


ANVCA 

**Ahmasuk v. State of Alaska,
Division of Banking and
Securities – A Challenge to
Alaska’s Proxy Regulations**

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FORMAT OF PRESENTATION

- **Part 1 – Laws governing the proxy solicitation process for Alaska Native Corporations (ANCs)**
 - Overview of regulatory framework
 - Filing requirements
 - Substantive content of proxy materials
 - Case Studies
- **Part 2 – Ahmasuk v. State of Alaska, Division of Banking and Securities**
 - Overview/background
 - Arguments of both parties
 - Potential impacts to ANCs

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2

Part 1

Laws governing the proxy solicitation process for Alaska Native Corporations (ANCs)

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3

OVERVIEW OF REGULATORY FRAMEWORK

- **What is the Alaska Division of Banking and Securities?**
 - A Division of the State of Alaska's Department of Commerce, Community, and Economic Development.
 - Exists to, among other things, administer the Alaska Securities Act and associated regulations.
- **What is the Alaska Securities Act?**
 - Regulation of sales and registration of stock.
 - Exercise of shareholder rights within corporations subject to the Act.

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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 that 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.

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What is a "proxy?"

- "[P]roxy" means a written authorization which may take the form of a consent, revocation of authority, or failure to act or dissent, signed by a shareholder or his attorney-in-fact and **giving another person power to vote with respect to the shares of the shareholder[.]**
 - 3 AAC 08.365(12)

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What is a "proxy statement?"

- "[P]roxy statement" means a letter, publication, press release, advertisement, radio/television script or tape, or **other communication of any type** which is made available to shareholders **under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy**[,]
 - 3 AAC 08.365(14)
 - Additional requirements under 3 AAC 08.345 for submission of dated, written "proxy statement" for Board solicitations.
 - Analogous provision under 3 AAC 08.355 for non-Board solicitations.

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What is a "solicitation?"

- Under 3 AAC 08.365(16), "solicitation" means:
 - (A) a request to execute or not to execute, or to revoke a proxy
 - (B) the distributing of a proxy or **other communication to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy**
 - Examples:
 - I think you should vote your proxy for X candidate.
 - Incumbent members of the board of directors are engaged in gross waste of corporate assets and giving away our lands for pennies on the dollar.
 - Note that under Division rulings, this does not require that the "communication" specifically ask shareholders to vote in any particular way. A "communication" can be "reasonably calculated to result in the procurement, withholding, or revocation of a proxy" by suggesting that a candidate engaged in misconduct.

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FILING REQUIREMENTS

- Filing requirements of AS 45.55.139.
 - 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** ...
 - Filing with the Division concurrently at time of distribution or proxy activity.
- » More specific requirements under 3 AAC 08.307.



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Filing requirements

- Electronic posts
 - The filing requirements are quite broad.
 - They apply to online posts on websites like Facebook, including "closed" Facebook pages
 - 3 AAC 08.312(a) – "A person who posts an annual report, proxy, consent or authorization, proxy statement, or **other material relating to proxy solicitation on the Internet, including on an electronic forum**, is responsible for filing it with the administrator as required by AS 45.55.139 **and for ensuring it complies with 3 AAC 08.300 - 3 AAC 08.365."**
 - 3 AAC 08.312(b) – A posting on an electronic forum is **presumed** to be distributed, published, or made available to at least 30 Alaska resident shareholders under AS 45.55.139.

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SUBSTANTIVE CONTENT

- AS 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.

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Substantive Content

- Broader definition under 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.**

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Requirements as to proxy

- 3 AAC 08.335 – Requirements of the proxy card itself
 - (a) A proxyholder shall either attend the shareholders' meeting in person or execute a power of substitution so that the shares for which the proxyholder has proxies are represented at the meeting.
 - (b) A proxyholder shall vote in accordance with any choices made by the shareholder or in the manner provided by the proxy when the shareholder has not specified a choice.
 - (c) The proxy must
 - (1) indicate that the proxy is solicited on behalf of the board or, if solicited other than by the board, indicate the identity of the persons on whose behalf the solicitation is made;
 - (2) provide a specifically designated blank space for dating the proxy; and
 - (3) provide a means for the shareholder to specify by boxes a choice between approval or disapproval of each matter or group of related matters identified in the proxy as intended to be acted upon, other than the election of directors.

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Requirements as to proxy

- 3 AAC 08.335
 - (d) A proxy may confer authority for matters on which a choice is not made by the shareholder if the proxy discloses how the shares represented by the proxy will be voted in each case.
 - (e) A proxy that provides for the election of directors must
 - (1) set out the names of the nominees for whom the proxy is solicited; and
 - (2) clearly provide one of the following:
 - (A) a box opposite the name of each nominee which may be marked to indicate that authority to vote for that nominee is withheld;
 - (B) an instruction that the shareholder may withhold authority to vote for a nominee by lining through or otherwise striking out the name of that nominee;
 - (C) a "ballot" type of selection in which the shareholder is permitted to award votes to selected nominees of the shareholder's choosing.

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Requirements as to proxy

- 3 AAC 08.335
 - (f) A proxy may confer discretionary authority to vote only with respect to the following:
 - (1) matters which the persons making the solicitation do not know, a reasonable time before the solicitation, are to be presented at the meeting;
 - (2) approval of the minutes of the prior meeting if the approval does not amount to ratification of the action taken at that meeting;
 - (3) the election of a person to an office for which a bona fide nominee is named in the proxy statement and the nominee is unable to serve or for good cause will not serve;
 - (4) a proposal omitted from the proxy statement and proxy, if solicited for an annual meeting by participants other than the board; or
 - (5) matters incident to the conduct of the meeting.
 - (g) If action is to be taken on the election of directors and if the shareholders have cumulative voting rights, a proxy may confer discretionary authority to cumulate votes.

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Proxy statement required for non-board solicitations

- 3 AAC 08.355 (Non-Board solicitation)
 - Before or at the time of Non-Board proxy **solicitation** on behalf of a **participant**, certain disclosures must be made to shareholders *and* filed with the Division.
 - Recall the definition of **"solicitation."**
 - (A) a request to execute or not to execute, or to revoke a proxy; or
 - (B) the distributing of a proxy or other communication to shareholders under circumstances reasonably calculated to result in the procurement, withholding, or revocation of a proxy
 - Definition of **"participant."**
 - Includes ... (B) a nominee for whose election as director proxies are solicited
 - (C) a committee or group which solicits proxies or a member of the committee or group
 - (D) a person who finances, directly or indirectly, the solicitation of proxies (more than \$500)
 - (E) a person who solicits proxies

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Proxy statement required for non-board solicitations

- 3 AAC 08.355 (Non-Board solicitation)
- Required disclosures include:
 - (1) the name of the corporation in respect to which proxies are being solicited;
 - (2) the name and address of each participant, including each proxyholder, who has joined or proposes to join in the solicitation;
 - (3) a statement indicating whether any of the participants in the solicitation has an arrangement or understanding with an entity for future employment by the corporation or future financial transactions to which the corporation will or may become a party, and a description listing the terms of and the parties to each arrangement or understanding;

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Proxy statement required for non-board solicitations

- 3 AAC 08.355 (Non-Board solicitation)
- Required disclosures include:
 - (4) if action is to be taken on the election of directors, a description of each nominee of the participant who has consented to act if elected; each description must include, if applicable
 - (A) name, age, and state and city of residence;
 - (B) all positions and offices presently and previously held with the corporation and its subsidiaries;
 - (C) the remaining term in office as director and all other periods of service as a director for the corporation and its subsidiaries;
 - (D) the total number of board meetings, including regularly scheduled and special meetings, and the number of meetings of committees on which the nominee served, and the percentage attendance during the last fiscal year at meetings of the board, including regularly scheduled and special meetings, and meetings of committees on which the nominee served, including those meetings for which the absence was excused;

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Proxy statement required for non-board solicitations

- 3 AAC 08.355 (Non-Board solicitation)
- Required disclosures include:
 - (E) the nature of any family relationship with any director, nominee, or executive officer of the corporation and its subsidiaries;
 - (F) business experience during the past five years, including
 - (i) principal employment or occupation;
 - (ii) the nominee's or director's employer; and
 - (iii) other directorships held for other entities; and
 - (G) any of the following events that occurred during the past 10 years: voluntary or involuntary petition under any bankruptcy or insolvency laws, appointment of a receiver, pending criminal proceedings except traffic violations or other minor offenses, conviction or plea of nolo contendere in a criminal proceeding, except traffic violations or other minor offenses, and the entry of any final judgment, order, or decree, not subsequently reversed or vacated, that the nominee engaged in unethical or illegal business practices, violated fiduciary duties, or violated securities laws;

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Proxy statement required for non-board solicitations

- 3 AAC 08.355 (Non-Board solicitation)
- Required disclosures include:
 - (5) a brief description of financial transactions by the corporation, including purpose and amount, with that participant, a member of that participant's family, or any entity since the beginning of the corporation's last fiscal year and presently proposed financial transactions by the corporation with that person or entity if
 - (A) the transactions in the aggregate exceed \$20,000; and
 - (B) the participant in the solicitation or a member of the participant's family is a party to the transaction or is employed by, is an officer or director of, or owns, directly or indirectly, an interest in the entity who is a party to the transaction;
 - (6) a brief description of all legal proceedings to which each participant in the solicitation is a party with interests adverse to the corporation or its subsidiaries during the last 10 years;
 - (7) a brief description of the methods to be employed to solicit proxies, if other than by the use of the mail;

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Proxy statement required for non-board solicitations

- 3 AAC 08.355 (Non-Board solicitation)
- Required disclosures include:
 - (8) a statement of the total amount estimated to be spent and the total already expended on the solicitation of proxies;
 - (9) a statement indicating who will bear the expense of solicitation, and the amount each participant in the solicitation has contributed or has agreed to contribute, unless the participant is a contributor of less than \$500 in the aggregate;
 - (10) a statement indicating whether reimbursement for solicitation expenses will be sought from the corporation;
 - (11) [Disclosures pertaining to a special meeting]
- The corporation itself is required to make similar (more extensive) disclosures to shareholders under 3 AAC 08.345 (Board solicitations)

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CASE STUDIES

- In the Matter of Felix Hess (Notice of Final Cease and Desist Order Assessing Civil Penalties) – Order No. 16-108-S
 - Distribution of two documents to ANC shareholders: "Memorandum" and "Matters of Concern that need [A]ttention"
 - In those documents, Respondent claimed that the board or officers of AI: "[i]mproper[ly] utiliz[ed] an attorney without board authorization"; "[r]eleas[ed] sensitive corporate information without the knowledge and approval of the elected board of directors"; "[r]eleas[ed] the past General Manager"; remov[ed], [without authorization], corporate information [...] [to the] Anchorage office"; remov[ed] [...] all corporate computers from [AI's] office [...] without board approval"; "amend[ed] corporate by-laws without presenting them to shareholders for approval"; remov[ed] [...] director [H.W.]; and "initiated a spoiler candidate [to run in AI's upcoming election]," among other statements.
 - Board authorization is not required for board members or officers wishing to consult with outside legal counsel; nor is it required for the release or removal of corporate information or property.
 - AI's bylaws provide methods for amendment that do not require shareholder approval.
 - The past General Manager as well as director H.W. resigned from their positions, and were not released or removed by the board or any of its officers.

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Case Studies

- In re: Felix Hess (Notice of Final Cease and Desist Order Assessing Civil Penalties) – Order No. 16-108-S
 - The letters sent by Respondent are proxy solicitations because they are reasonably calculated to result in the procurement, withholding, or revocation of a proxy
 - Respondent is subject to the filing requirements of AS 45.55.139 because he is a shareholder of AI and AI is subject to the filing requirements.
 - Respondent violated 3 AAC 08.315(a) by materially misrepresenting that AI or its chairman: "[i]mproper[ly] utiliz[ed] an attorney without board authorization"; "[r]eleas[ed] sensitive corporate information without the knowledge and approval of the elected board of directors"; "[r]eleas[ed] the past General Manager"; remov[ed], [without authorization], corporate information [...] [to the] Anchorage office"; remov[ed] [...] all corporate computers from [AI's] office [...] without board approval"; "amend[ed] corporate by-laws without presenting them to shareholders for approval"; remov[ed] [...] director [H.W.]; and "initiated a spoiler candidate [to run in AI's upcoming election]," among other statements.
 - Respondent is subject to a **civil penalty** pursuant to AS 45.55.920(c) because he violated 3 AAC 08.315(a).

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Case Studies

- What civil penalties are available?
 - AS 45.55.920.
 - Cease and desist order, three year pre-filing requirement (10 working days before distribution), voiding the proxies, 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 series of related proceedings.

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Case Studies

- Rude v. Cook Inlet Region, Inc., 294 P.3d 76 (Alaska 2012)
 - Campaign by independent candidates for board of directors ("New Alliance" slate)
 - Trial court found five sets of statements in New Alliance's proxy solicitation materials misleading as a matter of law.
 - Allegations that senior manager compensation increased 32% between 2006 and 2007 (as opposed to a 9.5% increase in shareholder dividends). These figures included accruals under long term incentive plans that "were not fully vested and may never be paid."
 - Claims that CIRI was being "liquidated" and that CIRI land entitlements had been reduced by 700,000 acres of surface and 1,000,000 acres of subsurface estate.
 - "We believe shareholder participation is lacking in our corporation ... Shareholders do not get to vote on: the sale of large ANCSA land and natural resource properties; large cash donations; the granting of CIRI owned stock to senior executives; political donations; large payments made to lobbyists and consultants; nor do they get to vote on legislation that would affect the rights or property. We want to change this!" → **According to the superior court, these statements were misleading because they suggested that shareholders had a right to participate in CIRI management decisions and that "the board [was] improperly denying shareholders' input into corporate governance."**
 - Claim that New Alliance members had to pay their own campaign expenses, when CIRI had procedure to cover some of these costs.
 - Statement that "never again will a hardcore minority of 6 directors control our corporation." → **According to the superior court, this implied that "a super minority is somehow improperly controlling the corporation."**

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Case Studies

- Rude v. Cook Inlet Region, Inc., 294 P.3d 76 (Alaska 2012)
 - Summary judgment was determined appropriate.
 - **"Writing proxy materials is not and should not be an exercise in how much can be insinuated about the other side without outright lying. As the superior court correctly found, this misrepresentation was material because a reasonable shareholder would consider the fact that the CIRI board was denying her rights important in considering how to vote."**

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Case Studies

- In re: Ella Bennett – Order No. 18-125-S
 - Candidate lists dates of employment on questionnaire
 - Bio returned to candidate with incorrect dates. Other changes made to bio, but candidate did not correct the dates of employment.
 - Candidate subject to Division proceedings and entry of order against her.
- In re: Ukepegvik Inupiat Corporation and David Leavitt, Jr. – Order No. 14-1170-S
 - Disclosure of prior convictions
- In re: Sea Lion Corporation – Order No. 12-0915-S
 - Corporation's failure to file

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Case Studies

- In re: Susenetta King – Order No. 17-162-S
 - According to audit, general manager had a payroll balance of \$8,105 at the end of 2015 and received additional advances in 2016 before this balance was repaid.
 - "Though the payroll advances were signed by a board member we recommend internal controls be established over payroll advances to ensure they are tracked and repaid in a timely manner."
 - "In response to [another shareholder's Facebook] post, Respondent posted a comment on Facebook, which stated: "What are your thoughts with certain individuals that miss handled [sic] over \$17,000.00?"
 - Respondent did not file her Facebook posts with the Administrator concurrently with their distribution to shareholders.
 - Respondent did not file with the Administrator a dated, written proxy statement disclosing additional information.
 - Respondent violated 3 AAC 08.315(a) by materially misrepresenting that any of the independent candidates mishandled \$17,000.00 from KI.

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Public policy / Constitutionality

- Private commercial speech
- In some ways similar to consumer protection laws covering, for example...
 - fraudulently conveying or transferring goods or services by representing them to be those of another;
 - falsely representing or designating the geographic origin of goods or services;
 - causing a likelihood of confusion or misunderstanding as to the source, sponsorship, or approval, or another person's affiliation, connection, or association with or certification of goods or services;
 - representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have

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Public policy / Constitutionality

- Meidinger v. Koniag
 - Free speech argument rejected as "unsupported by any case law involving proxy solicitations."
 - Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as ... corporate proxy statements.... [T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.")

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Part 2

Laws governing the proxy solicitation process for Alaska Native Corporations (ANCs)

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31

Overview/background

- The Ahmasuk matter has its origins in what his attorney refers to as a controversy among ANC's shareholders about "discretionary proxies."
- "In the winter of 2015-2016, shareholders submitted a petition to amend the bylaws to eliminate discretionary proxies. ... That effort failed for lack of a quorum at the meeting at which the proposed bylaw amendment was to be voted on."
- In re Fagerstrom, Order No. 16-97-S – Order to Cease and Desist, Imposing Civil Penalties and Consent to Order (dated June 28, 2016)
 - Respondent anonymously distributed a proxy solicitation stating, *inter alia*, "Director [B.K.] was the shareholders [sic] choice, and would have retained her seat if the Discretionary Proxy votes were not used. ..."
 - Respondent distributed a second proxy solicitation stating "Say no to ISIS style leadership on the [SNC] board of directors."
 - Violations of 3 AAC 08.307 (failure to file), 3 AAC 08.315(a) (material misrepresentations), 3 AAC 08.355(2) (anonymous distribution).
- In re Fagerstrom, Order No. 17-40-S – Notice of Final Cease and Desist Order to Pay Suspended Civil Penalty and Assessing Civil Penalties (dated July 12, 2017).
 - Letter to editor – "Through the misuse of the discretionary proxy, [J.E.] was able to unseat the shareholders' choice and elect his choice."
 - Respondent is a shareholder and past president of Sitnasuak Native Corporation (SNC), which certified to the Administrator that it has more than 500 shareholders and total assets exceeding \$1,000,000.
 - Current law allows a shareholder to delegate voting rights through a discretionary proxy to another shareholder, who may then cumulate votes in the election of directors. When shareholders vote via discretionary proxies, they consent to the accumulation of their votes and the proxyholder's voting according to the proxyholder's discretion. **No votes are counted until the proxyholder exercises discretion to vote the proxy how he or she chooses.**
 - Violation of 3 AAC 08.315(a) and Consent Order 16-97-S by materially misrepresenting that J.E. had misused discretionary proxies. Violation of 3 AAC 08.355 and Consent Order for failure to file.

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32

Overview/background


- The Ahmasuk matter has its origins in what his attorney refers to as a controversy among ANC's shareholders about "discretionary proxies."
- In re Potter, Order No. 16-137-S – Order to Cease and Desist, Imposing Civil Penalties and Consent to Order (dated August 4, 2016)
 - Letter to the editor – "[Shareholders' voting rights [were being] coerced from shareholders [by the board of directors] and ... 'like Bering Straits [Native Corporation] (BSNC), it is time to end the abuse, mistreatment, and shame [discretionary proxy voting] has brought to [SNC]."
 - Violation of AS 45.55.138 (failure to file), violation of 3 AAC 08.315(a) "by materially misrepresenting that SNC's board of directors coerced shareholders' voting rights and that BSNC had ended discretionary proxy voting."
- In re Mazonna, Order No. 16-229-S – Temporary Cease and Desist Order Effective Immediately, Assessing Civil Penalties, With Notice of Hearing Rights and Notice of Final Cease and Desist Order
 - Response to a Facebook post which included a copy of a discretionary proxy postcard – "The shareholders VOTED [sic] [D.K.] and others in. These people named above used Discretionary [sic] votes to place [T.S.] on the SNC Board of Directors). It wasn't true voting by the shareholders. It was made by this select few known as the Sitnasuak Six. Its [sic] not so difficult to understand. It wasn't the shareholders [sic] choice! [sic] ..."
 - Violation of 3 AAC 08.307 and 3 AAC 08.355 (failure to file), violation of 3 AAC 08.315(a) by materially misrepresenting that the election of T.S. to SNC's Board of Directors was not "true" voting, and that T.S. was not the shareholders' choice, as discretionary proxies and the cumulation of votes are permitted by law and SNC rules."

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33

Overview/background

- The Ahmasuk matter has its origins in what his attorney refers to as a controversy among ANC's shareholders about "discretionary proxies."
- In re Ahmasuk, Order No. 17-49-S (dated March 13, 2017).
 - Letter to the Editor – "Discretionary proxies have allowed single persons to use discretionary proxies to dramatically alter the outcome of an election for their singular goal. You know who they are they are members of the SNC &. Please do NOT vote a discretionary proxy in 2017."
 - Violations of 3 AAC 08.307 and 3 AAC 08.355 (failure to file), violation of 3 AAC 08.315(e) by materially misrepresenting that discretionary proxies have allowed single persons to alter the outcome of an election because the cumulative of votes, permitted by law and SNC rules, does not "alter the outcome of the election," as the outcome has not been determined until the votes are cumulated and cast.



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Arguments

- Ahmasuk, represented by the ACLU, challenged this order before an ALJ.
 - Ahmasuk and the Division briefed the issues of whether Ahmasuk's letter was a "proxy solicitation" and whether such a letter constitutionally could be subject to the proxy solicitation regulations.
 - Ahmasuk argued (1) the proxy solicitation regulations should be interpreted not to apply to a letter such as his, (2) interpreting the regulations to apply to Ahmasuk's letter would deny him due process, and (3) interpreting the regulations to apply to Ahmasuk's letter would violate his free speech rights, because the State has no compelling interest in regulating statements such as his, and any legitimate interest can be served through less restrictive regulations.
 - Proceedings postponed on whether any of the underlying statements were false and misleading.
 - ALJ ruled in Division's favor

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Arguments

- Ahmasuk, represented by the ACLU, then filed an administrative appeal to the Superior Court.
 - Ahmasuk argued that letter was not a "proxy solicitation" under the Alaska regulations
 - Specifically, "Ahmasuk's letter... was not reasonably likely to persuade any shareholder to withhold a proxy... The letter advocated against use of a particular kind of proxy but it did not advocate against all proxies or against any identifiable candidates, because no candidates had been announced."
 - Asks the court to restrict application of regulation to "requests to provide or withhold a proxy that will be voted for against a particular candidate or ballot proposition..."
 - Definition of "proxy solicitation" should not be so broad as to "effectively suppress all negative shareholder speech."
 - Ahmasuk argued that treating his letter as a proxy solicitation violates his rights of due process and free speech
 - "The Alaska regulatory definition of 'proxy solicitation' fails to provide shareholders due process, because the definition does not provide a person of ordinary intelligence fair notice of what it allows and what it prohibits."
 - He "... again considered the regulations and concluded they do not apply to a communication that does not name any candidates – particularly when the communication is issues [sic; issued] before anyone knows who will run for election."
 - "Ahmasuk had no fair notice that putting a sentence of criticism into a letter disparaging the use of discretionary proxies would convert his letter into a 'proxy solicitation.'"
 - "A clean and narrow definition of 'proxy solicitation' would ensure that both shareholders and SNC representatives can speak freely about general issues of corporate governance – including election procedures – without the burden of making disclosures to the Division..."

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Arguments

- Ahmasuk, represented by the ACLU, then filed an administrative appeal to the Superior Court.
 - Ahmasuk proposed "less restrictive alternatives" that, in his view, would not violate the First Amendment
 - Re-writing proxy solicitation definitions to apply only to communications that specifically support or oppose identifiable candidates or propositions.
 - Exempting filing and disclosure requirements for people who are not soliciting proxies for themselves.
 - Re-defining "solicitation" to exclude statements of opinion about how a shareholder intends to vote, and the reasons for that vote, when statements are made in a public forum.

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Arguments

- The Division, represented by the Attorney General's Office, asked the Court to uphold the ALJ's decision.
 - The Division argued that the letter to the editor "falls well within the definition of a proxy solicitation." It references SNC's election in five months, makes assertions about the supposed disadvantages of discretionary proxies, alleges that the "SNC 6," a group of individuals whose identity is generally known to SNC shareholders, has misused discretionary proxies, and then concludes by stating, "Please do NOT vote a discretionary proxy in 2017."
 - The statement "expressly calls for the withholding of a proxy."
 - The Division further argued that Alaska's proxy solicitation regulations (and the federal rules they are based on) are not unconstitutionally vague.
 - Meidinger v. Koniag*
 - "Appellant cites to no cases, and the State is not aware of any, holding this sixty-plus-year-old language [of SEC Rule 14a-1, on which Alaska's proxy solicitation language is based], applicable to the entire American securities industry, is unconstitutionally vague."**
 - Appellant's conduct "falls squarely within the phrase's plain meaning."
 - "A critical issue in free speech cases is whether speech is misleading. In this case, the parties have reserved the issue of whether Appellant's proxy solicitation was materially misleading."
 - "Here, if Appellant's statements are materially misleading, Caucus makes clear that they have no First Amendment protection. If Appellant's statements are true, needing to file a proxy solicitation survives constitutional review because of the state's interest in preventing fraud and the minimally intrusive act of filing a proxy solicitation statement, which Appellant has done before."

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Arguments

- Superior Court's Decision and Order upheld the ALJ's decision
 - "While Austin correctly states that the only reported Alaska Supreme Court cases on proxy solicitations concern express solicitations for proxies for specific candidates or specific propositions, the language of the regulations does not suggest such a narrow interpretation."
 - The notion that the "entire regulatory scheme must be interpreted to apply only to communications directed towards specific candidates or positions" is "an unreasonable reading and interpretation of the regulatory scheme as a whole."
 - "Austin's letter was a communication to shareholders, specifically referencing the upcoming election, specifically urging shareholders to withhold a proxy. Those circumstances are reasonably calculated to result in the withholding of a proxy. And that type of communication should unmistakably be classified as a proxy solicitation."
 - "The court does not find the proxy solicitation regulations to be impermissibly vague. ... Austin had fair notice that communicating to shareholders, before an election, about a specific election, urging them to withhold a proxy would be classified as a proxy solicitation. Any he had fair notice that a filing of the proxy solicitation was required in order to avoid a penalty."
 - "Austin argues that applying the proxy solicitation regulations to his letter to the editor violates free speech because his speech fell outside of that speech that the government has a compelling interest in regulating. ... He argues that 'traditional proxy solicitation may be regulated because the government has a compelling interest in protecting the integrity of an election, but that his speech, which addressed concerns about a type of proxy voting, the government does not have a compelling interest in regulating. The court does not buy into this distinction between 'traditional' proxy solicitations and other proxy solicitations."

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POTENTIAL IMPACT

- Ahmasuk appeals to the Alaska Supreme Court
 - Currently pending, awaiting record/transcript
- Discussion

Holland & Knight 40
