the cost of living index. Under the RMBCA, adjustment for inflation or deflation would have to be accomplished by way of legislative amendment.

**Section .830 FEES ON APPOINTMENT OR REVOCATION OF APPOINTMENT**

**ORIGIN:** ACC Section .830 is a redrafting without substantive change of AS 10.05.714, which was based upon MBCA Section 128.

**SUMMARY OF COVERAGE:** ACC Section .830 provides that when a foreign corporation files with the department a certificate of appointment of a process agent, or the change of address of a process agent, it shall pay a fee established by regulation.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** See comparison of features noted under ACC Section .828.

**Section .833 FEES AND PENALTIES PAYABLE ON WITHDRAWAL OF FOREIGN CORPORATION**

**Section .835 FEES ON DISSOLUTION OF DOMESTIC CORPORATION**

**Section .838 TAXES, PENALTIES, AND FEES ON FILING CERTIFICATE OF DISSOLUTION OF FOREIGN CORPORATION**

**Section .840 FEES FOR CERTIFIED COPIES OF DOCUMENT**

**Section .843 OTHER FILING FEES**

**ORIGIN:** ACC Sections .833, .835, .838, .840, and .843 reenact without substantive change AS 10.05.750, .753, .756 (which were based upon MBCA Section 128), .762 (which was based upon MBCA Section 129), and .747, all as amended in 1980.

**SUMMARY OF COVERAGE:** ACC Sections .833 through .843 establish the indicated occasions for the imposition of fees, which are to be determined by the department of Commerce and Economic Development, subject to Section .860's cost of living ceiling.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** See comparison of features noted under ACC Section .828.

**Section .845 BIENNIAL CORPORATION TAX; PENALTY FOR NONPAYMENT**

**Section .848 FAILURE TO PAY TAX OR MAKE REPORT AS PRECLUDING SUIT BY CORPORATION**

Section .850 COMMISSIONER TO INSTITUTE SUITS TO COMPEL PAYMENT

Section .853 FAILURE TO PAY TAX AS EVIDENCE OF INSOLVENCY

Section .855 PAYMENTS TO BE MADE IN ADVANCE

Section .858 ACCOUNTING FOR AND DISPOSITION OF TAXES AND FEES

ORIGIN: ACC Sections .845 through .858 represent modifications and reenactments of AS 10.05.717, .720, .723, .726, 765, and .768. In turn, these provisions were predicated upon MBCA Sections 132, 133, and 134. ACC Section .850 substitutes the Commissioner of the Department of Commerce and Economic Development for the Attorney General as the official to commence suit to compel the payment of the biennial corporation tax.

SUMMARY OF COVERAGE: ACC Sections .845 through .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 tax.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: As noted, the RMBCA does not address the issue of penalty consequences for failure to observe reporting requirements. The recommended fee structure is very rigid with adjustments necessitating legislative amendment.

Section .860 INCREASE IN FEES

ORIGIN: ACC Section .860 is a reenactment of AS 10.05.773, as enacted in 1980.

SUMMARY OF COVERAGE: ACC Section .860 explicitly limits increases in fees authorized throughout this Chapter to a ceiling reflecting changes in the consumer price index for Anchorage as determined by the Bureau of Labor Statistics of the United States Department of Labor.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: There is no RMBCA provision on this point.

Section .863 APPEAL FROM REVOCATION OF CERTIFICATE OF AUTHORITY

ORIGIN: ACC Section .863 is a reenactment without change of AS 10.05.792, which was based upon MBCA Section 140.

SUMMARY OF COVERAGE: ACC Section .863 authorizes recourse to the superior court to contest any disapproval of any document or revocation of any certificate of authority. Upon compliance with the procedures set out in this section, the applicant is entitled to a trial de novo, and the court is em-

powered to take such action as is proper.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.26 provides for judicial review of an administrative refusal to file a document. The official comment (1-27) makes it clear that the RMBCA does not take a position on either the burden of proof, scope or nature of the review. ACC Section .863 resolves these issues.

**Section .865 CANCELLATION OF CERTIFICATES ISSUED AND FILINGS ACCEPTED**

ORIGIN: ACC Section .865 is a reenactment with one change of AS 10.05.794 as enacted in 1980. The change makes clear that the ground for cancellation must be one that existed at the time of the original filing or issuance of the certificate.

SUMMARY OF COVERAGE: ACC Section .865 gives the commissioner a period of one year from the time which a document is filed to discover defects and act upon them. If the defect is a ground for refusal to issue the certificate or refusal to accept a filing and the discovery is made within one year, the commissioner is empowered upon proper notice and procedure to cancel the certificate issued or filing accepted.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA does not contain an explicit provision on this important question. It is possible that the general powers provision (RMBCA Section 1.30) might be aggressively interpreted to invoke this power.

**Section .868 FORMS TO BE FURNISHED BY THE COMMISSIONER**

ORIGIN: ACC Section .868 is a reenactment without change of AS 10.05.798, and is based upon MBCA Section 142.

SUMMARY OF COVERAGE: This section grants the commissioner the right to prescribe the content of forms for any report required by this Chapter. It also obligates the commissioner to furnish appropriate forms for required reports and other documents. This provision is sought to serve both the convenience of persons attempting to comply with the act as well as facilitating the record keeping efforts of the state.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.21 grants administrative authority to prescribe and furnish forms but, unlike ACC Section .868, does not oblige the state to create such forms.

**Section .870 IDENTIFICATION CODE**

ORIGIN: ACC Section .870 is a reenactment without change of

AS 10.05.799, which was enacted in 1980.

**SUMMARY OF COVERAGE:** This section requires the commissioners of the Departments of Revenue and of Commerce and Economic Development to establish a coded list of business activities and make such list available to the public.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** Reflecting its character as a statute designed for the needs and interests of no particular jurisdiction, the RMBCA contains no provision on this important Alaska effort.

Notes

## ARTICLE 12. MISCELLANEOUS PROVISIONS

### Section .905 VOTING OF SHARES; QUORUM; STATUS OF DISQUALIFIED SHARES

ORIGIN: ACC Section .905 is taken from GCL Section 112, and is without precedent in Alaska law.

SUMMARY OF COVERAGE: This section defines the references to a "majority of shares" found throughout the ACC to mean a majority of shares entitled to vote under the articles of incorporation. Votes disqualified from voting are not to be considered "outstanding" for determining a "quorum" or a "majority."

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no explicit provision defining the terms "majority" or "majority of shares."

### Section .910 PROCESSING OF WRITINGS FILED WITH THE COMMISSIONER

ORIGIN: ACC Section .910 consolidates without substantive change in one provision matters covered in AS 10.05.081, .258, .288, .303, .321, .339, .357, .402, .468, .483, .504, 513, .621, and .669.

SUMMARY OF COVERAGE: ACC Section .910 establishes a uniform procedure whereby the commissioner reviews and processes reports and documents which have been filed with the department.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.25(a) and (b) seeks to accomplish the same uniform treatment of reports and documents submitted for filing.

### Section .915 DISAPPROVAL OF WRITING BY COMMISSIONER: APPEAL

ORIGIN: ACC Section .915 is a reenactment without change of AS 10.05.792, and is based upon MBCA Section 140.

SUMMARY OF COVERAGE: ACC Section .915, like Section .863, authorizes a trial de novo in the superior court for purposes of contesting the disapproval of any document or the revocation of any certificate of authority.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.25(c) requires that a refused document be returned with a

written explanation. RMBCA Section 1.26 establishes a right to seek judicial review although, as noted, it does not specify the standard of review or burden of proof.

#### Section .920 WRITINGS; CORRECTIONS

ORIGIN: ACC Section .920 is derived from NBCL Section 105.

SUMMARY OF COVERAGE: ACC Section .920 provides procedures for correcting minor mistakes without affecting the effective date in writings which have been filed. Major omissions and misinformation may not be corrected by this procedure.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.24 is functionally identical to ACC Section .920.

#### Section .925 WRITINGS AS EVIDENCE

ORIGIN: ACC Section .925 is adapted from NBCL Section 106. The language in .925(a) regarding the absence of a filing is new. The remainder of subsection (a) is similar to AS 10.05.795, which was based upon MBCA Section 1.1.

SUMMARY OF COVERAGE: ACC Section .925 specifies that certain writings and certifications by the commissioner of the absence of a writing are to be regarded as prima facie evidence of the facts stated in the writings and the execution or nonexecution thereof.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.27 creates a far more limited evidentiary value for writing filed with the state. The certificate of filing merely creates a conclusive evidentiary presumption that the original of the document has been filed. Nothing is created by way of evidentiary presumptions concerning the content of such writings.

#### Section .930 CORPORATE SEAL AS EVIDENCE

ORIGIN: ACC Section .930 is predicated upon NBCL Section 107, and is without precedent in Alaska law.

SUMMARY OF COVERAGE: ACC Section .930 treats the presence of a corporate seal on a writing as prima facie evidence that the writing was executed by authority of the corporation.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.27 fails to establish this evidentiary quality respecting the use of the corporate seal.

Section .935 WAIVER OF NOTICE

ORIGIN: ACC Section .935 is a reenactment of AS 10.05.804, which was based upon MBCA Section 144.

SUMMARY OF COVERAGE: This section provides that a written waiver of notice, whether executed before or after the time stated for notice, is to be accepted as the equivalent of giving notice in any situation where notice to a director or shareholder is required.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 7.05(a) is functionally identical to ACC Section .935.

Notes

## ARTICLE 13. GENERAL PROVISIONS

### Section .950 POWERS OF COMMISSIONER

ORIGIN: ACC Section .950 is a reenactment without change of AS 10.05.813, and is based upon MBCA Section 139.

SUMMARY OF COVERAGE: ACC Section .950 grants broad though nonsubstantive administrative authority to the Commissioner of the Department of Commerce and Economic Development. The limited authority of the Commissioner to adopt regulations is set forth in ACC Section .953.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.30 is identical to ACC Section 950 except that it refers to the secretary of state.

### Section .953 REGULATIONS

ORIGIN: ACC Section .953 is a redrafting of AS 10.05.823, which was enacted in 1980.

SUMMARY OF COVERAGE: ACC Section .953 is a restrictive grant of rulemaking authority to the commissioner and Department of Commerce and Economic Development. This rulemaking authority must be exercised in conformity with the Administrative Procedure Act (AS 44.62), and may be invoked only as specifically provided in this Chapter.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no comparable provision restricting either the substance or limiting the procedures to be employed in administrative rule making.

### Section .955 APPLICATION

ORIGIN: ACC Section .955 subsection (a) is a modified version of NBCL Section 103, and replaces AS 10.05.816, which was based upon MBCA Section 147. Subsection (b) is a modified version of GCL Section 102(b), and replaces AS 10.05.816, which was based upon MBCA Section 147. This section supplements AS 01.10.100.

SUMMARY OF COVERAGE: ACC Section .955 makes the ACC applicable to domestic corporations formed under AS 10.05, and to foreign corporations to the extent provided generally in Article 10 and expressly elsewhere. Subsection .955(b) pro-

vides that the existence of corporations formed under existing law is not affected. Subsection .955(c) provides that enactment of the ACC does not affect pre-enactment legal disputes.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 17.01 extends the application to domestic corporations while RMBCA Section 17.02 accomplishes the extension to foreign corporations authorized to transact business in the host state.

#### Section .958 PROVISIONS CONSTRUED AS RESTATEMENTS AND CONTINUATION

ORIGIN: ACC Section .958 is taken from GCL Section 2.

SUMMARY OF COVERAGE: Much of the ACC represents a reenactment of existing Alaska law, either verbatim or with minor changes to conform with ACC usage and style. ACC Section .958 construes these reenactments as restatements and continuations of existing law.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA does not contain this useful transaction and application section.

#### Section .960 CORPORATIONS ORGANIZED UNDER P. L. 92-203

ORIGIN: ACC Section .960 is a reenactment of AS 10.05.005, with the addition of subsection (d) which exempts Native corporations from the provisions of ACC Section .488 on the liability of directors and officers. AS 10.05.005 was enacted in 1972 and amended in 1975 and 1981.

SUMMARY OF COVERAGE: Under the Alaska Native Claims Settlement Act, P.L. 92-203, 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 are to hold the assets distributed through ANCSA. Due to the special nature of these corporations and the federal requirement that the corporate form be used, the ACC contains a variety of special provisions tailored to Native corporations. ACC Section .960 provides for 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.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no provisions accomplishing discrete treatment of corporations formed under the Alaska Native Claims Settlement Act.

Section .963 SEVERABILITY

ORIGIN: ACC Section .963 is taken from NBCL Section 111. It supplements the provisions of AS 01.10.030.

SUMMARY OF COVERAGE: ACC Section .963 provides that the ACC will not be struck down as a whole on account of the invalidity of any provision in it.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 17.04 contains a severability provision similar to ACC Section 963.

Section .965 RESERVATION OF POWER

ORIGIN: ACC Section .965 is based upon AS 10.05.822, MBCA Section 149, and NBCL Section 110.

SUMMARY OF COVERAGE: This section reserves unto the legislature the plenary right to alter, amend, suspend, or repeal in whole or in part the provisions of the ACC.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.02 contains a reservation of power clause similar to ACC Section 965.

Section .968 SIGNATURE

ORIGIN: ACC Section .968 is derived from GCL Section 17, and is new to Alaska law.

SUMMARY OF COVERAGE: This section 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.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA does not contain a provision anticipating the needs of citizens who cannot write.

Section .970 RULES OF CONSTRUCTION AND INTERPRETATION

ORIGIN: ACC Section .970 is derived from GCL Sections 5, 6, 7, 8, 113, 114, 118, 10, 11, 12, 13, 15, and 16 respectively, and are all new to Alaska law.

SUMMARY OF COVERAGE: ACC Section .970 sets out basic rules of construction to be applied to the ACC, to obviate the possibility of litigation on a variety of topics susceptible of differing interpretations and to specify the handling of financial accounting procedure. 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." These concepts have been replaced by the "retained earnings" and "ratio assets surplus" tests found in ACC Sections .358 through 365. This new approach relies upon generally accepted accounting principles in use at the time of performance of a financial accounting task.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: The RMBCA contains no comparable specification of rules of construction and interpretation.

## Section .990 DEFINITIONS

ORIGIN: ACC Section .990 is derived from existing Alaska law, typically based upon a definition from the MBCA Section 2, or the GCL. The following chart indicates specific sources:

1. NEW
2. AS 10.05.825(18) enacted 1976
3. AS 10.05.825(22) enacted 1980
4. GCL Section 151
5. GCL Section 152
6. GCL Section 153
7. AS 10.05.825(5)
8. AS 10.05.825(9)
9. GCL Section 155
10. AS 10.05.825(1)
11. GCL section 159
12. AS 10.05.825(19) enacted 1976
13. AS 10.05.825(2)
14. AS 10.05.825(17)
15. AS 10.05.825(3)
16. GCL Section 164
17. GCL Section 166
18. GCL Section 169
19. AS 10.05.825(24) enacted 1980
20. AS 10.05.825(4)
21. GCL Section 115
22. GCL Section 172
23. AS 10.05.825(11)
24. GCL Section 173
25. GCL Section 174
26. NEW
27. GCL Section 175
28. NEW
29. AS 10.05.825(20) enacted 1976
30. GCL Section 176
31. GCL Section 178
32. GCL Section 179
33. GCL Section 180
34. NEW replacing AS 10.05.825(14)
35. GCL Section 183
36. AS 10.05.825(8)

37. AS 10.05.825(6)
38. NEW
39. AS 10.05.825(7)
40. GCL Section 189
41. GCL Section 190
42. GCL Section 192
43. AS 09.63.040
44. GCL Section 194
45. GCL Section 195
46. NEW

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.40 contains a twenty-four item list of definitions.

Section .995 SHORT TITLE

ORIGIN: ACC Section .995 replaces AS 10.05.828.

SUMMARY OF COVERAGE: The title of the chapter regulating the organization and operation of business corporations will be changed from "Alaska Business Corporations Act" to "Alaska Corporations Code", which will facilitate distinctions between the old and the new law.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 1.01 designates a generic short title.

3

3

3

Notes

PART THREE

MODIFICATIONS

of the

ALASKA CORPORATIONS ACT

Here is a non-exhaustive list of provisions of the ACC draft which might be modified to reflect the content of the Revised Model Business Corporations Act. In each instance I will identify the provision of the ACC and indicate the page in Part Two of this memorandum where that provision is discussed in greater detail as well as the page of S.B. 246 where the text of the existing draft is set forth.

#### ARTICLE 4: Corporate Finance

There are two areas in which the ACC and RMBCA differ which were noted by Professor Hamilton. While both draft statutes would eliminate the current reliance upon notions of legal "surplus", they differ in the formulation of a substitute standard for determining the financial circumstance in which a distribution of corporate assets to shareholders is licit. The two statutes also part company with respect to accounting procedures.

1. The restraint upon distributions: See discussion pages 29-34 of this memorandum.

The ACC: has followed California's "ratio/assets surplus" test. Simply stated a corporation may make a distribution at any time out of current earnings or, if there are no net current earnings, so long as the assets of the entity exceed its liabilities by a ratio of 1.25 to 1. The ACC provisions are found at pages 28-31 of S.B. 246.

The RMBCA: simply uses the equitable insolvency test. So long as the corporation can continue to meet its current liabilities it may licitly declare and make a distribution. See Section 6.40 in your copy of the Final Draft along with the official comment which begins at page 6-73..

Views of the Consultant: the California/ACC standard mandates greater protection of corporate assets. It also has the advantage of being tested in a major jurisdiction for the past eight years. Reliance upon the equitable insolvency test is, to my knowledge, untested in any jurisdiction. However, should the RMBCA gain a following, an alignment of Alaska with this future band of states may put it in more numerous company. Professor Hamilton notes that both Oregon and Arizona are currently looking at their existing statutes with a view toward revision. In an interesting historical aboutface, if the Commission determines that it prefers to retain the ratio/assets test it might make available to these western states a copy of its bill and comments.

2. Accounting Standards: See discussion pages 29-34 of this memorandum. The ACC provisions are found at pages 28-31 of S.B. 246.

The ACC: Section 970(5) [p 150 of S.B. 246] requires the use of generally accepted accounting principles in preparing financial statements, balance sheets, income statements and statements of changes in financial position.

The RMBCA: The final draft [p. 6-78] notes that directors will normally be entitled to use generally accepted accounting principles. However there is no mandate that such principles be followed. "[S]ection 6.40 only requires the use of accounting practices and principles that are reasonable in the circumstances, and does not constitute a statutory enactment of generally accepted accounting principles."

Views of the Consultant: Professor Hamilton's talk justified the RMBCA provision on several grounds. First he questioned the degree to which there is uniformity among those who purport to follow generally accepted accounting principles. More importantly, he opined that mandating their observance might be a hardship on smaller entities for it would force recourse to accountants.

In favor of the ACC position I note that California has followed it for nearly a decade without any appellate litigation as to its meaning or application. The entire goal of the revision is to preclude the use of "creative accounting". The RMBCA comment that "accounting practices and principles. . .reasonable in the circumstances. . ." would appear an invitation to litigation.

## ARTICLE 5. Meetings of Shareholders

### 3. Notice Requirements See page 39 of this memorandum.

The ACC: Section 410 [pp. 36-37 of S.B. 246], establishes a minimum of twenty and a maximum of fifty days for giving notice of shareholder meetings. The twenty day minimum involved a conscious deviation from the shorter recommendation of the original Model Act and was thought necessary to accommodate the physical conditions in Alaska.

The RMBCA: Section 7.05 [p 7-19] adopts a formula of a ten day minimum and a sixty day maximum.

Views of the Consultant: I am neutral on this issue. If the Commissioners believe that ten days is an insufficient minimum notice provision we could consider adopting the RMBCA's recommended sixty day maximum.

### 4. Civil Liability Consequences for Failure or Refusal to Accord Inspection Rights See pages 39-40 of this memorandum.

The ACC: Section 413 [pp. 37-38 of S.B. 246] imposes personal civil liability on an officer or agent of the corporation

who fails or refuses to compile, maintain and make available for shareholder inspection a voting list. The liability is to be measured by the extent of the demanding shareholder's damage.

The RMBCA: Section 7.20 [p. 7-32] sanctions the use of a summary court order to support a shareholder's right to inspect the voting list but does not impose any civil liability upon a corporate officer or agent who is obstructing this inspection. In his remarks to the Alaska Bar Association, Professor Hamilton indicated philosophical opposition to such tactics and also the belief that when prescribed by statute they are rarely imposed by courts.

Views of the Consultant: Whether one agrees with Professor Hamilton, ACC Section 413 is in need of attention. At an early stage in the evolution of the statute the Commission made a determination that it did not want to recommend any mandatory course of conduct and then be silent on the consequences of an individual's non-observance of that commandment. Accordingly, it determined to create sanctions within the statute in support of its mandatory provisions. Section 413's liability differs from that found elsewhere in the ACC in that it sets no minimum civil liability consequence but merely measures the recovery according to the shareholder's damages. If those damages are nominal or not susceptible of easy proof, there will be little incentive to undertake the burdens and costs of litigation in support of the statute. Contrast this with the provision in ACC Sections 430(c) [p. 45 of S.B. 246] and 433(f) [p. 48 of S.B. 246].

Section 430 mandates the keeping of minimum books and records as well as creating a right of inspection in shareholders. An officer or agent who refuses to permit inspection is liable for a penalty in the amount of 10% of the value of the shares owned by the demanding shareholder or \$5,000 whichever is greater in addition to any provable damages.

Section 433 deals with the preparation and distribution of an annual report to shareholders. Under subsection (f) a corporation that neglects, fails, or refuses to prepare the required financial statements is subject to a penalty of \$25 per day up to maximum of \$1,500. This liability runs to the shareholder or shareholders making the request for performance by the duty or duties imposed by the section.

Should some similar minimum consequence be fixed for violation of Section 413 or should all of these minimum liability consequences be abolished in conformity with Professor Hamilton's views?

## ARTICLE 6. Directors and Officers

5. Delegation of Board Functions: see page 48 of this memorandum.

The ACC: Section 450(a) [p. 53 of S.B. 246] requires that

corporations have a board of directors. However, it also stipulates that if there is affirmative provision in the articles the powers, duties, privileges, and liabilities conferred or imposed upon the board shall be exercised, performed, extended and assumed by an identified individual or individuals.

The RMBCA: Section 8.01(c) [p. 8-2] limits the ability to use the articles to dispense with or limit the authority of the board to corporations with 50 or fewer shareholders. If the number of shareholders exceeds 50 the corporation is required to have a traditional board although it may "delegate" certain functions to agents.

Views of the Consultant: The distinctions between the statutes suggest two problems. You must decide whether to clearly permit substitution as opposed to delegation, and, if so, whether you want to adopt a limitation predicated upon the number of shareholders. As I review ACC Section 450 and the official comment (p. 119-120 of the House and Senate Joint Journal for April 8, 1983), I am struck that we fudged a very important conceptual distinction. The RMBCA does a better job.

A well drafted statute would distinguish between the circumstances in which the statute would tolerate substitution of some individual or individuals for the board as opposed to conditions under which it is licit for a board to delegate its powers to such person or persons. The issue is one of agency law. Are the individuals identified in the articles merely the agents of the board as principal or are they a substitute source of authority?

In the RMBCA it is clear that if the corporation has 50 or fewer shareholders they may be substitutes. Unfortunately, the RMBCA does not confront the question of whether such substitutes are then limited by the term and other requirements laid down in Section 8.03.

ACC Section 450 could be construed as allowing either delegates or substitutes. The apparent mandatory presence of a board of directors would, however, cause me to interpret it as limited to agency delegation. Why leave the matter in doubt. The Commissioner's should decide whether they wish to permit substitution and, if so, whether they want to adopt the limitation suggested in RMBCA Section 8.01(c).

6. Minimum size of board committees: see pages 52-53 of this memorandum.

The ACC: Section 468 [pp. 59-60 of S.B. 246] permits the articles or bylaws to empower the board to set up executive and other committees and to delegate to such committees the powers otherwise vested in the board. Certain powers are excepted.

The RMBCA: Section 8.25(a) [p. 8-43] requires that any such committees have a minimum of two members.

View of the Consultant: I would advocate following the RMBCA position on the minimum composition of board committees.

7. Indemnification---advances to defendants: see pages 58-60 of this memorandum.

The ACC: Section 490(e) [pp. 70-71 of S.B. 246] gives the corporation discretion to advance expenses anticipated by a defendant in any civil or criminal action prior to the final disposition of the action or proceeding. This advance is conditioned upon an undertaking by the defendant to repay the funds if it should ultimately be determined that there was no entitlement to indemnification.

The RMBCA: Section 8.53(a) [p. 8-109] is far more conservative. Before an advance may be authorized there must be a determination of the defendant's good faith, the furnishing of a written personal undertaking to repay the funds, and a finding that the facts as then known would not preclude indemnification.

Views of the Consultant: I would personally favor substitution of the concepts in RMBCA Section 8.53(a) for the less restrictive provisions of ACC Section 490(e).

#### ARTICLE 7: Amendments and Changes

8. Procedure to Amend Articles of Incorporation: see pages 61-62 of this memorandum.

The ACC: Section 504 [pp. 73-74 of S.B. 246] defines the procedures which must be followed to amend the articles of incorporation. Assuming that shares are outstanding, Section 504 vests the power to initiate amendments in both the board and the shareholders. To be adopted, the amendment must be approved by both groups.

The RMBCA: Section 10.03 [pp. 10-10, 10-15] differs from the ACC in restricting the power to initiate amendments to the articles to the board. Under normal circumstances, the amendment is not adopted until approved by the shareholders. However, Section 10.02 [pp 10-7, 10-10] lists six changes in the articles which, unless the articles provide otherwise, are within the power of the board to effect without shareholder approval. The official comment terms them "housekeeping amendments."

Views of the Consultant: I can see little harm in adoption of the RMBCA position on this point. Expense would be saved in corporate entities in which there is a large body of shareholders by exempting the need to poll them in the stated circumstances. Few Alaska corporations would presently fall into this category but this would seem an insufficient reason to reject this innovation.

## ARTICLE 8. Organic Change

9. Right of shareholders to dissent: see pages 73-74 of this memorandum.

The ACC: Section 574 [pp. 90-91 of S.B. 246] recognizes the right of shareholders to dissent in the case of an organic change, including the sale of all or substantially all of the corporate assets other than in the usual and regular course of business.

The RMBCA: Section 13.02 [pp. 13-8, 13-16] accords these same rights but goes further. It would grant shareholders the right to force the corporation to purchase their shares in the event of an amendment to the articles which would impair existing preemptive, redemption or voting rights. In its final draft, this has been expanded further to accord the right to dissent in the event an amendment is adopted reducing the outstanding shares. Any shareholder who would, in consequence of such reduction, be left with a fraction of a share which is then subject to acquisition for cash at the option of the corporation is to be accorded dissenter's rights.

Views of the Consultant: I think that the provisions of Section 13.02 are desirable and commend them as additions to the present content of ACC Section 574.

10. Payment to dissenting shareholder: see pages 75-76 of this memorandum.

The ACC: ACC Sections 580 and 582 [pp 93-94 of S.B. 246] create an obligation in the corporation to pay the dissenter who has perfected her rights the fair value of the shares. The scheme is to first give the shareholder and the corporation the opportunity to agree on this figure. If they cannot, Section 582 imposes the burden upon the corporation to commence litigation seeking a judicial determination of fair value.

The RMBCA: Section 13.25 [p. 13-31] contains a valuable innovation. It requires that the corporation pay to the dissenting shareholder the amount deemed by the corporation to represent the fair value of the shares. If there is a dispute and, ultimately, litigation at least the shareholder has these funds with which to finance the fight.

Views of the Consultant: Professor Hamilton made a convincing presentation on this point in his address to the Alaska Bar Association and I would favor its inclusion in the ACC.

Limit 2 pages

John Sunel wants:

- 1) Letter on policy reasons for new bill
  - a) Old model act.
  - b) Poorly organized
  - c) Work done by Comm w/ Prof Jansler
  - d) Pulled out 488 99% of controversy
  - e) Discript of regm 2015. 5/14  
pours
  - f) Look book approach
  - g) Have to read whole code to discover provisions - new bill all in one place  
Minimize X-refs.
  - h) Most criticisms are really of existing law - not new provisions
  - i) Exp of winddown re filing TP actions.

Senate - do in 2 uses

- 1) Take over a new issues - has to be subj of new bill - not addressed in current bill.

THE ALASKA CODE REVISION COMMISSION

April 1985

A COMPARATIVE STUDY

OF THE PROPOSED ALASKA CORPORATIONS CODE (ACC)  
WITH THE FINAL 1984 DRAFT  
OF THE REVISED MODEL BUSINESS CORPORATION ACT (RMBCA)

INCLUDING THE ORIGIN AND SUMMARY OF EACH SECTION OF THE ACC

Prepared by

The Code Revision Project

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### ABBREVIATIONS USED

In this publication the following abbreviations are used:

**ACC**--Alaska Corporations Code (the short title of the comprehensive revision of corporation law to be made by House Bill 246 and Senate Bill 199, identical bills introduced in the Fourteenth Alaska Legislature).

**ABCA**--The present Alaska Business Corporation Act (chapter 126, Session Laws of Alaska 1957, now Alaska Statutes Sections 10.05.003-10.05.828).

**MBCA** or "the Model Act"--Model Business Corporation Act as revised through July 1, 1969 (a product of a committee of the American Bar Association first published in 1950 and carried forward with changes until generally revised in 1984. The 1953 version became the basis of the existing Alaska Business Corporation Act).

**RMBCA** or Revised Model Act--Revised Model Business Corporation Act (1984) (the 1984 comprehensive revision by a committee of the American Bar Association of its earlier Model Business Corporation Act).

**CGCL** or **GCL**--California General Corporation Law (the 1977 omnibus revision of California's for profit corporations code, one of the two principal sources for the ACC).

**NBCL** or **BCL**--New York Business Corporation Law (the second of the two principal sources for the ACC).

**ANCSA**--Alaska Native Claims Settlement Act (Public Law 92-203, as amended, 43 U.S.C. sec. 1601, et seq., the federal Act of December 18, 1971, and its amendments settling land claims and providing for the formation of regional and village corporations. The Act and its amendments are reprinted in Volume 1 of Alaska Statutes).

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## PREFACE

This study paper consists of three parts, each designed to familiarize the reader with the contents and origin of the proposed Alaska Corporations Code (ACC) and its relationship to the 1984 Revised Model Business Corporation Act (RMBCA).

Part I 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. This work was originally produced by the Alaska Code Revision Commission in March, 1984, to provide a comparative study of the ACC and the tentative exposure draft of the RMBCA, for use by the Alaska Legislature, the Alaska Bar Association, and others interested in the content of the ACC. The study paper demonstrates the substantial similarity between the draft RMBCA and the proposed provisions of the ACC. In June, 1984, the final draft of the RMBCA was produced by the Committee on Corporate Laws Section of Corporation, Banking, and Business Law of the American Bar Association. The Alaska Code Revision Commission again considered the content of the RMBCA, and adopted additional RMBCA provisions into the content of the ACC. Part I's comparative study has been updated to reflect these recent revisions to the ACC.

Part II consists of three comparison charts which provide a section-by-section cross-reference of the ACC to the existing Alaska Business Corporations Act- AS 10.05 (ABCA) and the RMBCA. These charts have also been updated to reflect revisions made to the ACC following the release of the 1984 RMBCA.

Part III is a source chart showing the origin of each provision of the ACC and its comparable coverage in existing Alaska law (ABCA), the former Model Business Corporation Act (MBCA), the California General Corporation Law (GCL), the New York Business Corporation Law (NBCL), other sources (e.g. Delaware or Oregon business corporation law), and the RMBCA.

The Alaska Code Revision Commission's goal in drafting the ACC was to provide Alaska with a modern, balanced corporations statute crafted to the special needs of Alaska. An examination of these study materials, especially the source chart in Part III, shows that the ACC has drawn its content from the very best statutory provisions found in the United States and in the Revised Model Business Corporation Act.

For the most comprehensive study of the ACC, readers are encouraged to use this study paper in conjunction with the Official Commentary to the ACC, found in the House and Senate Joint Journal Supplement to HB 246/ SB 199, dated February 7, 1985.

PART I.

A SECTION-BY-SECTION COMPARATIVE STUDY  
OF THE PROPOSED ALASKA CORPORATIONS CODE (ACC)  
AND THE  
1984 REVISED MODEL BUSINESS CORPORATION ACT (RMBCA)

## 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.

## 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.

## 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.

## 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

the GCL, and substantially enlarges the coverage of AS 10.05135, which had been based on Section 27 of the MBCA.

**SUMMARY OF COVERAGE:** Under ACC Section .230, the bylaws have a mandatory content only if the articles have not fixed the number of directors or established a formula from which that number may be derived. The ACC's provisions on the number of directors establish three as the default minimum unless the corporation has fewer than three shareholders. In that instance, the number of directors need not exceed the number of shareholders. This will provide significant flexibility in the formation and operation of closely held corporations. Any bylaw which would change the number of directors must obtain approval of the outstanding shares. Further, if the effort is to reduce the number of positions on the board to fewer than five, subsection 230(d) protects the interests of minority shareholders by invalidating the attempt if sixteen and two-thirds percent of the outstanding shares vote against it.

Under subsection (e), the optional content of the bylaws is partially enumerated. These provisions need not be adopted but are intended to suggest to those forming corporations some of the important matters governing procedures, e.g. for shareholder and director meetings, the qualifications, duties, authority and compensation of directors and officers, and such other matters relating to the day to day management of the corporation as are usefully stabilized in a formal agreement.

**COMPARISON WITH THE FINAL DRAFT OF THE RMBCA:** RMBCA Section 2.06(b) simply states that the bylaws may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles. This is in accord with ACC Section .230(e). The absence of the enumerated list of optional provisions should not be taken to suggest that the RMBCA is less exacting than the ACC. The cross-references to RMBCA Section 2.06 indicate twenty-two matters which should be considered for regulation in the bylaws. Rather than the convenience of ACC Section .230(e), one has to page through the provisions of the RMBCA.

**Section .233 BYLAWS TO BE KEPT AT OFFICE; INSPECTION BY SHAREHOLDERS**

**ORIGIN:** ACC Section .233 is taken from Section 213 of the GCL.

**SUMMARY OF COVERAGE:** The corporation is obligated to keep at its principal business office in Alaska a copy of its bylaws reflecting all current provisions including amendments. The shareholders are to have a right to inspect the bylaws at all reasonable times. A foreign corporation which does not have a principal business office in Alaska is obligated to furnish a copy of its current bylaws to any Alaska shareholder who

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.

## ARTICLE 4. CORPORATE FINANCE

### Section .305 CREATION, CLASSES, AND ISSUANCE OF SHARES

ORIGIN: ACC Section .305 is premised upon GCL Section 40c, 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, is-

suance 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 irrebuttable 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 times 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 other-

wise 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 corporation 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,  
INDENTURES 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.

## 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 penalty of \$5000 upon an officer or agent having charge of the stock transfer books who fails or refuses to prepare or exhibit such a list as above provided. Such a liability runs to the shareholder or jointly among shareholders making written request for the performance of the duties imposed by this section.

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

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

to comply with its terms.

## Section .435 SHAREHOLDERS' DERIVATIVE ACTION

ORIGIN: ACC Section .435 is new and without statutory precedent in Alaska. Shareholders' derivative actions are presently regulated by the Alaska Supreme Court's adoption of Federal Rule of Civil Procedure 23.1.

Subsection .435(a) is taken in modified form from Section 626(a) of the NBCL. Subsection .435(b) is taken from GCL Section 800(b)(1). Subsections .435(c) through (i) represent original work by the Code Revision Commission. Subsection (h), security for expenses, is taken from MBCA Section 49. Subsections (j) and (i) are predicated upon NBCL Section 626(d) and (e).

SUMMARY OF COVERAGE: ACC Section .435(a) subjects shareholders' derivative actions to statutory regulation for the first time. Section .435(b) establishes a limited departure from what is otherwise a contemporaneous share ownership requirement. If a noncontemporaneous shareholder can establish to the satisfaction of the court that the criteria enumerated in Sections .435(b)(1)-(5) are satisfied, the statute empowers the court to grant standing to such a plaintiff.

Section .435(c) requires that a qualified shareholder make a demand upon the board to secure such action as the plaintiff desires, unless the shareholder can show that such demand would be futile. Under Section .435(d), the burden to establish excuse is upon the plaintiff-shareholder. If a demand on the board is not excused, Section .435(e) provides that a decision by the board, consonant with its duties of care and loyalty, that in its business judgment such litigation would not be in the best interest of the corporation, terminates the right created by Section .435(a). A shareholder is not thereafter precluded from offering evidence that any or all of the directors who have decided that the litigation not go forward are implicated in the wrong complained of.

If an initial demand on the board has been excused, or if the shareholder is able to prove that the recommendation by a board upon which demand has been made should be ignored as tainted, Section .435(f) provides for the subsequent intervention by allegedly disinterested directors asserting that, in their good faith, independent, and informed business judgment, the action should be dismissed as inimical to the best interests of the corporation. Assuming that these disinterested directors are able to meet their burden of establishing good faith, independence, and informed business judgment, the trial court is directed to make an independent assessment in exercising its own judgment as to whether the action should be maintained.

Section .435(g) aligns Alaska with California and New York in omitting the requirement that a shareholder make a

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 shareholders 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.

## ARTICLE 6. DIRECTORS AND OFFICERS

### Section .450 BOARD OF DIRECTORS; DUTY OF CARE; RIGHT OF INSPECTION; FAILURE TO DISSENT

ORIGIN: ACC Section .450(a) is premised upon the 1977 revision of the MBCA Section 35. The rights, privileges, and duties which are fixed upon the board devolve upon delegates. ACC Section .450 differs from the Model Act language to make it clear that with this delegation flows the liabilities which the Chapter otherwise imposes upon the directors. This modification follows GCL Section 300(d).

Subsection (b) is also premised upon the revised content of MBCA Section 35. Presently, there is no statutorily defined duty of care to be observed by a corporate director. One deviation from the MBCA is the provision in ACC Section .450(b) in which the duty of care includes the duty of reasonable inquiry. This is taken from GCL Section 300(d).

This section replaces AS 10.05.174, .222, and .219.

SUMMARY OF COVERAGE: Under Section .450 there must be a board of directors. ACC Section .450 provides for the exercise and delegation of board functions; the duty of care which must be observed by the directors and their right to rely upon certain information, opinions, reports, or statements from officers, experts, and committees of the board; the grant of an absolute right of inspection to every director as to all corporate books, records, and documents, together with the right to use an agent or attorney and the right to make copies or extracts; and, the consequences of a director's failure to dissent as to any action taken by the board at a meeting at which she is present.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.01 parallels ACC Section .450(a) in requiring a board of directors. The authority to delegate board functions is more limited under RMBCA Section 8.01 in that the corporations with more than 50 shareholders may not delegate board functions.

RMBCA Section 8.30 establishes the standards of care which must be observed for directors. Like ACC Section .450(b) it imposes a standard of honesty in fact augmented by the requirement that the conduct meet the level which an "ordinarily prudent person in a like position would exercise under similar circumstances. . . ." Unlike the California and ACC standard, the one articulated in the RMBCA does not reference a duty of reasonable inquiry. RMBCA Section 8.30(b) and (c) are similar to ACC Section .450(b) in enabling a director to rely upon information, opinions, reports

and statements from officers, experts, or committees of the board. This right of reliance is qualified and inapplicable if the director knows, or as a reasonable person ought to know, that, as to the matter in question, reliance is unwarranted.

### Section .453 NUMBER AND ELECTION OF DIRECTORS

ORIGIN: ACC Section .453(a) and (b) are premised upon a modification of New York Business Corporation Law Section 702(a) and (b), and were adopted in lieu of comparable provisions of Section 36 of the MBCA. Section .453(c), (d), and (e) are taken from MBCA Section 36. This section replaces AS 10.05.177, .180, and .183.

SUMMARY OF COVERAGE: Section .453(a) continues the policy of AS 10.05.177, which sets the minimum number of directors at three, save for a corporation with less than three shareholders. In a corporation with less than three shareholders, the number of directors need not exceed the number of shareholders. The Model language which would permit a corporation to function with a board of one regardless of the number of shareholders was rejected. Further, Section .453(a) makes it impossible for a board to adopt bylaws changing the number of directors without participation of the shares (as now provided in AS 10.05.177), unless the board acts under a provision of the articles or bylaws adopted by approval of the outstanding shares.

This section also directs that there shall be an election of directors at each annual meeting except in the case of a classified board, and defines the tenure in office of incumbent directors. Subsection (c) sanctions a provision in the articles which would secure the election of one or more directors to the holders of the shares of a class or series voting as a class or series. Subsection (e) makes clear that a director serves until the expiration of the term for which he is elected and until a successor has been elected and qualified.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: RMBCA Section 8.03 governs the number and election of directors. It perpetuates the concept previously not adopted by the Legislature which would permit a board of a single director regardless of the number of persons who own shares. RMBCA Section 8.03 tracks ACC Section .453(b) in permitting the articles or bylaws to establish a formula permitting either the shareholders or the board to increase or decrease the number of positions on the board. The RMBCA limits the power of the board under such a provision to an increase or decrease of no more than 30 percent from the number last approved by the shareholders. It, too, establishes the norm of one year terms unless the board is classified with staggered terms.

RMBCA Section 8.04 parallels ACC Section .453(c) in permitting the articles to permit classes to elect certain

positions on the board. Unlike the ACC, it would not permit series of shares to have discrete voting rights.

RMBCA Section 8.05 is functionally identical to ACC Section .453(e) respecting terms of directors and the continuation of a director's liability until a successor shall have been elected and qualified.

#### Section .455 CLASSIFICATION OF DIRECTORS

ORIGIN: ACC Section .455 is an enactment of MBCA Section 37, and works an important change from AS 10.05.186. Under existing Alaska law, the decision to classify the board could be taken by a bylaw adopted by the board without shareholder participation. Subsection (b), continuing the concern for minority shareholder representation on the board, is new. Section .455 replaces AS 10.05.186.

SUMMARY OF COVERAGE: ACC Section .455 provides for optional classification of the board if there are nine or more board members, as long as the option is specified in the articles. However, if the corporation has not eliminated cumulative voting, an amendment to the articles attempting to provide for board classification is ineffective if the number of shares voting against classification is sufficient to elect one director under a cumulative voting scheme.

COMPARISON WITH THE FINAL DRAFT OF THE RMBCA: 8.06 is functionally identical to ACC Section .455(a). Classification cannot be made unless there are nine or more directors and there may not be more than three classes serving staggered one year terms. Unfortunately, the RMBCA does not contain any protective mechanism for those corporations which have elected cumulative voting rights.

#### Section .458 VACANCIES ON THE BOARD

ORIGIN: ACC Section .458 is adapted from GCL Section 302. It has no direct parallel in Alaska law.

SUMMARY OF COVERAGE: ACC Section .458 provides that the board may declare vacant the office of a director who has been declared of unsound mind by a court order, or who has had civil rights suspended due to imprisonment as provided in AS 33.30.310.

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

#### Section .460 REMOVAL OF DIRECTOR WITHOUT CAUSE

ORIGIN: ACC Section .460 is premised upon Section 303 of the GCL, and has no parallel in Alaska law. This section pro-