No. 11-35252

United States Court of Appeals
for the Ninth Circuit

COOK INLET REGION, INC.

Plaintiff-Appellee

v.

ROBERT W. RUDE AND HAROLD RUDOLPH

Defendants-Appellants,

On Appeal from the United States District Court
for the District of Alaska (Hon. Ralph R. Beistline)
Civil Action No. 3:09-cv-00256-RRB

BRIEF OF DEFENDANTS-APPELLANTS

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14 July 2011

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INTRODUCTION

ANCSA does not create a federal cause of action and ANCSA does not provide a federal remedy, so CIRI's suit that invokes ANCSA does not present a federal question (and if there were a federal issue in this case, it is not "substantial"):

This suit has been filed improperly in federal court, which lacks jurisdiction over the subject matter. This is a pure state-law contract dispute between a corporation and two of its shareholders, who are former corporate directors.

The issues in this case involve the corporate governance and internal affairs of an Alaska business corporation. The corporation (CIRI) has sued two shareholders, claiming they have breached proxy regulations, and issues false and misleading proxy statements. There is not a faint scintilla of federal law in this case. It is a pure state-law corporate dispute.

This court is not constitutionally competent to hear this dispute because there is no federal question, no diversity of citizenship, and no independent federal ground for jurisdiction. Therefore the case should be dismissed for lack of subject matter jurisdiction.

STATEMENT OF JURISDICTION

(1) *The statutory basis of subject matter jurisdiction of the district court or agency:* There is no jurisdiction of the subject matter! This is a purely state law case about Alaska corporate law. There is no federal question, there is no diversity, and no independent basis for federal jurisdiction. So the district court lacks jurisdiction of the subject matter.

(2) *The basis for claiming that the judgment or order appealed from is final or otherwise appealable, and the statutory basis of jurisdiction of this Court:* The district court entered final judgment for CIRI on 15 December 2010. ER 30 (Judgment). Within 28 days of judgment was entered, the defendants moved pursuant to Civil Rules 12(h)(3) and 60(b) for relief from judgment, as expressly allowed by Fed.R.App.P. 4(a)(4)(A)(vi) ("if the motion is filed no later than 28 days after the judgment is entered"). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

(3) *The date of entry of the judgment or order appealed from; the date of filing of the notice of appeal or petition for review; and the statute or rule under which it is claimed the appeal is timely:* The district court entered final judgment for CIRI on 15 December 2010. ER 30 (Judgment). The district court denied defendants' timely post-trial motions on 22 March 2011, ER 18 (*see also* corrective order on 23 March 2011 at ER 2), and entered an amended order

granting CIRI's motion for summary judgment on 23 March 2011, ER 2. Messrs Rude and Rudolph timely filed a notice of appeal from the judgment and the district court's denial of their post-judgment motion for relief from judgment, doing so on 22 March 2011. ER 16 (Notice of Appeal). The district court subsequently entered an order granting CIRI's motion for attorneys' fees. ER 1. (Minute Order of 23 March 2011).

STATEMENT OF THE ISSUES

There is only one issue in this case, which can be phrased in two ways: Whether the plaintiff's complaint presents a federal question? And therefore, whether the district court has subject matter jurisdiction?

STATEMENT OF THE CASE (course of proceedings)

Defendants' Motion to Dismiss and for Relief from Judgment pursuant to Civil Rules 12(b)(1), 12(h)(3), and 60(b)(4) — No federal question in this case:

This lawsuit is a corporate law dispute that is governed by Alaska Statutes, AS 10.06 (the Alaska Corporations Code), by the Alaska Administrative Code, 3 AAC 08, and by the common law of corporations and the common law of contracts.

The defendants moved to dismiss and for vacatur of judgment pursuant to 28 U.S.C. § 1331[1] and pursuant to Fed.R.Civ.P. 12(b)(1),[2] 12(h)(3)[3], and 60(b)(4).[4]

The district court denied the defendants' motion for relief from judgment.

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[1] 28 U.S.C. § 1331. Federal question.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[2] Fed.R.Civ.P. 12(b)(1): "[T]he following defenses may . . . be made by motion: (1) lack of jurisdiction over the subject matter"

[3] Fed.R.Civ.P. 12(h)(3): "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

[4] Fed.R.Civ.P. 60(b)(4): "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . (4) the judgment is void . . . ."

STATEMENT OF FACTS

(1) CIRI alleges federal question jurisdiction merely by citing a federal statute: CIRI's Complaint claims federal jurisdiction is grounded in § 1331 ("arises under"), not in some express grant of federal jurisdiction elsewhere in the United States Code. Here is CIRI's jurisdictional allegation

> **Jurisdiction and Venue**
>
> 4. This Court has original jurisdiction over this civil action under 28 U.S.C. § 1331 because it arises under the laws of the United States (ANCSA, 43 U.S.C. § 1601 *et seq.*). This Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367 because these claims are so related to the federal claims in this action that they form part of the same case or controversy under Article III of the United States Constitution. This Court is authorized to issue the relief sought under 28 U.S.C. §§ 2201–2202.

CIRI's Complaint of 28 December 2009 at ¶4 (underlining added).

(2) CIRI complained about a corporate shareholder petition (i.e., a proxy solicitation) and seeks to enforce a corporate confidentiality agreement against two former directors (i.e., a state law contract): The details of CIRI's complaint are explained in Cmpt. ¶¶ 21 – 32, which present four claims for relief:

Summary of CIRI's Causes of Action:

Claim Number	*Paragraphs*	*Theory or basis of the claim*
First	¶¶ 21 – 23	False and Misleading Solicitations of Petition Signatures — ANCSA § 36(c)
Second	¶¶ 24 – 26	ANCSA Requirements for Petitions – ANCSA §§ 36, 37
Third	¶¶ 27– 29	False and Misleading Proxy Solicitation; AS 45.55.160, Alaska regs 3 AAC 08
Fourth	¶¶ 30– 32	Breach of Confidential Agmt. and Violation of AS 10.06.468(b)

(3) Nature of the case — CIRI's claim of federal jurisdiction resides in only two of its claims: The only scent of federal law in this case can be glimpsed here:

> **FIRST CLAIM FOR RELIEF**
>
> (False and Misleading Solicitations of Petition Signatures – 43 U.S.C. § 1629b(c))
>
> 21. CIRI incorporates herein by reference, as though fully set forth, each and every allegation in paragraphs 1 through 20 above.
>
> 22. The solicitation materials distributed by Defendants in connection with the petition for a special meeting to vote on the termination of stock alienability restrictions contain numerous materially false and misleading statements in violation of ANCSA and state law.
>
> 23. CIRI is entitled to an Order (a) finding that the solicitation materials disseminated by Defendants in connection with the petition for a special meeting to vote on the termination of stock

alienability restrictions are materially false and misleading in violation of ANCSA; (b) declaring that all of the petition signatures solicited by the Mailers are invalid and void; (c) requiring a corrective statement for all materially false and misleading statements made in the Mailers; (d) requiring prior review and approval by both the State of Alaska's Division of Banking and Securities and CIRI of Defendants' future solicitations to shareholders for a reasonable period of time; and (e) enjoining future solicitation of petition signatures for the termination of stock alienability
restrictions based on additional materially false and misleading statements.

SECOND CLAIM FOR RELIEF

(ANCSA Requirements for Petitions – 43 U.S.C. §§ 1629b–1629c.)

24. CIRI incorporates herein by reference, as though fully set forth, each and every allegation in paragraphs 1 through 23 above.

25. The petition for a special meeting to vote on the termination of stock alienability restrictions fails to meet the procedural and substantive requirements of ANCSA, which include but are not limited to the requirement that shareholders be given written notice of the language of the proposed amendment on terminating alienability restrictions and the requirement that the date of the termination of alienability restrictions is specified.

26. CIRI is entitled to an Order (a) finding that Defendants' petition for a special meeting to vote on the termination of stock alienability restrictions fails to meet the procedural and substantive requirements of ANCSA; (b) declaring that all of the petition signatures for a special meeting to vote on the termination of stock alienability restrictions solicited by the Mailers are invalid and void; and (c) enjoining future solicitation of petition signatures for a special meeting to vote on the removal of stock alienability restrictions pending circulation of a corrective statement.

CIRI's Complaint of 28 December 2009 at ¶¶ 21 - 26 (underlining added).

The multiple ironies are that

- ANCSA does not contain a prohibition against proxy materials that are

"materially false and misleading in violation of ANCSA." State law has such a restriction in 3 AAC 08.315. But the only federal law of this sort is found in the Securities and Exchange Act of 1934, §§ 10 and 14 and the rules authorized by these sections (SEC Rules 10b–5 and 14a–9). However, ANCSA § 28 expressly exempts Alaska Native corporations from compliance with federal securities laws.

- "[T]he procedural and substantive requirements of ANCSA" that CIRI relies upon are duties imposed on the corporation and upon its own directors but not upon the shareholders, such as Messrs. Rude and Rudolph. CIRI has misread the statute, or worse, has deliberately distorted it in order to create an improper ground for federal question jurisdiction.

The shareholder meeting for which the disputed proxy materials were intended never took place. CIRI objected to holding the meeting and there was not a quorum sufficient to convene it. The federal issue was mooted.

SUMMARY OF ARGUMENT

The appellants Rude and Rudolph set out two main arguments.

Their first main argument is that CIRI's first claim that Rude and Rudolph violated 43 U.S.C. § 1629b(c)(1)(B) does not provide federal-question jurisdiction.

This conclusion rests on three distinct supporting arguments.

The first is that § 1629b(c)(1)(B) cannot be reasonably read to mean that Congress, by referencing Alaska Security Law, intended to federalize Alaska law for the purpose of providing federal-question jurisdiction. Rather, the reasonable reading of § 1629b(c)(1)(B) shows that Congress intended to make it clear in this section that disputes relating to the solicitation of signatures for a petition to the board of directors of an ANCSA Corporation were to be resolved by Alaska law enacted and enforced by the state of Alaska.

The second supporting argument is that even if it could be said that § 1629b(c)(1)(B) "federalizes" Alaska law, federal-question jurisdiction still does not exist because the "federal question" raised by CIRI does not meet the "substantial" test required by the Supreme Court in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) and *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986).

The appellants' third supporting argument is that a finding that ANCSA § 36(c)(1)(B) [43 USC § 1629b(c)(1)(B)] provides federal-question jurisdiction would cut against the holding in *Grable* to the effect that federal-question jurisdiction does not exist where, in the absence of clear congressional intent, it would disrupt the "the balance of federal-state judicial responsibilities." *Grable*, 545 U.S. at 314.

Rude and Rudolph's second main argument in 43 U.S.C. § 1629b(b)(2)(A) does not provide federal-question in this case. This conclusion relies on two supporting arguments.

1. First, in order to provide federal-question jurisdiction, CIRI's second claim alleging a violation of§ 1629b(b)(2)(A) cannot simply be "colorable", rather it must rest on a "reasonable" reading of § 1629b(b)(2)(A). On its face, it is patently clear that § 1629b(b)(2)(A) is concerned only with duties owed by CIRI's board of directors. It has nothing at all to do with the appellant shareholders. CIRI's claim does not "rest upon a reasonable foundation." *Smith v. Kansas City Title and Trust Co.*, 255 U.S. 180, 199 (1921).

2. Second, because § 1629b(b)(2)(A) creates no federal cause of action, Congress did not intend to open the federal courts of "a horde of original filings and removal cases"—the very thing that concerned the Supreme Court in *Merrell Dow* and *Grable*. *Grable*, 545 U.S. at 318.

STANDARD OF REVIEW

Review is *de novo*. Whether the district court has subject matter jurisdiction requires interpretation and application of 28 U.S.C. § 1331, which in turn is a pure question of law, which the reviewing court decides de novo without any deference to the lower court's decision. In the Ninth Circuit, case law establishes a firm rule:

> We review de novo the district court's determination of subject matter jurisdiction. See *Blackburn v. United States* 100 F.3d 1426, 1429 (9th Cir.1996).

Gager v. U.S., 149 F.3d 918, 920 (9th Cir. 1998).

Questions of law are reviewed de novo, including questions of state law. *Matter of McLinn*, 739 F.2d 1395, 1397-98 (9th Cir. 1984) (en banc) ("Today we adopt as the law of the circuit the rule that questions of state law are reviewable under the same independent de novo standard as are questions of federal law.").

> A question of federal subject matter jurisdiction, such as that permitting removal of a case from state to federal court, is reviewable *de novo. See Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 538 (9th Cir.1985).

Bright v. Bechtel Petroleum, Inc.,780 F.2d 766, 768 (9th Cir. 1986). The rule is the same in other circuits. "We review *de novo* a district court's legal conclusion with respect to its subject matter jurisdiction." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 140 (2nd. Cir. 2004) (Sotomayor, J.), *affirmed Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006).

ARGUMENT

I. Introduction — CIRI's two federal claims:

CIRI asserts federal jurisdiction in this case on the grounds that the first and second claims for relief in its complaint arise "under the…laws…of the United States." (28 U.S.C. § 1331)

(A) CIRI's First Claim for Relief:

The substance of CIRI's first claim for relief is that the appellants Rude and Rudolph made "numerous false and misleading" statements in solicitation materials they disseminated in connection with a petition calling for a special meeting to consider an amendment. According to CIRI, this is a violation of ANCSA § 36(c)(1)(B) [43 U.S.C. § 1629b(c)(1)(B)], [5] the relevant parts of which read as follows:

> **(c) Shareholder petitions**
>
> (1) (A)…
>
> (B) The requirements of the laws of the State relating to the solicitation of proxies shall govern solicitation of signatures for a petition described in subparagraph (A) ... If a petition meets the applicable solicitation requirements and—
>
> (i) the board agrees with such petition, the board shall submit the amendment an either the proponents' statement or its own statement in

[5] ER. 67, CIRI's Complaint, paragraph 22, and Docket # 74, CIRI's Opposition to Motion to Dismiss for Lack of Jurisdiction at 4-5.

> support of the amendment to the shareholders for a vote, or
>
> (ii) the board disagrees with the petition for any reason, the board shall submit the amendment and the proponents' statement to the shareholders for a vote and may, at its discretion, submit an opposing statement or an alternative amendment.

CIRI draws the conclusion that, by virtue of its first claim, the district court has federal-question jurisdiction.

As a point of reference, if these allegations are true, Rude and Rudolph would be in violation of Alaska law (AS 45.55.160) and Alaska regulations (3 AAC 08.315). And they would face penalties set out in AS 45.55.920 and AS 45.55.925.

The point is that Alaska law provides for an administrative procedure to deal with the claim that CIRI has set out in its first claim for relief.[6] *See* AS 45.55.935 and 3 AAC 08. 930.

Why CIRI did not use state law and resolve its claim through Alaska's administrative process – instead filing its claim in federal court – is an open question. But whatever the reason, it will be argued that CIRI's "false and misleading" claim does not provide the federal court with federal question jurisdiction.

(B) CIRI's Second Claim for Relief:

CIRI's second claim for relief is based on its assertion that the defendants

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[6] See AS 45.55.935 and 3 AAC 08.930.

violated ANCSA § 36(b)(2)(A) [43 U.S.C. § 1629b(b)(2)(A)] when they failed to include a proposed amendment with their petition. The relevant parts of ANCSA § 36(b) [43 U.S.C. § 1629b(b)] read as follows:

> (b) **Basic procedure**
>
> (1) An amendment or resolution described in subsection (c) of this section may be approved by the board of directors of a Native Corporation in accordance with its bylaws. If the board approves the amendment or resolution, it shall direct that the amendment or resolution be submitted to a vote of the shareholders at the next meeting or at a special meeting (if the board, at its discretion, schedules such special meeting). …
>
> (2)(A) A written notice (including a proxy statement if required under applicable law), setting forth the amendment or resolution approved pursuant to paragraph (1) (and at the discretion of the board, a summary of the changes to be effected) together with any amendment or resolution submitted pursuant to subsection (c) of this section and the statements described therein shall be sent, not less than fifty days nor more than sixty days prior to the meeting of the shareholders, by first-class mail or hand-delivered to each shareholder of record entitled to vote at his or her address as it appears in the records of the Native Corporation. …

CIRI implies that its second claim also provides the court with federal question jurisdiction. (Note: CIRI's second claim was resolved by the District Court in its Amended Order Granting Motion for Partial Summary Judgment at 11-12, ER. 2. The court ruled that § 1629b(b)(2)(A) imposes a duty only on corporate directors and has nothing to do with Rude or Randolph.)

CIRI's allegations in its second claim for relief could also have been resolved in state court. CIRI could have filed a state court action alleging a

violation of AS 10.06.504(c), an Alaska stature that, for the most part, mirrors § 1629b(b)(2)(A).

CIRI's claim that the defendants violated ANCSA § 36(b)(2) [43 U.S.C. § 1629b(b)(2)] does not provide the federal court with federal question jurisdiction.

II. The District Court's ruling on Federal-Question Jurisdiction—the court federalized state law by a process of reverse incorporation:

The District Court, in addressing the appellants' argument that neither one of CIRI's two claims for relief provides the court with subject matter jurisdiction, noted that § 1629b(c)(1)(B) incorporated "the requirements of Alaska Security law as they relate "to the solicitation of proxies"[7] and directed that these requirements "govern the solicitation of signatures for a petition" to adopt an amendment related to the issuance of stock.[8] The District Court concluded that this operated to change state law into federal law:

> When federal law incorporates state law, such state law becomes federal law, and thus federal law, not state supplies the rule of decision.

ER. 18, Order Regarding Motion for Relief from Judgment at 5.

Because what was once state law is now federal law by virtue of § 1629b(c)(1)(B), the District Court determined that CIRI has raised a federal-

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[7] Alaska law that sets out these requirements is AS 45.55.160 together with 3 AAC 08.315.

[8] ER. 18, Order Regarding Motion for Relief from Judgment at 4-5.

question in its complaint:

> First, as explained above, ANCSA incorporates AS 45.55.160 and accompanying administration regulations governing the solicitation of proxies. Such adoption of Alaska law by federal law transforms the adopted law into federal law when the Alaska laws are applied through ANCSA. Consequently, any dispute that "really and substantially" involves the effect of such adopted law constitutes a federal question.

ER. 18, Order Regarding Motion for Relief of Judgment at 6. (footnotes omitted)

Finding that there was a federal question, the court concluded that it had subject matter jurisdiction over CIRI's claims.

III. CIRI's claim based on ANCSA § 36(c)(1)(B) [43 U.S.C. § 1629b(c)(1)(B)] does not provide Federal-Question Jurisdiction:

1. Congress, by referencing Alaska Security law in § 1629b(c)(1)(B), did not intend to federalize Alaska Law for the purpose of providing Federal Jurisdiction but rather intended to make it clear that disputes relating to the solicitation of signatures for a petition to the Board of Directors of an ANCSA Corporation were to be resolved by Alaska law enacted and enforced by the state of Alaska.

The validity of the district court's conclusion that it has jurisdiction in this matter turns on as whether the court correctly interpreted § 1629b(c)(1)(B). There are two possible interpretations:

a) Congress, by referencing Alaska Security law (i) intended to have disputes

over the solicitation of signatures for a petition to the board of directors of ANCSA corporations resolved in federal court, and (ii) looked to state law in this area so as not to require the court to invent federal common law; or, alternatively, this section means:

b) Congress, by referencing Alaska Security law, intended to make it clear that disputes over the solicitation of signatures for a petition to the board of directors of ANCSA corporations were to be governed, not by state law transformed into federal law, but by law enacted and enforced by the sovereign state of Alaska.

If interpretation (a) above were correct, then Congress surely would have created a federal cause of action for such disputes in § 1629b(c)(1)(B) or elsewhere in ANCSA. But Congress did not do this. In fact, the only federal cause of action specifically created in ANCSA is found in 43 U.S.C. § 1609(a). And this cause of action is limited to suits calling into question the legality of Chap. 33, The Alaska Native Claims Settlement Act.

Contrast what Congress did not do here with what it did do when it enacted the Federal Torts Claim Act (28 U.S.C. § 1346 et seq.). There, Congress incorporated state law for torts (28 U.S.C. §2674) and, at the same time, created a federal cause of action for tort claims against the government (28 U.S.C. §

1346(b)(1)).[9] Then too, there is the fact that Congress eschewed simply saying "an action based on the requirements of Alaska statute AS 45.55.160 may be brought in federal district court to resolve challenges to signatures for a petition." Instead, Congress used the phrase "law of the State…shall govern…." The use of the latter indicates that Congress intended Alaska courts to resolve claims of misleading and false statements in soliciting signatures for a petition.

In sum, the failure of Congress to create a cause of action in ANCSA for challenges to the solicitation of signatures for a shareholder petition and its use of the phrase "…laws of the State … shall govern…" indicates that Congress did not intend to have disputes over the solicitation of petition signatures be resolved in federal court.[10]

This conclusion is further supported by the fact that § 1629b(c)(2) specifically says "Insofar as they are not inconsistent with this section, the laws of the State shall govern any shareholder right of petition for Native Corporations."

In other words, Congress was not federalizing state securities law to supplement a new federal cause of action.

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[9] Also see 42 U.S.C. § 1983 and section 4 of the Clayton Act (15 U.S.C. § 15) where Congress clearly created a cause of action.

[10] Of course, if Congress intended to federalize Alaska Security law as the District Court claims, the law to be applied would no longer be the "laws of the State".

III. Even if ANCSA § 36(c)(1)(B) [§ 1629b(c)(1)(B)] "federalizes" Alaska corporate and securities law, federal-question jurisdiction does not exist because (a) the "federal question" raised by CIRI is not "substantial", and (b) because federal question jurisdiction over CIRI's claim would disrupt the "balance of federal and state judicial responsibilities:" [11]

***(A) The federal question raised by CIRI in its ANCSA § 36 [§ 1629b(c)(1)(B)] claim is not* substantial:**

As far back as 1912, the Supreme Court has limited federal-question jurisdiction to claims that "really and substantially involve a dispute or controversy respecting the validity, construction or effect of federal law."[12] Justice Cardozo, addressing the matter of federal jurisdiction, warned against the failure to distinguish between controversies involving federal law that are "basic" and "necessary" and those that are merely "collateral".[13] Only "substantial causes" furnish federal jurisdiction.[14] The reason for this is grounded in common sense:

> The doctrine captures the common sense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal

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[11] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005).

[12] *Schulthis v. McDougal*, 225 U.S. 561, 569 (1912),

[13] *Gully v. First Federal National Bank*, 299 U.S. 109, 118 (1936).

[14] Id. Also see *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).

> issues, ….

Grable, 545 U.S. at 312 (citations omitted).

A classic example of a substantial federal-question is *Smith v. Kansas City Title*, 255 U.S. 180, 199 (1921) where the main issue in the case was the constitutionality of a federal bond issue.

Another important factor in determining the substantiality of a federal question is to whether Congress created a cause of action for a violation of the federal statute at issue. In *Merrell Dow v. Thompson*, 478 U.S. 804, 813 (1986), the Court held that when Congress determines "that there should

be no federal remedy for the violation" of a federal statute, this

> … is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently "substantial" to confer federal-question jurisdiction.

Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 814 (1986) (footnote omitted).

In *Grable*, the Court interpreted the holding in *Merrell Dow* as recognizing the danger of "a horde of original filings and removal cases" ending up in federal court:

> The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances when exercising federal jurisdiction over a state misbranding action would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues. For if the federal labeling standard without a cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of

action. And this would have meant a tremendous number of cases.

Grable, 545 U.S. at 318.

As noted above, Congress did not create cause of action for a violation of § 1629b(c)(1)(B).[15]

In sum, CIRI's argument that its claim that the defendants violated federalized state law prohibiting false and misleading information raises a substantial federal question fails.

First, the fact that ANCSA creates no federal cause of action for a violation of this "federalized" state law is persuasive evidence that Congress did not consider "a claimed violation" of this law to be important enough "to confer federal-question jurisdiction." [16]

Second, CIRI's "well-pleaded complaint" does not allege any serious dispute over the validity, construction or effect" of the "federalized" state law and state regulations at issue here that requires the experience and uniformity "that a federal forum offers. " To the contrary, federal interpretations of what are, in essence, Alaska law and Alaska regulations, run the risk of introducing all sorts of

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[15] Here, of course, we are dealing with a claim that state law has been "federalized." Nonetheless, it is helpful to examine the question as if a federal law were embedded in a state cause of action. Federal law embedded in a state cause of action is analogous to state law embedded in federal law. It stands to reason that the analysis as to whether either creates federal-question jurisdiction should be the same.

[16] *Merrell Dow v. Thompson*, 478 U.S. 804, 814 (1986).

contradictions and tensions between Alaska law and what is termed "federalized" Alaska law. In short, it would "disrupt" federal and state jurisprudence.

The federal question raised by CIRI in its first claim is not substantial and, therefore, does not confer federal-question jurisdiction.

(B) Under the Supreme Court's current § 1331 jurisprudence, federal-question jurisdiction is not present if asserting it will upset the state-federal balance set by Congress — no federal question if it will be disruptive: Congress has drawn a line between the authority of state and federal courts.

> Because arising-under jurisdiction to hear a state-law claim always raises the possibility of upsetting the state-federal line drawn (or at least assumed) by Congress, the presence of a disputed federal issue and the ostensible importance of a federal forum are never necessarily dispositive; there must always be an assessment of any disruptive portent in exercising federal jurisdiction. See also *Merrell Dow*, 478 U.S., at 810, 106 S.Ct. 3229.

Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308, 314, 125 S.Ct. 2363, 2367-68 (2005) (citation in the original; underlining added). Thus, if hearing a second branch case (one for which federal law does not create the cause of action) in a federal court disrupts the federal – state jurisdictional balance, the case must be heard in state court not in a federal court.

(C) Hearing cases like this in a federal court will disrupt the "congressionally approved balance of federal and state judicial

responsibilities"[17] and disturb the State of Alaska's corporate law and its proxy regulatory scheme:

(1) The district court based its jurisdiction on a reverse incorporation of state law into federal law, but failed to notice that the "welcome mat" is missing: The district court based its jurisdiction on its finding that:

> Under 43 U.S.C. § 1629b(c)(1)(B), "[t]he requirements of the laws of the State relating to the solicitation of proxies shall govern solicitation of signatures" for a petition to require the board of directors of an Alaska Native Corporation to submit to a vote of the shareholders an amendment to terminate alienability restrictions. Furthermore, because CIRI is expressly exempted from the Federal Securities Act of 1933 and the Securities Exchange Act of 1934, Alaska security law governs Defendants statements made in soliciting signatures for the petition to hold a special meeting on the six advisory resolutions. Thus, the statements made in conjunction with soliciting signatures for both petitions, found in Defendants' four mailings, are governed by Alaska security law.

Amended Order Granting Motion for Partial Summary Judgment, Docket 81 at 7 (citing 43 U.S.C. § 1625(a) (2010)). The district court found that because ANCSA incorporates Alaska securities law, therefore the federal court has jurisdiction to hear this case:

> When federal law incorporates state law, such state law becomes federal, and thus federal law, not state, supplies the rule of decision. A clear example of federal adoption of state law can "be found in the Federal Tort Claims Act under which the United States is made liable for certain torts of its employees in accordance with relevant state law."

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[17] *Grable*, 545 U.S. at 314, 125 S. Ct. at 2368.

Order Granting Motion for Partial Summary Judgment, Docket 79 at 5 (citing and quoting *Young v. U.S.*, 149 F.R.D. 199, 202 (S.D. Cal. 1993)). However, *Young* is distinguishable because it is a first branch case. *Young* involves the Federal Tort Claims Act, which creates a federal cause of action. In the words of *Grable*, the Federal Tort Claims Act does provide a "welcome mat." But there is no welcome mat in ANCSA, which does not create a federal cause of action, does not provide a federal remedy or federal penalty, and does not contain a federal jurisdictional grant.

The present case is distinguishable from *Young* because this case is a second branch case. ANCSA does not provide a cause of action. As such the court must look elsewhere for a "welcome mat." The district court overlooked the question of disruptiveness; it failed to consider whether federal jurisdiction over ANCSA proxy solicitation cases would disrupt the federal-state balance intended by Congress and expressed in ANCSA.

(2) Federal court involvement in the state regulatory scheme will be disruptive – for example, because it would allow direct federal review of state agency decisions that belong in state court: The State of Alaska has an extensive statutory and regulatory scheme for the regulation of proxy solicitations. The Alaska Securities Act is administered by a state agency, the Division of Banking and Securities, a branch of a department of the Alaska executive branch.

> **45.55.905. Administration of chapter.**
>
> (a) The Department of Commerce, Community, and Economic Development shall administer this chapter.

AS 45.55.905(a). Moreover, the Division is empowered to promulgate regulations and enforce Alaska's Securities laws.

> **Sec. 45.55.935. Hearings.**
>
> (a) The administrator shall adopt regulations, consistent with the provisions of this chapter and with regulations adopted under AS 44.64.060, governing administrative hearings conducted by the office of administrative hearings (AS 44.64.010) for the following:
>
> (1) orders issued under AS 45.55.120__, 45.55.900(d), or 45.55.920; in these instances, the administrator shall promptly send a notice of opportunity for hearing to the issuer of the securities and to all persons who have filed with the department a notice of intention to sell the securities; and
>
> (2) orders issued under AS 45.55.060_; before the administrator enters an order under AS 45.55.060 , the administrator shall send to the person involved a notice of opportunity for hearing; if the person involved is an agent or investment adviser representative, then the administrator shall, in addition, notify the employing broker-dealer, state investment adviser, federal covered adviser, or issuer.
>
> (b) In conducting a hearing in accordance with (a) of this section, the administrative law judge may issue a subpoena to compel the attendance of any witness or party and to compel production of evidence.

AS 45.55.935. Pursuant to this statute, the Alaska Department of Commerce, Division of Banking and Securities, has promulgated regulations for the enforcement of Alaska's Securities laws found at 3 AAC 08.005 - 3 AAC 08.950.

Should the federal courts now claim jurisdiction over enforcement of Alaska's securities laws, it would disrupt the entire scheme. Alaska's statutes provide for judicial review of the agency's orders in Alaska courts, not in a federal court.

> **Sec. 45.55.940. Judicial review of orders.**
>
> (a) A person aggrieved by a final order of the administrator may obtain a review of the order in the superior court by filing, in accordance with the Rules of Appellate Procedure, a notice of appeal. A copy of the notice of appeal shall be served immediately upon the administrator, and thereupon the administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these are filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part.
>
> (b) The commencement of proceedings under (a) of this section does not, unless specifically ordered by the court, operate as a stay of the administrator's order.

AS § 45.55.940. But if the federal courts now have jurisdiction of Alaska proxy disputes, the entire regulatory scheme can be bypassed. Thus, for actions against ANCSA corporations or their shareholders that are initiated at the Division, appeal of the agency's orders could be taken in federal court. The federal courts will become bogged down in numerous proxy fights that properly belong in the Alaska agency and in Alaska courts.

Four developments in this case illustrate the *disruption* that will follow if jurisdiction of state-law corporate proxy disputes is conferred on the federal courts.

First, the federal district court's order requires submission of proxies to the

Alaska Division of Banking and Securities for three years (regardless of whether or not the division remains in existence, or if state law is modified).[18] By implication, the federal court is ordering the Division (which is not a party to the case) to review the proxies. This is beyond the reasonable power of a federal court.

Second, the district court has been asked to use its contempt power to enforce state laws through the actions of state agencies — there are no federal agencies involved in this dispute. Based on the order at docket 81, the plaintiff in this case recently has moved for contempt on allegations that the defendants did not submit to the Alaska Division of Banking and Securities for review the defendants' Facebook entries (even though defendants are not soliciting any proxies). Cook Inlet Region, Inc.'s Second Sealed Motion for Order in Civil Contempt, Docket #94 at 7-9.

Third, the district court's previous orders seem to require the Division of Banking and Securities to review numerous posts made to Internet sites by the defendants. The district court has not yet ruled on the motion for contempt. But no matter what will be the district court's decision: If the federal court assumes jurisdiction over the regulation of ANCSA proxy solicitations, the federal courts will be stepping all over the entire regulatory scheme of the State of Alaska.

Fourth, the long-lasting nature of the district court's permanent injunctions

[18] Amended Order Granting Motion for Partial Summary Judgment, Docket 81 at 13 (citing AS § 45.55.920(a)(1)).

will mean that the district court will be sending directives about these litigants to the Alaska Division of Banking and Securities for many years to come. The disruption in the balance of supervisory authority is not fleeting or short-lived; it will continue for years.

Because the disruption of the federal-state balance would be great, Congress withdrew the "welcome mat" when it adopted ANCSA. This court should find that jurisdiction over ANCSA proxy solicitations should remain with the state agency and state proxy disputes should be reviewed only in the state courts.

IV. CIRI's claim based on ANCSA § 36(b)(2)(A) [43 U.S.C. § 1629b(b)(2)(A)] does not provide Federal-Question Jurisdiction:

CIRI's second federal claim is that the appellants Rude and Rudolph violated ANCSA § 36(b)(2)(A) [43 U.S.C. § 1629b(b)(2)(A)] by failing to provide "written language of the proposed amendment on terminating alienability restrictions and the requirement that the date of the termination of alienability restriction be specified." [19] Presumably, CIRI takes the position that any claim that shareholder violated this section raises a substantial federal-question. But this is not true.

Even a cursory reading of § 1629b(b)(2)(A) together with § 1629b(b)(1) discloses that that this section is exclusively concerned with the duties that the

[19] ER. 76, CIRI's Complaint at ¶ 25.

board of directors of an ANCSA corporation must carry out once they approve an amendment described in § 1629b(c). The District Court noted this in its Amended Order for Partial Summary Judgment .[20] This section has nothing at all to do with the defendants, who are merely shareholders but not directors; it imposes a duty only on CIRI's board of directors.[21] The only entity that could possibly violate this section is CIRI's directors.

CIRI's mere claim that Rude and Rudolph violated § 1629b(b)(2)(A) is not enough to create federal question jurisdiction. If this were so, a plaintiff could allege a defendant violated any federal statute selected at random and thus secure federal-question jurisdiction for its claim. But this cannot be true. Then-judge Sotomayor explains why:

> Though the plaintiff is generally "the master of the complaint," *id.*, a plaintiff cannot create federal jurisdiction under § 1331 simply by alleging a federal claim where in reality none exists. *See Perpetual Securities, Inc. v. Tang*, 290 F.3d 132, 137 (2nd Cir. 2002).

Empire Healthchoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 140 (2nd. Cir. 2004) (Sotomayor, J.) (underlining added), *affirmed Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006).

A plaintiff's federal claim cannot merely be "colorable"; it must rest on a "reasonable" reading of the federal law:

---

[20] ER. 2, Amended Order Granting Partial Summary Judgment at 11-12.

[21] Id at 12.

> The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such Federal claim is not merely colorable, and rests upon a reasonable foundation, the district court has jurisdiction under this provision.

Smith v. Kansas City Title and Trust Co., 255 U.S. 180, 199 (1921).

As noted, it is crystal clear on its face that § 1629b(b)(2)(A) is concerned only with duties placed on CIRI's board of directors. Any reading of this section that concludes it places a duty on an ANCSA shareholder who solicits a petition is patently unreasonable and bordering on the frivolous. CIRI's second claim, then, cannot create federal question jurisdiction; it does not "rest upon a reasonable foundation."

Further, any argument that CIRI's § 1629b(b)(2)(A) claim creates federal-question jurisdiction fails for a second reason. Because 1629b(b)(2)(A) obviously concerns only duties owed by CIRI's *directors*, and has nothing to do with duties of *shareholders*, whatever question of federal law CIRI's second claim raises, it cannot possibly be a "substantial question." [22] Rude and Rudolph are shareholders but they were not directors at the times relevant to CIRI's complaint. And while CIRI might argue its claim has a "federal element", "…it takes more than a federal element 'to open the 'arising under' door."[23]

---

[22] The only question raised is whether § 1629b(b)(2)(A) creates a duty on shareholders Rude and Rudolph. Given the plain meaning of this section, such a question is neither serious nor substantial. It is obvious that it applies to "directors" but not to mere shareholders; the statute simply does not apply.

[23] *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006).

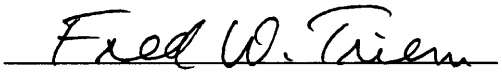
Finally, because § 1629b(b)(2)(A) creates no federal cause of action, it can be presumed that Congress did not intend to open the federal courts to "a horde of original filings and removal cases"—the thing that concerned the Court in *Merrell Dow* and in *Grable* .

CIRI's second claim based on § 1629b(b)(2)(A) does not provide the District Court with federal-question jurisdiction.

CONCLUSION

The complaint does not present a federal question; the district court lacks jurisdiction of the subject matter; and its decision should be reversed and the judgment vacated. The case should be remanded for entry of a judgment of dismissal.

Respectfully submitted on 14 July 2011 at Petersburg, Alaska.



Fred W. Triem, No. 7912140
Attorney for Appellants

STATEMENT OF RELATED CASES

There are no other cases currently pending in the federal courts that are related to this case.

/s *Fred W. Triem*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the brief is proportionately spaced, has a typeface of 14 points or more, and contains 7,039 words.

/s *Fred W. Triem*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on 14 July 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s *Fred W. Triem*

ADDENDUM (pertinent constitutional provisions, statutes, etc.)

See Cir. Rule 28-2.7

ADDENDUM

ADDENDUM TO BRIEF OF DEFENDANTS-APPELLANTS

Pertinent Provisions of Statutes and Regulations

TABLE OF CONTENTS

FEDERAL STATUTES

U.S. CODE TITLE 43. PUBLIC LANDS

CHAPTER 33 — ALASKA NATIVE CLAIMS SETTLEMENT [ANCSA]

ANCSA § 1 [43 U.S.C. § 1601] Congressional findings and declaration of policy

Congress finds and declares that--

***

(f) no provision of this chapter shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of this chapter; and

ANCSA § 7 [43 U.S. C. §1606] — Regional Corporations

(a) Division of Alaska into twelve geographic regions; common heritage and common interest of region; area of region commensurate with operations of Native association; boundary disputes, arbitration

For purposes of this chapter, the State of Alaska shall be divided by the Secretary within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests. In the absence of good cause shown to the contrary, such regions shall approximate the areas covered by the operations of the following existing Native associations:

(1) Arctic Slope Native Association (Barrow, Point Hope);

(2) Bering Straits Association (Seward Peninsula, Unalakleet, Saint Lawrence Island);

(3) Northwest Alaska Native Association (Kotzebue);

(4) Association of Village Council Presidents (southwest coast, all villages in the Bethel area, including all villages on the Lower Yukon River and the Lower Kuskokwim River);

(5) Tanana Chiefs' Conference (Koyukuk, Middle and Upper Yukon Rivers, Upper Kuskokwim, Tanana River);

(6) Cook Inlet Association (Kenai, Tyonek, Eklutna, Iliamna);

(7) Bristol Bay Native Association (Dillingham, Upper Alaska Peninsula);

(8) Aleut League (Aleutian Islands, Pribilof Islands and that part of the Alaska Peninsula which is in the Aleut League);

(9) Chugach Native Association (Cordova, Tatitlek, Port Graham, English Bay, Valdez, and Seward);

(10) Tlingit-Haida Central Council (southeastern Alaska, including Metlakatla);

(11) Kodiak Area Native Association (all villages on and around Kodiak Island); and

(12) Copper River Native Association (Copper Center, Glennallen, Chitina, Mentasta).

Any dispute over the boundaries of a region or regions shall be resolved by a board of arbitrators consisting of one person selected by each of the Native associations involved, and an additional one or two persons, whichever is needed to make an odd number of arbitrators, such additional person or persons to be selected by the arbitrators selected by the Native associations involved.

(b) Region mergers; limitation

The Secretary may, on request made within one year of December 18, 1971, by representative and responsible leaders of the Native associations listed in subsection (a) of this section, merge two or more of the twelve regions: Provided, That the twelve regions may not be reduced to less than seven, and there may be no fewer than seven Regional Corporations.

(c) Establishment of thirteenth region for nonresident Natives; majority vote; Regional Corporation for thirteenth region

If a majority of all eligible Natives eighteen years of age or older who are not

permanent residents of Alaska elect, pursuant to section 1604(c) of this title, to be enrolled in a thirteenth region for Natives who are non-residents of Alaska, the Secretary shall establish such a region for the benefit of the Natives who elected to be enrolled therein, and they may establish a Regional Corporation pursuant to this chapter.

(d) Incorporation; business for profit; eligibility for benefits; provisions in articles for carrying out chapter

Five incorporators within each region, named by the Native association in the region, shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits of this chapter so long as it is organized and functions in accordance with this chapter. The articles of incorporation shall include provisions necessary to carry out the terms of this chapter.

(e) Original articles and bylaws: approval by Secretary prior to filing, submission for approval; amendments to articles: approval by Secretary; withholding approval in event of creation of inequities among Native individuals or groups

The original articles of incorporation and bylaws shall be approved by the Secretary before they are filed, and they shall be submitted for approval within eighteen months after December 18, 1971. The articles of incorporation may not be amended during the Regional Corporation's first five years without the approval of the Secretary. The Secretary may withhold approval under this section if in his judgment inequities among Native individuals or groups of Native individuals would be created.

(f) Board of directors; management; stockholders; provisions in articles or bylaws for number, term, and method of election

The management of the Regional Corporation shall be vested in a board of directors, all of whom, with the exception of the initial board, shall be stockholders over the age of eighteen. The number, terms, and method of election of members of the board of directors shall be fixed in the articles of incorporation or bylaws of the Regional Corporation.

(g) Issuance of stock

(1) Settlement Common Stock

(A) The Regional Corporation shall be authorized to issue such number of shares of Settlement Common Stock (divided into such classes as may be specified in the articles of incorporation to reflect the provisions of this chapter) as may be needed to issue one hundred shares of stock to each Native enrolled in the region pursuant to section 1604 of this title.

(B)(i) A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock to--

(I) Natives born after December 18, 1971, and, at the further option of the Corporation, descendants of Natives born after December 18, 1971,

(II) Natives who were eligible for enrollment pursuant to section 1604 of this title but were not so enrolled, or

(III) Natives who have attained the age of 65, for no consideration or for such consideration and upon such terms and conditions as may be specified in such amendment or in a resolution approved by the board of directors pursuant to authority expressly vested in the board by the amendment. The amendment to the articles of incorporation may specify which class of Settlement Common Stock shall be issued to the various groups of Natives.

(ii) Not more than one hundred shares of Settlement Common Stock shall be issued to any one individual pursuant to clause (i).

(iii) The amendment authorized by clause (i) may provide that Settlement Common Stock issued to a Native pursuant to such amendment (or stock issued in exchange for such Settlement Common Stock pursuant to subsection (h)(3) of this section or section 1629c(d) of this title) shall be deemed canceled upon the death of such Native. No compensation for this cancellation shall be paid to the estate of the deceased Native or to any person holding the stock.

(iv) Settlement Common Stock issued pursuant to clause (i) shall not carry rights to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section unless, prior to the issuance of such stock, a majority of the class of existing holders of Settlement Common Stock carrying such rights separately approve the granting of such rights. The articles of incorporation of the Regional

Corporation shall be deemed to be amended to authorize such class vote.

(C)(i) A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock as a dividend or other distribution (without regard to surplus of the corporation under the laws of the state) upon each outstanding share of Settlement Common Stock issued pursuant to subparagraphs (A) and (B).

(ii) The amendment authorized by clause (i) may provide that shares of Settlement Common Stock issued as a dividend or other distribution shall constitute a separate class of stock with greater per share voting power than Settlement Common Stock issued pursuant to subparagraphs (A) and (B).

(2) Other forms of stock

(A) A Regional Corporation may amend its articles of incorporation to authorize the issuance of shares of stock other than Settlement Common Stock in accordance with the provisions of this paragraph. Such amendment may provide that--

(i) preemptive rights of shareholders under the laws of the state shall not apply to the issuance of such shares, or

(ii) issuance of such shares shall permanently preclude the corporation from--

(I) conveying assets to a Settlement Trust, or

(II) issuing shares of stock without adequate consideration as required under the laws of the state.

(B) The amendment authorized by subparagraph (A) may provide that the stock to be issued shall be one or more of the following--

(i) divided into classes and series within classes, with preferences, limitations, and relative rights, including, without limitation--

(I) dividend rights,

(II) voting rights, and

(III) liquidation preferences;

(ii) made subject to one or more of--

(I) the restrictions on alienation described in clauses (i), (ii), and (iv) of subsection (h)(1)(B) of this section, and

(II) the restriction described in paragraph (1)(B)(iii); and

(iii) restricted in issuance to--

(I) Natives who have attained the age of sixty-five;

(II) other identifiable groups of Natives or identifiable groups of descendants of Natives defined in terms of general applicability and not in any way by reference to place of residence or family;

(III) Settlement Trusts; or

(IV) entities established for the sole benefit of Natives or descendants of Natives, in which the classes of beneficiaries are defined in terms of general applicability and not in any way by reference to place of residence, family, or position as an officer, director, or employee of a Native Corporation.

(C) The amendment authorized by subparagraph (A) shall provide that the additional shares of stock shall be issued--

(i) as a dividend or other distribution (without regard to surplus of the corporation under the laws of the state) upon all outstanding shares of stock of any class or series, or

(ii) for such consideration as may be permitted by law (except that this requirement may be waived with respect to issuance of stock to the individuals or entities described in subparagraph (B)(iii)).

(D) During any period in which alienability restrictions are in effect, no stock whose issuance is authorized by subparagraph (A) shall be--

(i) issued to, or for the benefit of, a group of individuals composed only or

principally of employees, officers, and directors of the corporation; or

(ii) issued more than thirteen months after the date on which the vote of the shareholders on the amendment authorizing the issuance of such stock occurred if, as a result of the issuance, the outstanding shares of Settlement Common Stock will represent less than a majority of the total voting power of the corporation for the purpose of electing directors.

(3) Disclosure requirements

(A) An amendment to the articles of incorporation of a Regional Corporation authorized by paragraph (2) shall specify--

(i) the maximum number of shares of any class or series of stock that may be issued, and

(ii) the maximum number of votes that may be held by such shares.

(B)(i) If the board of directors of a Regional Corporation intends to propose an amendment pursuant to paragraph (2) which would authorize the issuance of classes or series of stock that, singly or in combination, could cause the outstanding shares of Settlement Common Stock to represent less than a majority of the total voting power of the corporation for the purposes of electing directors, the shareholders of such corporation shall be expressly so informed.

(ii) Such information shall be transmitted to the shareholders in a separate disclosure statement or in another informational document in writing or in recorded sound form both in English and any Native language used by a shareholder of such corporation. Such statement or informational document shall be transmitted to the shareholders at least sixty days prior to the date on which such proposal is to be submitted for a vote.

(iii) If not later than thirty days after issuance of such disclosure statement or informational document the board of directors receives a prepared concise statement setting forth arguments in opposition to the proposed amendment together with a request for distribution thereof signed by the holders of at least 10 per centum of the outstanding shares of Settlement Common Stock, the board shall either distribute such statement to the shareholders or provide to the requesting shareholders a list of all shareholder's names and addresses so that the requesting

shareholders may distribute such statement.

(4) Savings

(A)(i) No shares of stock issued pursuant to paragraphs (1)(C) and (2) shall carry rights to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section. No shares of stock issued pursuant to paragraph (1)(B) shall carry such rights unless authorized pursuant to paragraph (1)(B)(iv).

(ii) Notwithstanding the issuance of additional shares of stock pursuant to paragraphs (1)(B), (1)(C), or (2), a Regional Corporation shall apply the ratio last computed pursuant to subsection (m) of this section prior to February 3, 1988 for purposes of distributing funds pursuant to subsections (j) and (m) of this section.

(B) The issuance of additional shares of stock pursuant to paragraphs (1)(B), (1)(C), or (2) shall not affect the division and distribution of revenues pursuant to subsection (i) of this section.

(C) No provision of this chapter shall limit the right of a Regional Corporation to take an action authorized by the laws of the state unless such action is inconsistent with the provisions of this chapter.

(h) Settlement Common Stock

(1) Rights and restrictions

(A) Except as otherwise expressly provided in this chapter, Settlement Common Stock of a Regional Corporation shall--

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the state.

(B) Except as otherwise provided in this subsection, Settlement Common Stock, inchoate rights thereto, and rights to dividends or distributions declared with respect thereto shall not be--

(i) sold;

(ii) pledged;

(iii) subjected to a lien or judgment execution;

(iv) assigned in present or future;

(v) treated as an asset under--

(I) Title 11 or any successor statute,

(II) any other insolvency or moratorium law, or

(III) other laws generally affecting creditors' rights; or

(vi) otherwise alienated.

(C) Notwithstanding the restrictions set forth in subparagraph (B), Settlement Common Stock may be transferred to a Native or a descendant of a Native--

(i) pursuant to a court decree of separation, divorce, or child support;

(ii) by a holder who is a member of a professional organization, association, or board that limits his or her ability to practice his or her profession because he or she holds Settlement Common Stock; or

(iii) as an inter vivos gift from a holder to his or her child, grandchild, great-grandchild, niece, nephew, or (if the holder has reached the age of majority as defined by the laws of the state of Alaska) brother or sister, notwithstanding an adoption, relinquishment, or termination of parental rights that may have altered or severed the legal relationship between the gift donor and recipient.

(2) Inheritance of Settlement Common Stock

(A) Upon the death of a holder of Settlement Common Stock, ownership of such stock (unless canceled in accordance with subsection (g)(1)(B)(iii) of this section) shall be transferred in accordance with the lawful will of such holder or pursuant to applicable laws of intestate succession. If the holder fails to dispose of his or her stock by will and has no heirs under applicable laws of intestate succession, the stock shall escheat to the issuing Regional Corporation and be canceled.

(B) The issuing Regional Corporation shall have the right to purchase at fair value Settlement Common Stock transferred pursuant to applicable laws of intestate succession to a person not a Native or a descendant of a Native after February 3, 1988, if--

(i) the corporation--

(I) amends its articles of incorporation to authorize such purchases, and

(II) gives the person receiving such stock written notice of its intent to purchase within ninety days after the date that the corporation either determines the decedent's heirs in accordance with the laws of the state or receives notice that such heirs have been determined, whichever later occurs; and

(ii) the person receiving such stock fails to transfer the stock pursuant to paragraph (1)(C)(iii) within sixty days after receiving such written notice.

(C) Settlement Common Stock of a Regional Corporation--

(i) transferred by will or pursuant to applicable laws of intestate succession after February 3, 1988, or

(ii) transferred by any means prior to February 3, 1988, to a person not a Native or a descendant of a Native shall not carry voting rights. If at a later date such stock is lawfully transferred to a Native or a descendant of a Native, voting rights shall be automatically restored.

(3) Replacement Common Stock

(A) On the date on which alienability restrictions terminate in accordance with the provisions of section 1629c of this title, all Settlement Common Stock previously issued by a Regional Corporation shall be deemed canceled, and shares of

Replacement Common Stock of the appropriate class shall be issued to each shareholder, share for share, subject only to subparagraph (B) and to such restrictions consistent with this chapter as may be provided by the articles of incorporation of the corporation or in agreements between the corporation and individual shareholders.

(B)(i) Replacement Common Stock issued in exchange for Settlement Common Stock issued subject to the restriction authorized by subsection (g)(1)(B)(iii) of this section shall bear a legend indicating that the stock will eventually be canceled in accordance with the requirements of that subsection.

(ii) Prior to the termination of alienability restrictions, the board of directors of the corporation shall approve a resolution to provide that each share of Settlement Common Stock carrying the right to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section shall be exchanged either for--

(I) a share of Replacement Common Stock that carries such right, or

(II) a share of Replacement Common Stock that does not carry such right together with a separate, non-voting security that represents only such right.

(iii) Replacement Common Stock issued in exchange for a class of Settlement Common Stock carrying greater per share voting power than Settlement Common Stock issued pursuant to subsections (g)(1)(A) and (g)(1)(B) of this section shall carry such voting power and be subject to such other terms as may be provided in the amendment to the articles of incorporation authorizing the issuance of such class of Settlement Common Stock.

(C) The articles of incorporation of the Regional Corporation shall be deemed amended to authorize the issuance of Replacement Common Stock and the security described in subparagraph (B)(ii)(II).

(D) Prior to the date on which alienability restrictions terminate, a Regional Corporation may amend its articles of incorporation to impose upon Replacement Common Stock one or more of the following--

(i) a restriction denying voting rights to any holder of Replacement Common Stock who is not a Native or a descendant of a Native;

(ii) a restriction granting the Regional Corporation, or the Regional Corporation and members of the shareholder's immediate family who are Natives or descendants of Natives, the first right to purchase, on reasonable terms, the Replacement Common Stock of the shareholder prior to the sale or transfer of such stock (other than a transfer by will or intestate succession) to any other party, including a transfer in satisfaction of a lien, writ of attachment, judgment execution, pledge, or other encumbrance; and

(iii) any other term, restriction, limitation, or provision authorized by the laws of the state.

(E) Replacement Common Stock shall not be subjected to a lien or judgment execution based upon any asserted or unasserted legal obligation of the original recipient arising prior to the issuance of such stock.

(4)(A) As used in this paragraph, the term "Cook Inlet Regional Corporation" means Cook Inlet Region, Incorporated.

(B) The Cook Inlet Regional Corporation may, by an amendment to its articles of incorporation made in accordance with the voting standards under section 1629b(d)(1) of this title, purchase Settlement Common Stock of the Cook Inlet Regional Corporation and all rights associated with the stock from the shareholders of Cook Inlet Regional Corporation in accordance with any provisions included in the amendment that relate to the terms, procedures, number of offers to purchase, and timing of offers to purchase.

(C) Subject to subparagraph (D), and notwithstanding paragraph (1)(B), the shareholders of Cook Inlet Regional Corporation may, in accordance with an amendment made pursuant to subparagraph (B), sell the Settlement Common Stock of the Cook Inlet Regional Corporation to itself.

(D) No sale or purchase may be made pursuant to this paragraph without the prior approval of the board of directors of Cook Inlet Regional Corporation. Except as provided in subparagraph (E), each sale and purchase made under this paragraph shall be made pursuant to an offer made on the same terms to all holders of Settlement Common Stock of the Cook Inlet Regional Corporation.

(E) To recognize the different rights that accrue to any class or series of shares of Settlement Common Stock owned by stockholders who are not residents of a

Native village (referred to in this paragraph as "non-village shares"), an amendment made pursuant to subparagraph (B) shall authorize the board of directors (at the option of the board) to offer to purchase--

(i) the non-village shares, including the right to share in distributions made to shareholders pursuant to subsections (j) and (m) of this section (referred to in this paragraph as "nonresident distribution rights"), at a price that includes a premium, in addition to the amount that is offered for the purchase of other village shares of Settlement Common Stock of the Cook Inlet Regional Corporation, that reflects the value of the nonresident distribution rights; or

(ii) non-village shares without the nonresident distribution rights associated with the shares.

(F) Any shareholder who accepts an offer made by the board of directors pursuant to subparagraph (E)(ii) shall receive, with respect to each non- village share sold by the shareholder to the Cook Inlet Regional Corporation--

(i) the consideration for a share of Settlement Common Stock offered to shareholders of village shares; and

(ii) a security for only the nonresident rights that attach to such share that does not have attached voting rights (referred to in this paragraph as a "non-voting security").

(G) An amendment made pursuant to subparagraph (B) shall authorize the issuance of a non-voting security that--

(i) shall, for purposes of subsections (j) and (m) of this section, be treated as a non-village share with respect to--

(I) computing distributions under such subsections; and

(II) entitling the holder of the share to the proportional share of the distributions made under such subsections;

(ii) may be sold to Cook Inlet Region, Inc.; and

(iii) shall otherwise be subject to the restrictions under paragraph (1)(B).

(H) Any shares of Settlement Common Stock purchased pursuant to this paragraph shall be canceled on the conditions that--

(i) non-village shares with the nonresident rights that attach to such shares that are purchased pursuant to this paragraph shall be considered to be--

(I) outstanding shares; and

(II) for the purposes of subsection (m) of this section, shares of stock registered on the books of the Cook Inlet Regional Corporation in the names of nonresidents of villages;

(ii) any amount of funds that would be distributable with respect to non- village shares or non-voting securities pursuant to subsection (j) or (m) of this section shall be distributed by Cook Inlet Regional Corporation to itself; and

(iii) village shares that are purchased pursuant to this paragraph shall be considered to be--

(I) outstanding shares, and

(II) for the purposes of subsection (k) of this section shares of stock registered on the books of the Cook Inlet Regional Corporation in the names of the residents of villages.

(I) Any offer to purchase Settlement Common Stock made pursuant to this paragraph shall exclude from the offer--

(i) any share of Settlement Common Stock held, at the time the offer is made, by an officer (including a member of the board of directors) of Cook Inlet Regional Corporation or a member of the immediate family of the officer; and

(ii) any share of Settlement Common Stock held by any custodian, guardian, trustee, or attorney representing a shareholder of Cook Inlet Regional Corporation in fact or law, or any other similar person, entity, or representative.

(J)(i) The board of directors of Cook Inlet Regional Corporation, in determining the terms of an offer to purchase made under this paragraph, including the amount

of any premium paid with respect to a non-village share, may rely upon the good faith opinion of a recognized firm of investment bankers or valuation experts.

(ii) Neither Cook Inlet Regional Corporation nor a member of the board of directors or officers of Cook Inlet Regional Corporation shall be liable for damages resulting from terms made in an offer made in connection with any purchase of Settlement Common Stock if the offer was made--

(I) in good faith;

(II) in reliance on a determination made pursuant to clause (i); and

(III) otherwise in accordance with this paragraph.

(K) The consideration given for the purchase of Settlement Common Stock made pursuant to an offer to purchase that provides for such consideration may be in the form of cash, securities, or a combination of cash and securities, as determined by the board of directors of Cook Inlet Regional Corporation, in a manner consistent with an amendment made pursuant to subparagraph (B).

(L) Sale of Settlement Common Stock in accordance with this paragraph shall not diminish a shareholder's status as an Alaska Native or descendant of a Native for the purpose of qualifying for those programs, benefits and services or other rights or privileges set out for the benefit of Alaska Natives and Native Americans. Proceeds from the sale of Settlement Common Stock shall not be excluded in determining eligibility for any needs-based programs that may be provided by Federal, State or local agencies.

(i) Certain natural resource revenues; distribution among twelve Regional Corporations; computation of amount; subsection inapplicable to thirteenth Regional Corporation

(1)(A) Except as provided by subparagraph (B), 70 percent of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter shall be divided annually by the Regional Corporation among all twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title. The provisions of this subsection shall not apply to the thirteenth Regional Corporation if organized pursuant to subsection (c) hereof.

(B) In the case of the sale, disposition, or other use of common varieties of sand, gravel, stone, pumice, peat, clay, or cinder resources made during a fiscal year ending after October 31, 1998, the revenues received by a Regional Corporation shall not be subject to division under subparagraph (A). Nothing in this subparagraph is intended to or shall be construed to alter the ownership of such sand, gravel, stone, pumice, peat, clay, or cinder resources.

(2) For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.

(j) Corporate funds and other net income, distribution among: stockholders of Regional Corporations; Village Corporations and nonresident stockholders; and stockholders of thirteenth Regional Corporation

During the five years following December 18, 1971, not less than 10% of all corporate funds received by each of the twelve Regional Corporations under section 1605 of this title (Alaska Native Fund), and under subsection (i) of this section (revenues from the timber resources and subsurface estate patented to it pursuant to this chapter), and all other net income, shall be distributed among the stockholders of the twelve Regional Corporations. Not less than 45% of funds from such sources during the first five-year period, and 50% thereafter, shall be distributed among the Village Corporations in the region and the class of stockholders who are not residents of those villages, as provided in subsection [FN1] to it. In the case of the thirteenth Regional Corporation, if organized, not less than 50% of all corporate funds received under section 1605 of this title shall be distributed to the stockholders.

(k) Distributions among Village Corporations; computation of amount

Funds distributed among the Village Corporations shall be divided among them according to the ratio that the number of shares of stock registered on the books of the Regional Corporation in the names of residents of each village bears to the number of shares of stock registered in the names of residents in all villages.

(l) Distributions to Village Corporations; village plan: withholding funds until submission of plan for use of money; joint ventures and joint financing of projects; disagreements, arbitration of issues as provided in articles of Regional Corporation

Funds distributed to a Village Corporation may be withheld until the village has submitted a plan for the use of the money that is satisfactory to the Regional Corporation. The Regional Corporation may require a village plan to provide for joint ventures with other villages, and for joint financing of projects undertaken by the Regional Corporation that will benefit the region generally. In the event of disagreement over the provisions of the plan, the issues in disagreement shall be submitted to arbitration, as shall be provided for in the articles of incorporation of the Regional Corporation.

(m) Distributions among Village Corporations in a region; computation of dividends for nonresidents of village; financing regional projects with equitably withheld dividends and Village Corporation funds

When funds are distributed among Village Corporations in a region, an amount computed as follows shall be distributed as dividends to the class of stockholders who are not residents of those villages: The amount distributed as dividends shall bear the same ratio to the amount distributed among the Village Corporations that the number of shares of stock registered on the books of the Regional Corporation in the names of nonresidents of villages bears to the number of shares of stock registered in the names of village residents: Provided, That an equitable portion of the amount distributed as dividends may be withheld and combined with Village Corporation funds to finance projects that will benefit the region generally.

(n) Projects for Village Corporations

The Regional Corporation may undertake on behalf of one or more of the Village Corporations in the region any project authorized and financed by them.

(o) Annual audit; place; availability of papers, things, or property to auditors to facilitate audits; verification of transactions; report to stockholders

The accounts of the Regional Corporation shall be audited annually in accordance with generally accepted auditing standards by independent certified public accountants or independent licensed public accountants, certified, or licensed by a regulatory authority of the State or the United States. The audits shall be conducted at the place or places where the accounts of the Regional Corporation are normally kept. All books, accounts, financial records, reports, files, and other papers, things, or property belonging to or in use by the Regional Corporation and

necessary to facilitate the audits shall be available to the person or persons conducting the audits; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agent, and custodians shall be afforded to such person or persons. Each audit report or a fair and reasonably detailed summary thereof shall be transmitted to each stockholder.

(p) Federal-State conflict of laws

In the event of any conflict between the provisions of this section and the laws of the state of Alaska, the provisions of this section shall prevail.

(q) Business management group; investment services contracts

Two or more Regional Corporations may contract with the same business management group for investment services and advice regarding the investment of corporate funds.

(r) Benefits for shareholders or immediate families

The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

ANCSA § 10 [43 U.S.C.. § 1609] — Limitation of actions

(a) Complaint, time for filing; jurisdiction; commencement by State official; certainty and finality of vested rights, titles, and interests

Notwithstanding any other provision of law, any civil action to contest the authority of the United States to legislate on the subject matter or the legality of this chapter shall be barred unless the complaint is filed within one year of December 18, 1971, and no such action shall be entertained unless it is commenced by a duly authorized official of the State. Exclusive jurisdiction over such action is hereby vested in the United States District Court for the District of Alaska. The purpose of this limitation on suits is to insure that, after the expiration of a reasonable period of time, the right, title, and interest of the United States, the Natives, and the State of Alaska will vest with certainty and finality and may be relied upon by all other persons in their relations with the State, the Natives, and the United States.

(b) Land selection; suspension and extension of rights

In the event that the State initiates litigation or voluntarily becomes a party to litigation to contest the authority of the United States to legislate on the subject matter or the legality of this chapter, all rights of land selection granted to the State by the Alaska Statehood Act shall be suspended as to any public lands which are determined by the Secretary to be potentially valuable for mineral development, timber, or other commercial purposes, and no selections shall be made, no tentative approvals shall be granted, and no patents shall be issued for such lands during the pendency of such litigation. In the event of such suspension, the State's right of land selection pursuant to section 6 of the Alaska Statehood Act shall be extended for a period of time equal to the period of time the selection right was suspended.

(Pub.L. 92-203, § 10, Dec. 18, 1971, 85 Stat. 696.)

ANCSA § 28 [43 U.S.C. § 1625] — Securities Law Exemption

(a) **Laws; termination date of exempt status**. A Native Corporation shall be exempt from the provisions, as amended, of the Investment Company Act of 1940 (54 Stat. 789), the Securities Act of 1933 (48 Stat. 74) and the Securities Exchange Act of 1934 (48 Stat. 881) until the earlier of the day after

(1) the date on which the corporation issues shares of stock other than Settlement Common Stock in a transaction where

(A) the transaction or the shares are not otherwise exempt from Federal securities laws; and

(B) the shares are issued to persons or entities other than

(i) individuals who held shares in the corporation on February 3, 1988;

(ii) Natives;

(iii) descendants of Natives;

(iv) individuals who have received shares of Settlement Common Stock by inheritance pursuant to section 1606(h)(2) of this title;

(v) Settlement Trusts; or

(vi) entities established for the sole benefit of Natives or descendants of Natives; or

(2) the date on which alienability restrictions are terminated; or

(3) the date on which the corporation files a registration statement with the Securities and Exchange Commission pursuant to either the Securities Act of 1933 or the Securities Exchange Act of 1934.

(b) **Status of Native Corporations after termination date**. No provision of this section shall be construed to require or imply that a Native Corporation shall, or shall not, be subject to provisions of the Acts listed in subsection (a) of this section after any of the dates described in subsection (a) of this section.

(c) **Annual report to shareholders; shareholders of record**

(1) A Native Corporation that, but for this section, would be subject to the provisions of the Securities Exchange Act of 1934 shall annually prepare and transmit to its shareholders a report that contains substantially all the information required to be included in an annual report to shareholders by a corporation subject to that Act.

(2) For purposes of determining the applicability of the registration requirements of the Securities Exchange Act of 1934 on or after the date described in subsection (a) of this section, holders of Settlement Common Stock shall be excluded from the calculation of the number of shareholders of record pursuant to section 12(g) of that Act.

(d) **Wholly owned subsidiaries; Settlement Trusts; voluntary registration as Investment Company**

(1) Notwithstanding any other provision of law, prior to January 1, 2001, the provisions of the Investment Company Act of 1940 shall not apply to any Native Corporation or any subsidiary of such corporation if such subsidiary is wholly owned (as that term is defined in the Investment Company Act of 1940) by the corporation and the corporation owns at least 95 per centum of the equity of the subsidiary.

(2) The Investment Company Act of 1940 shall not apply to any Settlement Trust.

(3) If, but for this section, a Native Corporation would qualify as an Investment Company under the Investment Company Act of 1940, it shall be entitled to voluntarily register pursuant to such Act and any such corporation which so registered shall thereafter comply with the provisions of such Act.

ANCSA § 36 [43 U.S.C. § 1629b]

(a) **Coverage**. Notwithstanding any provision of the articles of incorporation and bylaws of a Native Corporation or of the laws of the State, except those related to proxy statements and solicitations that are not inconsistent with this section

(1) an amendment to the articles of incorporation of a Native Corporation authorized by subsections (g) and (h) of section 1606 of this title, subsection (d)(1)(B) of this section, or section 1629c of this title;

(2) a resolution authorized by section 1629d(a)(2) of this title;

(3) a resolution to establish a Settlement Trust; or

(4) a resolution to convey all or substantially all of the assets of a Native Corporation to a Settlement Trust pursuant to section 1629e(a)(1) of this title;

shall be considered in accordance with the provisions of this section.

(b) **Basic procedure**

(1) An amendment or resolution described in subsection (a) of this section may be approved by the board of directors of a Native Corporation in accordance with its bylaws. If the board approves the amendment or resolution, it shall direct that the amendment or resolution be submitted to a vote of the shareholders at the next annual meeting or at a special meeting (if the board, at its discretion, schedules such special meeting). One or more such amendments or resolutions may be submitted to the shareholders and voted upon at one meeting.

(2)(A) A written notice (including a proxy statement if required under applicable law), setting forth the amendment or resolution approved pursuant to paragraph (1) (and, at the discretion of the board, a summary of the changes to be effected) together with any amendment or resolution submitted pursuant to subsection (c) of this section and the statements described therein shall be sent, not less than fifty days nor more than sixty days prior to the meeting of the shareholders, by first-class mail or hand-delivered to each shareholder of record entitled to vote at his or her address as it appears in the records of the Native Corporation. The corporation may also communicate with its shareholders at any time and in any manner authorized by the laws of the State.

(B) The board of directors may, but shall not be required to, appraise or otherwise determine the value of

(i) land conveyed to the corporation pursuant to section 1613(h)(1) of this title or any other land used as a cemetery;

(ii) the surface estate of land that is both

(I) exempt from real estate taxation pursuant to section 1636(d)(1)(A) of this title; and

(II) used by the shareholders of the corporation for subsistence uses (as defined in section 3113 of Title 16); or

(iii) land or interest in land which the board of directors believes to be only of speculative value;

in connection with any communication made to the shareholders pursuant to this subsection.

(C) If the board of directors determines, for quorum purposes or otherwise, that a previously-noticed meeting must be postponed or adjourned, it may, by giving notice to the shareholders, set a new date for such meeting not more than forty-five days later than the original date without sending the shareholders a new written notice (or a new summary of changes to be effected). If the new date is more than forty-five days later than the original date, however, a new written notice (and a new summary of changes to be effected if such a summary was originally sent pursuant to subparagraph (A)), shall be sent or delivered to shareholders not less than thirty days nor more than forty-five days prior to the new date.

(c) **Shareholder petitions**

(1)(A) With respect to an amendment authorized by section 1606(g)(1)(B) of this title or section 1629c(b) of this title or an amendment authorizing the issuance of stock subject to the restrictions provided by section 1606(g)(2)(B)(iii) of this title, the holders of shares representing at least 25 per centum of the total voting power of a Native Corporation may petition the board of directors to submit such amendment to a vote of the shareholders in accordance with the provisions of this section.

(B) The requirements of the laws of the State relating to the solicitation of proxies shall govern solicitation of signatures for a petition

described in subparagraph (A) except that the requirements of Federal law shall govern the solicitation of signatures for a petition that is to be submitted to a Native Corporation which at the time of such submission has issued a class of equity securities registered pursuant to the Securities Exchange Act of 1934. If a petition meets the applicable solicitation requirements and

(i) the board agrees with such petition, the board shall submit the amendment and either the proponents' statement or its own statement in support of the amendment to the shareholders for a vote, or

(ii) the board disagrees with the petition for any reason, the board shall submit the amendment and the proponents' statement to the shareholders for a vote and may, at its discretion, submit an opposing statement or an alternative amendment.

(2) Paragraph (1) shall not apply to a Native Corporation that on or before the date one year after February 3, 1988 elects application of section 1629c(d) of this title in lieu of section 1629c(b) of this title. Until December 18, 1991, paragraph (1) shall not apply to a Native Corporation that elects application of section 1629c(c) of this title in lieu of section 1629c(b) of this title. Insofar as they are not inconsistent with this section, the laws of the State shall govern any shareholder right of petition for Native Corporations.

(d) **Voting standards**

(1) Except as otherwise set forth in subsection (3) of this section, an amendment or resolution described in subsection (a) shall be considered to be approved by the shareholders of a Native Corporation if it receives the affirmative vote of shares representing

(A) a majority of the total voting power of the corporation, or

(B) a level of the total voting power of the corporation greater than a majority (but not greater than two-thirds of the total voting power of the corporation) if the corporation establishes such a level by an amendment to its articles of incorporation.

(2) A Native Corporation in amending its articles of incorporation pursuant to section 1606(g)(2) of this title to authorize the issuance of a new class or series of stock may provide that a majority (or more than a majority) of the shares of such class or series must vote in favor of an amendment or resolution described in subsection (a) of this section (other than an amendment authorized by

section 1629c of this title) in order for such amendment or resolution to be approved.

(3) A resolution described in subsection (a)(3) or an amendment to articles of incorporation under section 7(g)(1)(B) shall be considered to be approved by the shareholders of a Native Corporation if it receives the affirmative vote of shares representing--

(A) a majority of the shares present or represented by proxy at the meeting relating to the resolution or amendment to the articles of incorporation; or

(B) an amount of shares greater than a majority of the shares present or represented by proxy at the meeting relating to the resolution or amendment to the articles of incorporation (but not greater than two-thirds of the total voting power of the corporation) if the corporation establishes such a level by an amendment to its articles of incorporation.

(e) **Voting power**. For the purposes of this section, the determination of total voting power of a Native Corporation shall include all outstanding shares of stock that carry voting rights except shares that are not permitted to vote on the amendment or resolution in question because of restrictions in the articles of incorporation of the corporation.

(f) **Substantially All of the Assets**. For purposes of this section and section 1629e of this title, a Native Corporation shall be considered to be transferring all or substantially all of its assets to a Settlement Trust only if such assets represent two-thirds or more of the fair market value of the Native Corporation's total assets.

ANCSA § 37 [43 U.S.C. § 1629c]

(a) **General rule**. Alienability restrictions shall continue until terminated in accordance with the procedures established by this section. No such termination shall take effect until after July 16, 1993: Provided, however, That this prohibition shall not apply to a Native Corporation whose board of directors approves, no later than March 1, 1992, a resolution (certified by the corporate secretary of such corporation) electing to decline the application of such prohibition.

(b) **Opt-out procedure**

(1)(A) A Native Corporation may amend its articles of incorporation to terminate alienability restrictions in accordance with this subsection. Only one amendment to terminate alienability restrictions shall be considered and voted on prior to December 18, 1991. Rejection of the amendment shall not preclude consideration prior to December 18, 1991, of subsequent amendments to terminate alienability restrictions.

(B) If an amendment to terminate alienability restrictions is considered, voted on, and rejected prior to December 18, 1991, then subsequent amendments to terminate alienability restrictions after December 18, 1991, shall be considered and voted on

(i) in the case of an amendment submitted by the board of directors of the corporation on its own motion, not earlier than five years after the rejection of the most recently rejected amendment to terminate restrictions; or

(ii) in the case of an amendment submitted by the board of directors of the corporation pursuant to a shareholder petition, not earlier than two years after the rejection of the most recently rejected amendment to terminate restrictions.

(C) If no amendment to terminate alienability restrictions is considered and voted on prior to December 18, 1991, then amendments to terminate alienability restrictions after December 18, 1991, shall be considered and voted on

(i) in the case of an amendment submitted by the board of directors of the corporation on its own motion, not more than once every five years; or

(ii) in the case of an amendment submitted by the board of directors of the corporation pursuant to a shareholder petition, not more than once every two years.

(2) An amendment authorized by paragraph (1) shall specify the time of termination, either by establishing a date certain or by describing the specific event upon which alienability restrictions shall terminate.

(3) Dissenters rights may be granted by the corporation in connection with the rejection of an amendment to terminate alienability restrictions in accordance with section 1629d of this title. Once dissenters rights have been so granted, they shall not be granted again in connection with subsequent amendments to terminate alienability restrictions.

(c) **Recapitalization procedure**

(1)(A) On or prior to December 18, 1991, a Native Corporation may amend its articles of incorporation to implement a recapitalization plan in accordance with this subsection. Rejection of an amendment or amendments to implement a recapitalization plan shall not preclude consideration prior to December 18, 1991, of a subsequent amendment or amendments to implement such a plan. Subsequent amendment or amendments shall be considered and voted on not earlier than one year after the date on which the most recent previous recapitalization plan was rejected. No recapitalization plan shall provide for the termination of alienability restrictions prior to December 18, 1991.

(B) An amendment or amendments submitted pursuant to subparagraph (A) (and any subsequent amendment submitted pursuant to subparagraph (C)) may provide for the maintenance or extension of alienability restrictions for

(i) an indefinite period of time;

(ii) a specified period of time not to exceed fifty years; or

(iii) a period of time that shall end upon the occurrence of a specified event.

(C) If an amendment or amendments approved pursuant to subparagraph (A) or this subparagraph maintains or extends alienability restrictions for a specified period of time, termination of the restrictions at the close of such

period may be postponed if a further amendment to the articles of incorporation of the corporation is approved to extend the restrictions. There shall be no limit on the number of such amendments that can be approved. Such amendments shall not be effective to extend the restrictions unless approved prior to the expiration of the period of maintenance or extension then in force.

(D) The board of directors may ask the shareholders to approve en bloc pursuant to a single vote a series of amendments (including an amendment to authorize the issuance of stock pursuant to section 1606(g) of this title) to implement a recapitalization plan that includes a provision maintaining alienability restrictions.

(2)(A) If an amendment to the articles of incorporation of a Native Corporation maintaining or extending alienability restrictions for a specified period of time is approved pursuant to paragraph (1), the restrictions shall automatically terminate at the end of such period unless the restrictions are extended in accordance with the provisions of paragraph (1)(C).

(B)(i) A Native Corporation that approves an amendment to its articles of incorporation pursuant to paragraph (1)(B) to maintain or extend alienability restrictions for an indefinite period may later amend its articles to terminate such restrictions. Such amendment shall specify the time of termination, either by establishing a date certain or by describing the specific event upon which the restrictions shall terminate.

(ii) Rejection of an amendment described in clause (i) by the shareholders shall not preclude consideration of subsequent amendments to terminate alienability restrictions.

(3) If a recapitalization plan approved pursuant to paragraph (1) distributes voting alienable common stock to each holder of shares of Settlement Common Stock (issued pursuant to section 1606(g)(1)(A) of this title) that carries aggregate dividend and liquidation rights equivalent to those carried by such shares of Settlement Common Stock (except for rights to distributions made pursuant to sections 1606(j) and 1606(m) of this title) upon completion of the recapitalization plan, then such holder shall have no right under section 1629d of this title and any other provision of law to further compensation from the corporation with respect to action taken pursuant to this subsection.

(d) **Opt-in procedure**

(1)(A) Subsection (b) of this section shall not apply to a Native Corporation whose board of directors approves, no later than one year after February 3, 1988, a resolution electing the application of this subsection and such resolution is not validly rescinded pursuant to paragraph (2)(B)(ii).

(B) This subsection shall not apply to Village Corporations, Urban Corporations, and Group Corporations located outside of the Bristol Bay and Aleut regions.

(2)(A) Alienability restrictions imposed on Settlement Common Stock issued by a Native Corporation electing application of this subsection shall terminate on December 18, 1991, unless extended in accordance with the provisions of this subsection.

(B)(i) The board of directors of a Native Corporation electing application of this subsection shall, at least once prior to January 1, 1991, approve, and submit to a vote of the shareholders, an amendment to the articles of incorporation of the corporation to extend alienability restrictions. If the amendment is not approved by the shareholders, the board of directors may submit another such amendment to the shareholders once or more a year until December 18, 1991.

(ii) In lieu of approving the amendment to the articles of incorporation described in clause (i) and submitting such amendment to a vote of the shareholders, at any time prior to January 1, 1991, the board of directors of a Native Corporation that has approved a resolution described in paragraph (1)(A) may approve a new resolution rescinding that prior resolution. Upon approval of the new resolution rescinding a resolution described in paragraph (1)(A), the latter resolution shall be void and alienability restrictions on the Settlement Common Stock of such corporation shall continue subsequent to December 18, 1991, until such time as the alienability restrictions are terminated pursuant to the procedure described in subsection (b) of this section.

(iii) Notwithstanding any other provision of law, a civil action that challenges the constitutionality of any provision in clause (ii) shall be barred unless it is filed within one year after the date of the vote of the board of directors approving a resolution to rescind a prior opt-in election under paragraph (1)(A). Any such civil action shall be filed in accordance with section 16(b) of the Alaska Native Claims Settlement Act Amendments of 1987 (101 Stat. 1813-1814).

(C) An amendment submitted pursuant to subparagraph (B) and any amendment submitted pursuant to subparagraph (D) may provide for an extension of alienability restrictions for

(i) an indefinite period of time, or

(ii) a specified period of time of not less than one year and not more than fifty years.

(D) If an amendment approved by the shareholders of a Native Corporation pursuant to subparagraph (B) or this subparagraph extends alienability restrictions for a specified period of time, termination of the restrictions at the close of such period may be postponed if a further amendment to the articles of incorporation of the corporation is approved to extend the restrictions. There shall be no limit on the number of such amendments that can be approved. Such amendments shall not be effective to extend the restrictions unless approved prior to the expiration of the period of extension then in force.

(3)(A) If an amendment to the articles of incorporation of a Native Corporation extending alienability restrictions for a specified period of time is approved pursuant to paragraph (2), the restrictions shall automatically terminate at the end of such period unless the restrictions are extended in accordance with the provisions of paragraph (2)(D).

(B) If the board of directors of a Native Corporation electing application of this subsection does not submit for a shareholder vote an amendment to the articles of incorporation of the corporation in accordance with paragraph (2)(B), or if the amendment submitted does not comply with paragraph (2)(C), alienability restrictions shall not terminate and shall instead remain in effect until such time as a court of competent jurisdiction, upon petition of one or more shareholders of the corporation, orders that a shareholder vote be taken on an amendment which complies with paragraph (2)(C) and such vote is conducted. Following the vote, the status of alienability restrictions shall be determined in accordance with the other provisions of this subsection and the amendment, if approved.

(4)(A) A Native Corporation that approves an amendment to its articles of incorporation pursuant to paragraph (2) to extend alienability restrictions for an indefinite period of time may later amend its articles of incorporation to terminate the restrictions. Such amendment shall specify the time of termination, either by establishing a date certain or by describing the specific event upon which the restrictions shall terminate.

(B) The rejection of an amendment described in subparagraph (A) by the shareholders shall not preclude consideration of subsequent amendments to terminate alienability restrictions.

(5)(A) If a Native Corporation amends its articles of incorporation pursuant to paragraph (2) to extend alienability restrictions, a shareholder who

(i) voted against such amendment, and

(ii) desires to relinquish his or her Settlement Common Stock in exchange for the stock or payment authorized by the board of directors pursuant to subparagraph (B),

shall notify the Corporation within ninety days of the date of the vote of the shareholders on the amendment of his or her desire.

(B) Within one hundred and twenty days after the date of the vote described in subparagraph (A), the board of directors shall approve a resolution to provide that each shareholder who has notified the corporation pursuant to subparagraph (A) shall receive either

(i) alienable common stock in exchange for his or her Settlement Common Stock pursuant to paragraph (6), or

(ii) an opportunity to request payment for his or her Settlement Common Stock pursuant to section 1629d(a)(1)(B) of this title.

(C) This paragraph shall apply only to the first extension of alienability restrictions approved by the shareholders. No dissenters rights of any sort shall be permitted in connection with subsequent extensions of such restrictions.

(6)(A) If the board of directors of a Native Corporation approves a resolution providing for the issuance of alienable common stock pursuant to paragraph (5)(B), then on December 18, 1991, or sixty days after the approval of the resolution, whichever later occurs, the Settlement Common Stock of each shareholder who has notified the corporation pursuant to paragraph (5)(A) shall be deemed canceled, and shares of alienable common stock of the appropriate class shall be issued to such shareholder, share for share, subject only to subparagraph (B) and to such restrictions consistent with this chapter as may be provided by the articles of incorporation of the corporation or in agreements between the corporation and individual shareholders.

(B)(i) Alienable common stock issued in exchange for Settlement Common Stock issued subject to the restriction authorized by section 1606(g)(1)(B)(iii) of this title shall bear a legend indicating that the stock will eventually be canceled in accordance with the requirements of that section.

(ii) Alienable common stock issued in exchange for a class of Settlement Common Stock carrying greater per share voting power than Settlement Common Stock issued pursuant to subsections (g)(1)(A) and (g)(1)(B) of this section shall carry such voting power and be subject to such other terms as may be provided in the amendment to the articles of incorporation authorizing the issuance of such class of Settlement Common Stock.

(iii) In the resolution authorized by paragraph (5)(B), the board of directors shall provide that each share of Settlement Common Stock carrying the right to share in distributions made to shareholders pursuant to subsections (j) and (m) of section 1606 of this title shall be exchanged either for

(I) a share of alienable common stock carrying such right, or

(II) a share of alienable common stock that does not carry such right together with a separate, non-voting security that represents only such right.

(iv) In the resolution authorized by paragraph (5)(B), the board of directors may impose upon the alienable common stock to be issued in exchange for Settlement Common Stock one or more of the following

(I) a restriction granting the corporation, or the corporation and members of the shareholder's immediate family who are Natives or descendants of Natives the first right to purchase, on reasonable terms, the alienable common stock of the shareholder prior to the sale or transfer of such stock (other than a transfer by will or intestate succession) to any other party, including a transfer in satisfaction of a lien, writ of attachment, judgment execution, pledge, or other encumbrance; or

(II) any other term, restriction, limitation, or other provision permitted under the laws of the State.

(C) The articles of incorporation of the Native Corporation shall be deemed amended to implement the provisions of the resolution authorized by paragraph (5)(B).

(D) Alienable common stock issued pursuant to this subparagraph shall not be subjected to a lien or judgment execution based upon any asserted or unasserted legal obligation of the original recipient arising prior to the issuance of such stock.

(7)(A) No share of alienable common stock issued pursuant to paragraph (6) shall carry voting rights if it is owned, legally or beneficially, by a person not a Native or a descendant of a Native.

(B)(i) A purchaser or other transferee of shares of alienable common stock shall, as a condition of the obligation of the issuing Native Corporation to transfer such shares on the books of the corporation, deliver to the corporation or transfer agent, as the case may be, a statement on a form prescribed by the corporation identifying the number of such shares to be transferred to such transferee and certifying

(I) that such transferee is or is not a Native or a descendant of a Native;

(II) that such transferee, if not a Native or a descendant of a Native understands that shares of such alienable common stock shall not carry voting rights so long as such shares are held by the transferee or any subsequent transferee not a Native or a descendant of a Native;

(III) that such transferee, if a purchaser, understands that such acquisition may be subject to section 78m(d) of Title 15, as amended, and the regulations of the Securities and Exchange Commission promulgated thereunder; and

(IV) whether such transferee will be the sole beneficial owner of such shares (if not, the transferee must certify as to the identities of all beneficial owners of such shares and whether such owners are Natives or descendants of Natives).

(ii) The statement required by clause (i) shall be prima facie evidence of the matters certified therein and may be relied upon by the corporation in effecting a transfer on its books.

(iii) For purposes of this subparagraph, a beneficial owner of a security includes any person (including a corporation, partnership, trust, association, or other entity) who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares

(I) voting power, which includes the power to vote, or to direct the voting of, such security; or

(II) investment power, which includes the power to dispose of, or to direct the disposition of, such security.

(iv) Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement, or any other contract, arrangement, or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the requirements imposed by this section or section 78m(d) of Title 15, as amended, shall be deemed for purposes of such sections to be the beneficial owner of such security.

(C) The statement required by subparagraph (B) shall be verified by the transferee before a notary public or other official authorized to administer oaths in accordance with the laws of the jurisdiction of the transferee or in which the transfer is made.

ALASKA STATUTES

ALASKA CORPORATIONS CODE, AS 10.06

AS 10.06.504. Procedure to amend articles of incorporation; application to certain elections.

(a) A corporation shall amend its articles of incorporation in the following manner:

(1) if shares have not been issued, the board shall adopt a resolution setting out the proposed amendment or amendments;

(2) subject to AS 10.06.506 , if shares have been issued, an amendment shall be approved by the board and the outstanding shares; approval may be initiated by the shareholders either before or after consideration by the board; if the board adopts a resolution setting out a proposed amendment, the board shall direct that the amendment be submitted to a vote at a meeting of shareholders that may be either the annual or a special meeting; if approval of the outstanding shares is obtained before action by the board, the board shall consider and either approve or reject the amendment at the next regular or special meeting;

(3) unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more of the following amendments to the articles of incorporation without shareholder action:

(A) to delete the names and addresses of the initial directors;

(B) to delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the commissioner; or

(C) to change each issued and unissued authorized share of an outstanding class into a greater number of whole shares if the corporation has only shares of that class outstanding.

(b) A proposed amendment may be contained in restated articles of incorporation that contain

(1) a statement that except for the designated amendment the restated articles correctly set out without change the provisions of the articles being amended; and

(2) a statement that the restated articles together with the designated amendment supersede the original articles and all amendments to the original articles.

(c) Written notice setting out the proposed amendment or amendments or a summary of the changes to be made shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this chapter for the giving of notice of meetings of shareholders. If the amendment is to be considered at an annual meeting, the proposed amendment or summary may be included in the notice of the annual meeting.

(d) The requirement of an affirmative vote of at least two-thirds of the shares entitled to vote for the adoption of an amendment to the articles of incorporation as provided in former AS 10.05.276 shall remain in force for corporations existing before July 1, 1989.

(e) Notwithstanding (d) of this section, an election to be governed by the voting provisions of AS 10.06.504 - 10.06.506, may be made in the same manner as an amendment to the articles of incorporation is made under those sections. An election under this subsection requires the affirmative vote of at least two-thirds of the shares entitled to vote under former AS 10.05.276 (3).

ALASKA SECURITIES ACT, AS 45.55

AS 45.55.138. Application to Alaska Native Claims Settlement Act Corporations.

The initial issue of stock of a corporation organized under Alaska law pursuant to 43 U.S.C. 1601 et seq. (Alaska Native Claims Settlement Act) is not a sale of a security under AS 45.55.070 and 45.55.990(28).

AS 45.55.139. Reports of corporations.

A copy of all annual reports, proxies, consents or authorizations, proxy statements, and other materials relating to proxy solicitations distributed, published, or made available by any person to at least 30 Alaska resident shareholders of a corporation that has total assets exceeding $1,000,000 and a class of equity security held of record by 500 or more persons and which is exempted from the registration

requirements of AS 45.55.070 by AS 45.55.138 , shall be filed with the administrator concurrently with its distribution to shareholders.

Sec. 45.55.160. Misleading filings.

A person may not, in a document filed with the administrator or in a proceeding under this chapter, make or cause to be made an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

AS 45.55.920. Orders, injunctions, and civil penalties.

(a) If it appears to the administrator that a person has engaged or is about to engage in an act or practice in violation of a provision of this chapter or regulation or order under this chapter, the administrator may

(1) in the public interest or for the protection of investors, issue an order

(A) directing the person to cease and desist from continuing the act or practice;

(B) directing the person, for a period not to exceed three years, to file the annual reports, proxies, consents or authorizations, proxy statements, or other materials relating to proxy solicitations required under AS 45.55.139 with the administrator for examination and review 10 working days before a distribution to shareholders; and

(C) voiding the proxies obtained by a person required to file under AS 45.55.139 , including their future exercise or actions resulting from their past exercise, if the proxies were solicited by means of an untrue or misleading statement prohibited under AS 45.55.160 ; or

(2) bring an action in the superior court to enjoin the acts or practices and to enforce compliance with this chapter or regulation or order under this chapter, and upon a proper showing, the appropriate remedy must be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets; the court may not require the administrator to post a bond.

(b) The administrator may issue an order against an applicant, registered person, or other person who knowingly or intentionally violates this chapter or a

regulation or order of the administrator under this chapter, imposing a civil penalty of not more than $2,500 for a single violation, or not more than $25,000 for multiple violations, in a single proceeding or a series of related proceedings.

(c) For violations not covered by (b) of this section, the administrator may issue an order against an applicant, registered person, or other person who violates this chapter or a regulation or order of the administrator under this chapter, imposing a civil penalty of not more than $500 for a single violation, or not more than $5,000 for multiple violations, in a single proceeding or a series of related proceedings.

(d) Before issuing an order under (a)(1), (b), or (c) of this section, the administrator shall give reasonable notice of and an opportunity for a hearing. However, the administrator may issue a temporary order under (a)(1) of this section pending the hearing, which remains in effect until 10 days after the hearing is held and which becomes final if the person to whom notice is addressed does not request a hearing within 15 days after the receipt of notice.

(e) After an order issued by the administrator under (b) or (c) of this section becomes final and all rights of appeal are exhausted, the administrator may petition the superior court to enter a judgment against a person who is a respondent in the order for the amount of the civil penalty levied against the person. Subject to AS 44.62.570 , the filing of the petition for a judgment does not reopen the final order to further substantive review unless the court orders otherwise. A judgment entered under this subsection may be executed on and levied under in the manner provided in AS 09.35.

AS 45.55.925. Criminal penalties.

(a) In addition to the civil penalties assessed under AS 45.55.920, a person who willfully violates a provision of this chapter except AS 45.55.030 (e), 45.55.040(h), 45.55.075, or 45.55.160, or who willfully violates a regulation or order under this chapter, or who willfully violates AS 45.55.160 knowing the statement made to be false or misleading in a material respect or the omission to be misleading by any material respect, upon conviction, is punishable by a fine of not more than $5,000, or by imprisonment for not less than one year nor more than five years, or both. Upon conviction of an individual for a felony under this chapter, imprisonment for not less than one year is mandatory. However, an individual may not be imprisoned for the violation of a regulation or order if the individual proves that the individual had no knowledge of the regulation or order. An indictment or

information may not be returned under this chapter more than five years after the alleged violation.

(b) The administrator may refer the evidence that is available concerning violations of this chapter or a regulation or order under this chapter to the attorney general who may, with or without a reference, institute appropriate criminal proceedings under this chapter.

(c) Nothing in this chapter limits the power of the state to punish a person for conduct that constitutes a crime by statute or at common law.

AS 45.55.935. Hearings.

(a) The administrator shall adopt regulations, consistent with the provisions of this chapter and with regulations adopted under AS 44.64.060, governing administrative hearings conducted by the office of administrative hearings (AS 44.64.010) for the following:

(1) orders issued under AS 45.55.120 , 45.55.900(d), or 45.55.920; in these instances, the administrator shall promptly send a notice of opportunity for hearing to the issuer of the securities and to all persons who have filed with the department a notice of intention to sell the securities; and

(2) orders issued under AS 45.55.060 ; before the administrator enters an order under AS 45.55.060 , the administrator shall send to the person involved a notice of opportunity for hearing; if the person involved is an agent or investment adviser representative, then the administrator shall, in addition, notify the employing broker-dealer, state investment adviser, federal covered adviser, or issuer.

(b) In conducting a hearing in accordance with (a) of this section, the administrative law judge may issue a subpoena to compel the attendance of any witness or party and to compel production of evidence.

Alaska Administrative Code

3 AAC 08.315. False or misleading statements

(a) A solicitation may not be made by means of a proxy statement, proxy, notice of meeting, or other communication that contains a material misrepresentation. A misrepresentation is a statement that, at the time and under the circumstances in which it is made (1) is false or misleading with respect to a material fact; (2) omits a material fact necessary in order to make a statement made in the solicitation not false or misleading; or (3) omits a material fact necessary to correct a statement, in an earlier communication regarding the solicitation of a proxy for the same meeting or subject matter, which has become false or misleading. A misrepresentation is material if there is substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. A series of statements or omissions that are objectively false or misleading, but which might not be material misrepresentations if considered separately, might be material misrepresentations if there is a substantial likelihood that a reasonable shareholder would consider the series important in deciding how to vote. Subjective proof that one or more shareholders actually granted a proxy because of a misrepresentation is not required. The following are some examples of what, depending upon particular facts and circumstances, might be misleading within the meaning of 3 AAC 08.305 - 3 AAC 08.365:

(1) predictions as to specific future market values;

(2) material that directly or indirectly impugns character, integrity, or personal reputation, or directly or indirectly makes charges concerning improper, illegal, or immoral conduct or associations, without factual foundation;

(3) failure to identify a proxy statement, proxy, or other soliciting material so as to distinguish it clearly from the soliciting material of any other person soliciting for the same meeting or subject matter;

(4) claims made before a meeting regarding the results of a solicitation; and

(5) regarding the election of directors, failure to disclose the existence of an agreement or understanding among two or more nominees, proxyholders, or other participants with respect to voting of proxies, and failure to disclose the material provisions of such an agreement or understanding, in circumstances where such

participants appear to solicit proxies independently or where there is no apparent affiliation among such participants.

(b) The fact that a proxy statement, proxy, or other soliciting material has been filed with or examined by the administrator under AS 45.55.139 is not a finding by the administrator that the material is accurate or complete or not false or misleading, or that the administrator has passed upon the merits of or approved any statement contained in the solicitation or any matter to be acted upon by shareholders. No representation to the contrary may be made.

(c) The administrator may require a person who has brought to his attention a solicitation which the person believes contains materially false or misleading statements to explain the reasons for his view in writing.

History: Eff. 1/4/81, Register 77; am 11/27/88, Register 108

Authority: AS 45.55.138

3 AAC 08.930. Hearings

(a) The administrator or the administrator's designated hearing officer will hold hearings under AS 45.55.935 upon written request by any person aggrieved by any act or failure to act of the administrator or by any report, ruling, or order of the administrator. The written request for hearing must specify the grounds to be relied upon as a basis for the relief requested at the hearing. The administrator or the hearing officer will, in the administrator's discretion, hold hearings upon the administrator's own motion, under AS 45.55.935 .

(b) Upon receipt of written request for a hearing, the administrator will, within 30 days from the receipt of the request, either schedule the matter for hearing or vacate in writing the order that the request concerns. The hearing shall take place no later than 90 days after the request is received by the administrator. If a delay is made necessary because of exigencies beyond the control of the parties or the hearing officer, application may be made to the administrator for an extension of time for good cause shown.

(c) At least 10 days advance notice of the hearing will be given to all persons directly affected by the hearing. In the notice of hearing the administrator will or the hearing officer shall include

(1) the time and place of the hearing;

(2) a statement of the matters to be considered;

(3) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(4) references to the particular sections of AS 45.55 or this chapter that are involved.

(d) The parties shall, no later than 20 days before the hearing, exchange those documents they intend to introduce at the hearing. A party may not obtain additional discovery, except upon a motion that demonstrates, to the satisfaction of the administrator or hearing officer, that good cause exists for additional discovery, and that additional discovery is to be limited to those areas that are relevant to the matter to be heard. Discovery must be completed at least 10 days before the hearing.

(e) Any person who is a party to the hearing before the administrator and who may be adversely affected by the order of the administrator may have subpoenas issued to any witness on that person's behalf in accordance with AS 44.62.430 . The party or the party's counsel is responsible for timely service of the subpoenas.

(f) Any person affected by the hearing may appear in person or by counsel. That person or counsel may be present during the giving of evidence, may have a reasonable opportunity to examine and inspect all documentary evidence, may examine witnesses, and may present evidence on counsel's client's behalf.

(g) The following rules of evidence apply in hearings held under this section:

(1) oral evidence will be taken only on oath or affirmation;

(2) each party may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on matters relevant to the issues, including matters not covered in the direct examination, impeach a witness regardless of which party first called the witness to testify, and rebut the evidence against that party;

(3) witnesses must give testimony relevant to the issue; upon objection of any party, the party calling the witness must make an offer of proof as to the witnesses'

testimony and its relevance; repetitive witnesses are not allowed, unless for extraordinary good cause;

(4) if the respondent does not testify in the respondent's own behalf, the respondent may be called and examined as if under cross-examination;

(5) the hearing need not be conducted according to technical rules relating to evidence and witnesses; relevant evidence, as defined at Rule 401 of the Alaska Rules of Evidence, must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action; hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action; the rules of privilege are effective to the same extent that they are recognized in a civil action; irrelevant and unduly repetitious evidence will be excluded.

(h) A record of all hearings will be made. Upon reasonable request made by any person affected by the hearing, and at that person's expense, a full stenographic record of the proceedings will be made. When a transcription is made part of the records of the division, any person having a direct interest in it will be furnished with a copy of the stenographic or electronic record at the requestor's expense.

(i) The record in a hearing includes the following:

(1) all pleadings, motions, and intermediate rulings;

(2) all evidence received or considered, including a statement of matters officially noted;

(3) questions or offers of proof, objections, and rulings on them;

(4) proposed findings and exceptions;

(5) the proposed decision, opinion, report, or order of the hearing officer, or the decision, opinion, report, or order of the administrator, if the hearing is conducted by the administrator.

(j) If the matter is heard before a hearing officer, the hearing officer shall make recommended findings of fact and conclusions of law to be presented within 10 days of the termination of the hearing to the administrator for adoption, amendment, or rejection. The administrator shall, within 10 days of receiving the hearing officer's recommendations, make a final order or remand the matter to the hearing officer for additional findings. If the matter is heard before the administrator, the administrator shall make a final order within 10 days of the termination of a hearing. A final order will be in writing. A final order will include findings of fact and conclusions of law. All findings of fact will be based exclusively on the evidence presented and on matters officially noticed. Findings of fact will be accompanied by a concise and explicit statement of the underlying facts supporting the findings. A copy of a final order will be delivered or mailed to each party affected or to that party's attorney of record within 10 days of the termination of the hearing or 10 days after the hearing officer makes the recommendation to the administrator.

(k) The administrator will, in the administrator's discretion, grant a rehearing to any aggrieved party if the party makes a written request within 10 days after the final order is mailed to the person entitled to receive it. A party requesting rehearing must set out one or more of the following grounds:

(1) newly discovered evidence or newly available evidence relevant to the issues;

(2) a need for additional evidence to develop the facts essential to a proper decision;

(3) probable error committed in the proceeding or in the administrator's decision that would be grounds for reversal on judicial review of the order;

(4) the need for further consideration of the issues and the evidence in the public interest.

(*l*) A rehearing is limited to those grounds upon which the rehearing was requested or granted. However, the administrator will, in the administrator's discretion, rehear, reopen, or reconsider any matter

(1) in accordance with other applicable statutory provisions; or

(2) on the grounds of

(A) fraud by the prevailing party; or

(B) procurement of the order by perjured testimony or fictitious evidence.

(m) An order or decision resulting from a rehearing will be delivered or mailed to each party affected and to that party's attorney of record within 10 days after termination of the rehearing.

History: Eff. 1/10/78, Register 65; am 4/19/2000, Register 154

Authority: AS 45.55.060

AS 45.55.120

AS 45.55.900

AS 45.55.920

AS 45.55.935

AS 45.55.950