

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
BY THE ADMINISTRATOR OF SECURITIES**

In the Matter of	)	
	)	
JASON EVANS	)	OAH No. 24-0706-SEC
	)	Agency No. 2024-00108

**NOTICE TRANSMITTING FINAL DECISION**

Attached is the Commissioner's final decision in this matter, which was slightly revised from the proposed decision pursuant to AS 44.64.060(e)(3) to address issues raised by the parties in their proposals for actions.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED: July 18, 2025.

By: /s/ Desttany Suaava  
Office of Administrative Hearings

**Certificate of Service:** I certify that on July 18, 2025, a true and correct copy of this document was sent to: Craig Richards, Attorney (by email); Maria Smilde, AAG (by email); Dept. of Law Central Email.

By: /s/ Desttany Suaava  
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**FINAL DECISION ON SUMMARY ADJUDICATION<sup>1</sup>**

**I. Introduction**

In October 2024, Jason Evans ran for reelection to the Bering Straits Native Corporation (“BSNC”) board of directors. As is common in these elections, he sent shareholders a letter asking for their support. With this letter, however, Mr. Evans provided a version of the proxy prepared by BSNC that was modified so that shareholders signing and returning it would cast 100 percent of their votes for him. The Division of Banking and Securities alleged that by using this modified proxy form Mr. Evans violated three rules governing proxy solicitations.

Since the relevant facts of this matter are not in dispute, both Mr. Evans and the Division filed competing motions for summary adjudication asking that a decision be issued in their favor. This decision concludes that, for purposes of determining whether the modified proxy card Mr. Evans sent to shareholders misrepresented the identity of the soliciting party, the proper inquiry must include both the proxy card and the accompanying letter. Because the letter advised in clear terms that Mr. Evans was seeking shareholder votes in his individual capacity, Mr. Evans did not materially misrepresent the identity of the soliciting party. However, in distributing an altered version of the official board proxy, Mr. Evans violated two Division regulations controlling the format and content of proxy cards utilized in corporate elections such as this.

Accordingly, each party’s motion for summary adjudication is granted in part and denied in part. The Division’s determination that Mr. Evans violated 3 AAC 08.315(a)(1) by misrepresenting the identity of the party soliciting his modified proxy is REVERSED. The Division’s determination that Mr. Evans violated 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2) by sending shareholders an improperly modified version of official board proxy is AFFIRMED.

**II. Legal Background**

For any corporate matter requiring a shareholder vote under the Alaska Corporations Code, a shareholder “may authorize another person or persons to act by proxy.”<sup>2</sup> To effectively

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<sup>1</sup> This final decision has been slightly modified from the proposed decision issued on June 3, 2025, through the addition of text at Pages 23-24 that addresses issues raised by the parties in their proposals for action.

<sup>2</sup> AS 10.06.418(a).

convey this authority, a shareholder must execute a “proxy,” which is statutorily defined as “a written authorization or an electronic transmission signed by a shareholder . . . giving another person power to vote with respect to the shares of the shareholder.”<sup>3</sup> Shareholders may execute proxies in favor of an individual, or a group of individuals (such as a corporation’s board of directors) who then vote those shares in the manner directed by the terms of the proxy. The physical or electronic form shareholders use to cast their votes is often referred to as a “proxy card.”

The Division is authorized by statute to regulate shareholder election activities for regional and village corporations organized under the Alaska Native Claims Settlement Act having total assets exceeding \$1 million and 500 or more shareholders.<sup>4</sup> For these regulated entities the Division has adopted detailed regulations setting out the requirements for proxies, and the communications directed toward shareholders from whom those proxies are solicited. In particular, these regulations require that proxies indicate whether they are being solicited by a corporation’s board of directors, or some other group or individual.<sup>5</sup> If a proxy relates to the election of directors, it must also set out the name of the nominees for whom the proxy is solicited.<sup>6</sup> These proxies must also be drafted in a manner that allows shareholders to easily identify the candidates they support or oppose.<sup>7</sup>

The regulations also cover “proxy statements,” which are defined as “a letter, publication . . . 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.”<sup>8</sup> Among the Division’s substantive requirements for proxies and proxy statements is a prohibition on false or misleading statements.<sup>9</sup>

The Division’s regulations recognize two types of proxy solicitations. The first category is a “board solicitation” that is made on behalf of a corporation’s board of directors. These must be accompanied by proxy statements that disclose a wide array of information regarding the corporation’s finances and the backgrounds of board candidates.<sup>10</sup> The second category is a “non-board solicitation” that must be accompanied by a proxy statement providing all the

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<sup>3</sup> AS 10.06.990(34).

<sup>4</sup> AS 45.55.139 and .905.

<sup>5</sup> 3 AAC 08.335(c)(1).

<sup>6</sup> 3 AAC 08.335(e)(1).

<sup>7</sup> 3 AAC 08.335(e)(2).

<sup>8</sup> 3 AAC 08.365(14).

<sup>9</sup> 3 AAC 08.315(a).

<sup>10</sup> 3 AAC 08.345(b).

information required for board solicitations, along with information relating to the individuals who fund or assist with the solicitation.<sup>11</sup>

Copies of proxies and proxy statements that are made available to more than 30 resident shareholders must be filed with the Division “concurrently with its distribution to shareholders.”<sup>12</sup> However, the fact such materials are filed with the Division does not represent “a finding by the [Division] that the material is accurate or complete or not false or misleading.”<sup>13</sup> The Division is statutorily empowered to investigate reports of alleged violations of these provisions and may issue orders voiding proxies and imposing civil penalties in matters where it believes violations have occurred.<sup>14</sup>

### **III. Facts**

#### *A. Procedures for the 2024 BSNC board election.*

BSNC is an Alaska corporation designated by the Alaska Native Claims Settlement Act (“ANCSA”) as the regional corporation for the Bering Straits region. This region encompasses most of the Seward Peninsula and coastal lands of Norton Sound and includes the communities of Nome, Unalakleet, and Shishmaref.<sup>15</sup> BSNC presently has over 8,200 shareholders.<sup>16</sup>

BSNC is governed by a 15-member board of directors, each of whom serves for a term of three years. These terms are staggered so that five seats come open every year. Elections for these open board seats occur during BSNC’s annual shareholders meeting.<sup>17</sup> Since BSNC’s shareholders are widely dispersed in communities throughout Alaska and the Lower 48, many use proxies to vote their shares in board elections.<sup>18</sup>

The 2024 annual meeting was scheduled for October 5 in Nome.<sup>19</sup> The only agenda item requiring a shareholder vote during the meeting was filling the five open board seats.<sup>20</sup> For this election, BSNC utilized an open election format that allowed any shareholder to apply for inclusion on the proxy card distributed by the board of directors (referenced herein as the “Board

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<sup>11</sup> 3 AAC 08.355.

<sup>12</sup> AS 45.55.139.

<sup>13</sup> 3 AAC 08.315(b).

<sup>14</sup> AS 45.55.910 and .920.

<sup>15</sup> 43 U.S.C. § 1606(a)(2).

<sup>16</sup> See <https://beringstraits.com/shareholders/> (accessed February 25, 2025).

<sup>17</sup> Exhibit A to Division’s Cross-Motion at pp. 3-17.

<sup>18</sup> See <https://beringstraits.com/shareholders/> (accessed February 25, 2025).

<sup>19</sup> Exhibit A to Division’s Cross-Motion at p. 3.

<sup>20</sup> *Id.*

Proxy Card”) by submitting a letter of intent, a recent resume, and a completed “proxy compliance questionnaire.”<sup>21</sup>

Seventeen shareholders, including Mr. Evans, applied to have their names included on the Board Proxy Card, which was mailed to shareholders accompanied by a proxy statement dated August 7, 2024. In this proxy statement BSNC provided shareholders with biographical information regarding all 17 candidates that was presented in a neutral and unbiased way.<sup>22</sup> While Mr. Evans and four other candidates were identified as being incumbent directors, nothing in the proxy statement suggested that any candidate had been endorsed by the board of directors.<sup>23</sup> The proxy statement specifically advised that all candidates who had submitted complete and timely applications “are included in the BSNC proxy material.”<sup>24</sup>

With the Board Proxy Card listing the names of everyone running for the open board seats, there was less need for candidates to seek shareholder votes using a non-board proxy card. Instead, in the manner akin to elections for public office, candidates could simply urge shareholders to cast votes for them when filling out the Board Proxy Card. Implicitly recognizing this, among the election rules adopted by BSNC was the following provision:

[A]ny candidate (or any person soliciting proxies on behalf of a candidate) named in the corporate proxy that solicits votes for themselves or for any other candidate(s) using the corporate (paper or on-line) proxy by communicating with shareholders in writing by (i) letter, flyer, postcard or other paper document that is mailed, faxed, emailed or otherwise delivered to shareholders; (ii) publishing ads or other notices or communications in print newspapers or posting them in on-line publications; or (iii) making postings to on-line forums, blogs or social media, shall comply with all regulations governing proxy solicitations promulgated by the Division of Banking, Securities and Corporations, including without limitation the prohibition on material misrepresentations (3 AAC 08.315) and that all such material be filed with the Division (3 AAC 08.307).<sup>25</sup>

A later provision in BSNC’s rules provided that after the notice of annual meeting had been mailed to shareholders, any board candidate listed on the Board Proxy Card could obtain a shareholder list and “one blank corporate proxy card” upon request.<sup>26</sup> Taken together, these rules appear to anticipate that board candidates would utilize the Board Proxy Card in their campaign communications with shareholders.

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<sup>21</sup> Exhibit 3 to Mr. Evan’s Motion at p. 1.

<sup>22</sup> Exhibit A to Division’s Cross-Motion at pp. 4-10.

<sup>23</sup> *Id.* at pp. 5-10.

<sup>24</sup> *Id.* at 4.

<sup>25</sup> Exhibit 3 to Mr. Evan’s Motion at p. 2.

<sup>26</sup> *Id.* at pp. 2-3.

BSNC's nomination and proxy procedures are unique in several key respects. For example, it is common in other corporations for the incumbent board of directors to nominate a preferred slate of candidates, or alternatively list only board-supported candidates on the proxy card the corporation distributes to shareholders.<sup>27</sup> While the Board Proxy Card granted authority to vote shares to a "Proxy Committee" comprised of three board members not standing for election, this committee was obligated to cast votes in the manner directed shareholders in their returned proxy cards.<sup>28</sup> This meant the Proxy Committee served as something of an elections clerk whose role was limited to counting votes and declaring the winners. The result was a notably open and democratic process where incumbent directors could neither control the nomination process, nor limit the names of candidates appearing on the Board Proxy Card.

*B. The shareholder mailing sent by Mr. Evans in September 2024.*

With so many candidates competing for a limited number of board seats, in September 2024 Mr. Evans decided to send a mailing to approximately 2,400 individuals holding 100 or more shares asking for their support in the upcoming election.<sup>29</sup> For all but 28 shareholders, this mailing was sent in an envelope with a return address of "Jason Charles Evan" followed by an Anchorage mailing address.<sup>30</sup> For reasons not explained in the record, the mailing sent to 28 shareholders was sent in an envelope with the following return address:

Re-Elect Jason Evans  
For the Bering Straits Native Corporation Board  
[Address and Zip Code]<sup>31</sup>

For all these mailings, three items were included in the envelope. The first item was a one-page letter, with a letterhead reading "Re-Elect Jason Evans," outlining his goals and past accomplishments. This letter opened with a summary of his past accomplishments and future priorities, and concluded with the following paragraphs:

These positive changes do not happen overnight. They require constant advocacy and dedication, and I believe there is still important work to be done. I humbly ask for your support and your vote so that I can continue to work on behalf of all shareholders.

With 17 strong shareholders putting their names forward for a seat on the Board, this election is competitive, and every vote counts. If you haven't yet

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<sup>27</sup> See, e.g., *Rude v. Cook Inlet Region, Inc.*, 294 P.3d 76, 90 (Alaska 2012) (noting that the Division's regulations "seem to assume that boards will be soliciting proxies for their recommended candidates").

<sup>28</sup> Exhibit A to Division's Cross-Motion at p. 4.

<sup>29</sup> Affidavit of Mr. Evans, attached as Exhibit 1 to Mr. Evans's Motion at p. 2; Agency Record at 000007.

<sup>30</sup> Affidavit of Mr. Evans, attached as Exhibit 1 to Mr. Evans's Motion at p. 2-3.

<sup>31</sup> *Id.*; Agency Record 000042.

voted, please take a moment to fill out the enclosed proxy. **If you've already voted but would like to change your vote to support me, you can do so with the proxy, just fill out the name and address and by my name put 100% for your votes to be directed to me and mail with the envelope enclosed.....**<sup>32</sup>

Text at the bottom of the letter advised, "This mailout is paid for by Jason Evans."

The second item within this mailing was a copy of the Board Proxy that Mr. Evans modified as shown below:

 <b>BERING STRAITS NATIVE CORPORATION</b>	<b>ANNUAL MEETING OF SHAREHOLDERS, OCTOBER 5, 2024 PROXY SOLICITED BY BOARD OF DIRECTORS</b>																																										
 Shareholder Name _____ Address _____ _____																																											
<p>I, the undersigned (sign below where indicated "Your signature"), hereby revoke all prior proxies and appoint the Proxy Committee (see members listed in the Board of Directors' Proxy Statement dated August 7, 2024), or any one of them acting in the absence of others, with full power of substitution, to represent me at the Annual Meeting of Shareholders to be held October 5, 2024 at 10 a.m. (Alaska Daylight Savings Time) at the Nome Recreation Center, 208 E 6<sup>th</sup> Avenue, Nome, Alaska, and at any adjournment thereof.</p> <p><b>Election of Directors.</b> Cast my votes in the manner and for the persons indicated below for membership on the Board of Directors for three-year terms ending in 2027. You may cast for one (1) nominee for director or divide as you choose among one or more nominees.</p> <table border="1" style="width: 100%;"><thead><tr><th style="width: 40%;">NOMINEE</th><th style="width: 20%;"># OF VOTES CAST</th><th style="width: 40%;"></th></tr></thead><tbody><tr><td>Jay Adams</td><td></td><td rowspan="18"><ul style="list-style-type: none"><li>• If you fail to direct how your votes should be cast in the election of directors, your shares will not be voted for any candidate(s) but will count towards quorum.</li><li>• If a nominee named in this proxy withdraws, any votes cast for such nominee will not be counted for the election of directors, but your shares will count towards quorum.</li><li>• The Proxy Committee will have discretionary authority to vote shares represented by this proxy on matters incident to the conduct of the meeting and other matters, which the Proxy Committee did not know a reasonable time before the solicitation.</li></ul></td></tr><tr><td>Ella Anaglick</td><td></td></tr><tr><td>Eugene Fred Asicksik</td><td></td></tr><tr><td>Edna R. (Becka) Baker</td><td></td></tr><tr><td><b>Jason Evans</b> Jason Evans</td><td>100%</td></tr><tr><td>Richard Foster</td><td></td></tr><tr><td>Steve Ivanoff</td><td></td></tr><tr><td>Gloria Ann Kammun</td><td></td></tr><tr><td>Marilyn Kootuna Irelan</td><td></td></tr><tr><td>Terry Kay Komonaseak</td><td></td></tr><tr><td>Natalie Leagley</td><td></td></tr><tr><td>Jolene M. Namouk</td><td></td></tr><tr><td>Ayyu Qarsataq</td><td></td></tr><tr><td>Josie Stiles</td><td></td></tr><tr><td>Tosby Storms</td><td></td></tr><tr><td>Stanley Tucktoo</td><td></td></tr><tr><td>Jaylene Z. Wheeler</td><td></td></tr><tr><td>Write-In</td><td></td></tr><tr><td>Write-In</td><td></td></tr></tbody></table>		NOMINEE	# OF VOTES CAST		Jay Adams		<ul style="list-style-type: none"><li>• If you fail to direct how your votes should be cast in the election of directors, your shares will not be voted for any candidate(s) but will count towards quorum.</li><li>• If a nominee named in this proxy withdraws, any votes cast for such nominee will not be counted for the election of directors, but your shares will count towards quorum.</li><li>• The Proxy Committee will have discretionary authority to vote shares represented by this proxy on matters incident to the conduct of the meeting and other matters, which the Proxy Committee did not know a reasonable time before the solicitation.</li></ul>	Ella Anaglick		Eugene Fred Asicksik		Edna R. (Becka) Baker		<b>Jason Evans</b> Jason Evans	100%	Richard Foster		Steve Ivanoff		Gloria Ann Kammun		Marilyn Kootuna Irelan		Terry Kay Komonaseak		Natalie Leagley		Jolene M. Namouk		Ayyu Qarsataq		Josie Stiles		Tosby Storms		Stanley Tucktoo		Jaylene Z. Wheeler		Write-In		Write-In	
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<p><b>This Proxy must be received by the Inspector of Elections by the deadline of 5 p.m., AKDT October 2, 2024</b></p>																																											

Exhibit 1  
Page 3 of 4

<sup>32</sup> Agency Record 000001 (emphasis in original).

By inserting the figure “100%” after his name, Mr. Evans created a proxy card where shareholders signing and returning it would cast all their available votes for him. Shareholders could not assign votes to any other candidate using this proxy card unless they first struck out the “100%” that was printed next to Mr. Evans’s name.

The third item in this mailing was a prepaid postage envelope that shareholders could utilize for mailing the modified proxy card to BSNC.<sup>33</sup> Mr. Evans submitted a copy of his letter and revised proxy to the Division before it was mailed.<sup>34</sup>

The record in this matter includes copies of 85 proxy cards which, in the view of BSNC, were affected by Mr. Evans’s mailing.<sup>35</sup> Of these, 18 were unmodified versions of the Board Proxy Card in which shareholders wrote “100%” after Mr. Evans’s name.<sup>36</sup> Fifty-five shareholders signed and returned the modified proxy card in Mr. Evans’s mailing that cast 100% of their votes for him.<sup>37</sup> Nine shareholders returned versions of the modified proxy card that were marked in a manner casting votes for other nominees.<sup>38</sup> The remaining modified proxy cards returned to BSNC were either unsigned, or signed by individuals who were not shareholders.

*C. The Division’s response to Mr. Evans’s mailing.*

Shortly after this mailing was sent, the Division received a complaint alleging that Mr. Evans had violated applicable regulations by sending shareholders a modified version of the Board Proxy Card.<sup>39</sup> Following an investigation, the Division issued a temporary order on October 2, 2024, which concluded that Mr. Evans had:

- (1) materially misrepresented that the proxy card in his mailing was solicited on behalf of BSNC’s board of directors in violation of 3 AAC 08.315(a)(1);
- (2) failed to indicate that this proxy card was being solicited by Mr. Evans in violation of 3 AAC 08.335(c)(1); and

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<sup>33</sup> Affidavit of Mr. Evans, attached as Exhibit 1 to Mr. Evans’s Motion at p. 4.

<sup>34</sup> *Id.* at p. 2; Agency Record at 000007. As noted in 3 AAC 08.315(b), however, the Division does not review proxy materials that are filed with it to verify compliance with applicable statutes and regulations.

<sup>35</sup> Exhibit 5 to Mr. Evans’s Motion. It should be noted that Mr. Evans incorrectly refers to this as Exhibit 3 in his affidavit. *See* Affidavit of Mr. Evans, attached as Exhibit 1 to Mr. Evans’s Motion at p. 3.

<sup>36</sup> Exhibit 5 at pp. 1-18. The obvious presumption here is that these shareholders filled out their Board Proxy Cards guided by the instructions in Mr. Evans’s mailing.

<sup>37</sup> A few of these shareholders wrote “100%” next to the printed “100%” figure that appeared next to Mr. Evans’s name in the modified proxy, or wrote their initials next to the printed number. *See, e.g.*, Exhibit 5 at pp. 23, 29, 31 and 38.

<sup>38</sup> *Id.* at pp. 73-74, 76-82.

<sup>39</sup> Agency Record at 000001.



(3) improperly altered the proxy card by pre-marking it to have 100% of the shareholder's votes cast for himself in violation of 3 AAC 08.335(e)(2).

Based on these conclusions, the Division ordered that all votes cast for Mr. Evans in response to his mailing be voided.<sup>40</sup> Notably, the sole focus of the Division's order was the modified proxy card; there is no allegation that anything that Mr. Evans communicated in the accompanying letter was misleading or improper. Mr. Evans timely challenged the Division's order, which led to this matter being assigned to the Office of Administrative Hearing for issuance of a proposed decision.

Notwithstanding the loss of shareholder votes resulting from the Division's order, at the annual meeting Mr. Evans received enough votes from proxy cards untainted by his mailing to retain his seat on BSNC's board of directors.<sup>41</sup> While this would seemingly render the matter moot,<sup>42</sup> Mr. Evans continues to challenge the Division's order due to regulations requiring a board of directors nominee for a regulated ANCSA corporation to disclose any violations of securities laws committed within the preceding 10 years.<sup>43</sup> Since the parties have implicitly recognized this as a sufficient basis to avoid application of the mootness doctrine, it will be treated in the same manner by this tribunal.<sup>44</sup>

#### **IV. Discussion**

##### *A. The "total mix" standard applicable to proxy solicitations.*

An important baseline question here is whether the modified proxy card that Mr. Evans included in his mailing should be analyzed in conjunction with the accompanying letter, and the envelope in which those were sent. This is a crucial question since – as the Division points out – a shareholder viewing the modified proxy card in isolation could potentially construe it as an endorsement of Mr. Evans's candidacy by BSNC's board of directors.<sup>45</sup>

Under Alaska law, alleged misrepresentations appearing in proxy materials must be evaluated considering the totality of information provided to shareholders. This approach, which is often referenced as the "total mix" standard, was first referenced in *Skaflestad v. Huna Totem*

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<sup>40</sup> Agency Record at 000051.

<sup>41</sup> While the fact Mr. Evans retained his board seat was discussed by the parties during oral argument on the summary adjudication motions, it is not referenced in the agency record or in the parties' briefing. A review of the BSNC website additionally confirms that Mr. Evans remains on the corporation's board of directors.

<sup>42</sup> See *Clark v. State, Dep't of Corrections*, 156 P.3d 384, 387 (Alaska 2007) (holding that a matter is moot "where a party bringing the action would not be entitled to any relief even if he or she prevailed").

<sup>43</sup> 3 AAC 08.345(b)(1)(G) and 3 AAC 08.355(4)(G).

<sup>44</sup> Since the outcome here will not impact Mr. Evans's re-election to BSNC's board of directors, the parties waived the decisional deadline ordinarily applicable to proxy disputes such as this.

<sup>45</sup> Division Cross-Motion at pp. 16-18.

*Corp.* There, the Alaska Supreme Court found that ambiguous information an Alaska Native corporation provided to its shareholders regarding a proposed settlement trust was resolved by a later proxy statement containing more detailed and accurate information.<sup>46</sup> The court noted that “the pertinent inquiry here was whether *the total mix* of materials submitted to Huna Totem shareholders was essentially accurate.”<sup>47</sup>

The Alaska Supreme Court later applied this standard in *Rude v. Cook Inlet Region, Inc.*, which arose from a hotly contested board election where a group of candidates opposing actions taken by the incumbent board made a series of allegedly misleading statements in their proxy solicitation materials.<sup>48</sup> In finding that many of these statements constituted material misrepresentations, the court noted:

Alaska applies the “total mix” standard for determining the materiality of omitted facts. Under this standard, an omitted fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available. For affirmative misrepresentations accompanied by accurate information, the question is whether the accurate information neutralizes the misleading information.<sup>49</sup>

The court went on to observe that “[n]ot every mixture with the true will neutralize the deceptive.”<sup>50</sup> Thus, for example, false financial information cannot be rectified by truthful information that would “take a financial analyst to spot the tension between the one and the other.”<sup>51</sup>

The Division suggested in its briefing that the “total mix” standard should only apply to scenarios where there are “omitted facts” as opposed to affirmative misrepresentations.<sup>52</sup> While there is at least one past case where the Alaska Supreme Court expressed some uncertainty regarding the doctrine’s applicability to affirmative misrepresentations,<sup>53</sup> the subsequent holding in *Rude* leaves little room for doubting that the doctrine applies equally to omissions and affirmative misrepresentations.

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<sup>46</sup> 76 P.3d 391, 397 (Alaska 2003).

<sup>47</sup> *Id.* (quotations omitted, emphasis in original).

<sup>48</sup> 294 P.3d at 80-81.

<sup>49</sup> *Id.* at 95 (cites and internal quotes omitted).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991).

<sup>52</sup> Division Cross-Motion at p. 16.

<sup>53</sup> *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 84 (Alaska 2001) (where court assumed “for purposes of discussion” that the total mix standard only applied to affirmative misrepresentations without explicitly holding that it did).

B. Under the “total mix of materials” standard, the proxy form included in the proxy solicitation did not constitute a misrepresentation under 3 AAC 08.315(a)(1).

The Division first alleges that Mr. Evans violated 3 AAC 08.315(a)(1), which provides in relevant part:

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.

The regulation goes on to provide that a misrepresentation is considered material if “there is substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” Notably, this regulation applies to “a solicitation” and is tempered by the requirement that the misrepresentation be material.

Here, the Division contends the modified proxy card that Mr. Evans included in his mailing was misleading since the words “PROXY SOLICITED BY BOARD OF DIRECTORS” appeared in the upper right-hand corner.<sup>54</sup> This, in the eyes of the Division, could be easily misconstrued as indicating that BSNC’s board had endorsed Mr. Evans’s candidacy. In pressing its argument on this point, the Division disregards the fact this proxy card was sent in the same envelope as a letter advising in clear and unambiguous matter that Mr. Evans was seeking shareholder votes in his individual capacity.<sup>55</sup> The Division relies on the holding of a federal case, *Dillion v. Berg*,<sup>56</sup> as supporting its determination here.

There are two problems with the Division’s approach. First, it cannot be easily squared with the holdings *Skaflestad* and *Rude*, which require that the “total mix” of information provided to shareholders be considered in this context. To disregard a letter contained in the same envelope as an allegedly misleading proxy card would require a narrowing of the total mix standard to a point of near non-existence.

Second, the holding of *Dillion v. Berg* is easily distinguished since the problematic proxy at issue there was accompanied by an proxy statement which repeated the same false assertions

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<sup>54</sup> Agency Record at 000054.

<sup>55</sup> Cross-Motion at p. 12-13.

<sup>56</sup> 326 F. Supp. 1214, 1234 (D. Del. 1971), *aff’d* 453 F.2d 879 (3<sup>rd</sup> Cir. 1971).

appearing on the face of the proxy form.<sup>57</sup> In contrast, the letter to shareholders included in Mr. Evans's mailing advised that he was, in a manner typical of individuals competing for elected office, seeking their votes in his purely individual capacity. Notably, Mr. Evans's letter does not include any direct or implied suggestion that he had been endorsed by anyone, much less BSNC's board of directors. The letter additionally makes it clear that the proxy card included in the letter had been modified by Mr. Evans, and that anyone who signed and submitted that proxy would be directing their votes to him in the upcoming election.

Additional considerations support this conclusion. First, the envelope in which this mailing was sent carried no indicia of having been sent at the behest of BSNC. Even before opening the envelope to see what was inside, shareholders receiving this mailing would have been alerted to the fact that it had been sent by Mr. Evans as opposed to being an official corporate communication issued by BSNC. Second, the proxy statement issued by BSNC before Mr. Evans sent his mailing advised shareholders that all candidates who submitted complete and timely applications had been listed on the Board Proxy without being endorsed (or opposed) by BSNC's board of directors or nominating committee. These factors reduced the likelihood of Mr. Evans's mailing being misconstrued as an official endorsement of his candidacy by BSNC's board of directors.

Thus, even accepting the Division's argument that the proxy form included in the Mr. Evan's mailing was misleading, that was effectively neutralized by the accompanying letter which made it clear that Mr. Evans sought shareholder support in his individual capacity, and had altered the enclosed proxy card by adding the figure "100%" next to his name. While the way Mr. Evans modified the Board Proxy Card raises separate issues that will be addressed below, the totality of the mailing he sent to shareholders does not constitute an actionable material misrepresentation under 3 AAC 08.315(a)(1).<sup>58</sup>

*C. The modified proxy card included in Mr. Evans's mailing violated 3 AAC 08.335(c)(1).*

The Division's next allegation is that Mr. Evans violated 3 AAC 08.335(c)(1) by sending BSNC shareholders a proxy card which, on its face, failed to advise who was soliciting it. This regulatory provision provides that:

(1) "The *proxy must*

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<sup>57</sup> 326 F.Supp. at 1227-28.

<sup>58</sup> Under this outcome, the votes cast for Mr. Evans by shareholders using the unmodified version of the Board Proxy Card should have been counted in his favor. See Exhibit 5 at pp. 1-18.

(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. (Emphasis added.)

Notably, the sole focus of this regulatory language is the information set out on the face of a proxy card. How this information might affect a reasonable shareholder is not a consideration in this context. This contrasts with the broader language of 3 AAC 315(a)(1) discussed above, which broadly prohibits misrepresentations across a wide spectrum of communications that might impact decisions made by reasonable shareholders.

For his part, Mr. Evans first argues that his modified proxy card complied with this regulation since the figure “100%” he added next to his name did not alter the authority of BSNC’s Proxy Committee to cast votes on the shareholder’s behalf.<sup>59</sup> Under this logic, board candidates could freely distribute modified versions of a board-approved proxy card that remained labeled as “solicited on behalf of the board” so long as the party holding the proxy was not altered. Mr. Evans additionally cites to the “total mix” standard in arguing that the failure of a proxy card to identify the person soliciting it can be cured by accompanying information (such as the letter included in his mailing) which clearly provides that information.<sup>60</sup>

Mr. Evans’s first argument finds no support in the regulatory text, which flatly prohibits the distribution of proxy cards that fail to accurately identify the “persons on whose behalf the solicitation is made.” The key word here is “solicitation,” which is defined by 3 AAC 08.365(16) to mean:

(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[.]

Under this regulatory definition, it is impossible to miscast BSNC’s board of directors as the party who distributed (and thus solicited) Mr. Evans’s modified proxy card. It is undisputed that BSNC’s board of directors did not ask shareholders to execute a proxy card wherein 100% of their votes would be counted for Mr. Evans. Equally undisputed is the fact BSNC’s board played no part in distributing the modified proxy card, which was instead mailed to shareholders at the singular behest of Mr. Evans. While it is true the modified proxy card did not alter the Proxy Committee’s authority to cast votes on shareholders’ behalf, this is an irrelevancy in the context

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<sup>59</sup> Mr. Evans’ Motion at p. 7-8.

<sup>60</sup> *Id.*

of a regulation exclusively focused on the identity of the person soliciting that proxy. In this regard, it is notable that the identity of the proxy holder is not even referenced in the text of 3 AAC 08.335(c)(1).

Under Alaska law, regulations are interpreted in the same manner as statutes.<sup>61</sup> Thus, when the plain meaning of a regulation can be ascertained from the text of the regulation itself, that meaning controls unless there is legislative history pointing to a different interpretation.<sup>62</sup> Here the plain meaning of 3 AAC 08.335(c)(1) is readily ascertainable from the text of the regulation itself, and the accompanying definition of “solicitation” provided by 3 AAC 08.365(16). Together, these regulatory provisions foreclose Mr. Evans’s argument on this point.

As stated above, the regulation imposes requirements for information that must be set out within the four corners of a proxy. Because these requirements must be met by the proxy itself, the “total mix” standard does not apply in this context.

Requiring the identity of the soliciting party to be plainly disclosed on the face of the proxy card itself is a prudent way of preventing shareholders from becoming confused or misled when filling it out. The need for such disclosure is particularly acute with proxy cards that automatically assign a shareholder’s votes to a given candidate or slate of candidates. The obvious purpose served by 3 AAC 08.335(c)(1) would be completely frustrated if the “total mix” standard could be relied upon in this context.

A key consideration in the foregoing analysis is the way Mr. Evans modified the neutral ballot set out in the Board Proxy Card into one uniquely beneficial to him. As noted above, this was *not* the proxy card BSNC’s board of directors approved for distribution to shareholders. While Mr. Evans repeatedly claims that he was simply using the Board Proxy Card to seek shareholder votes, the moment he inserted the figure “100%” after his name and mailed it to shareholders (along with a postage prepaid return envelope) he converted that into his own personal proxy without following the rules established by the Division and BSNC for non-board proxy solicitations.<sup>63</sup>

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<sup>61</sup> *Romann v. State, Dep’t of Transp. & Pub. Facilities*, 991 P.2d 186, 191 (Alaska 1999) (applying sliding scale analysis to interpretation of regulations); *Tea ex rel. A.T.*, 278 P.3d 1262, 1265 n.17 (Alaska 2012) (same).

<sup>62</sup> While the phrase “legislative history” can be confusing in a regulatory context, the Administrative Procedure Act requires agencies to prepare documents explaining the rationale for adopting or modifying a regulation. They must also maintain a record of related public comments. *See* AS 44.62.190 and AS 44.62.215. These are typically the materials relied upon for establishing a regulation’s “legislative history.”

<sup>63</sup> *See* Exhibit 3 to Mr. Evans’s Motion at p. 2 (addressing “Limited Discretionary Voting”) and 3 AAC 08.355 (setting out requirements for non-board solicitations).

Nor was Mr. Evans merely providing shareholders a demonstrative example of how they could use the Board Proxy Card to vote their shares for him. On the contrary, Mr. Evans specifically asked shareholders to sign and return his modified proxy card, and he provided a postage-prepaid envelope to facilitate this.

To be clear, if Mr. Evans had simply included an unmodified copy of the Board Proxy Card in his mailing, and provided instructions on how shareholder could use it to cast their votes for him, different considerations might come into play.<sup>64</sup> Since that is not what happened here, however, questions of how 3 AAC 08.335(c)(1) might apply to that hypothetical scenario need not be addressed in this decision.

There is no evidence in the record suggesting that Mr. Evans acted with any intent to deceive BSNC shareholders. While the issue of intent to deceive will be addressed in greater detail below, it is important to note that nothing in the text of 3 AAC 08.335(c)(1) or related regulations suggests that the Division must offer evidence of improper motive to prove a violation. While the letter Mr. Evans included in his mailing demonstrates a desire to be forthright with shareholders, this cannot excuse his decision to distribute a modified proxy card which, if viewed in isolation, had potential to mislead shareholders into believing that BSNC's board of directors was quite enthusiastically backing his candidacy.

Accordingly, the Division's determination that Mr. Evans violated 3 AAC 08.335(c)(1) by sending a modified version of the Board Proxy Card to BSNC shareholders that failed to identify him as the soliciting party is affirmed.

*D. The modified proxy card included in Mr. Evans's mailing violated the requirements of 3 AAC 08.335(e)(2).*

The Division contends that the modified proxy card that Mr. Evans mailed to BSNC shareholders failed to comply with the requirements of 3 AAC 08.335(e)(2), which provides:

- (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;

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<sup>64</sup> It should be noted, however, that the Second Circuit Court of Appeals ruled in *MONY Grp., Inc. v. Highfields Cap. Mgmt., L.P.*, 368 F.3d 138, 144 (2<sup>nd</sup> Cir. 2004), that a similar proxy regulation adopted by the Securities and Exchange Commission was violated when shareholders opposing a proposed merger agreement sent an unmodified duplicate of the board proxy to shareholders accompanied by a letter urging them to use that to vote "no" on the proposal.

(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.

Mr. Evans acknowledges that the Board Proxy Card conforms to subsection (C) above, but contends that modifying it by inserting "100%" after his name did not transform it into a different form of proxy.<sup>65</sup> This argument rests on the premise that shareholders receiving the modified proxy could still award votes to candidates of their choosing by scratching out the "100%" after his name and casting their votes for someone else.<sup>66</sup>

This argument fails for the simple reason that a pre-marked ballot ceases to be a "ballot" that allows shareholders to vote for their preferred candidates for purposes of 3 AAC 08.335(e)(2)(C). A pre-marked ballot is inherently suggestive, and by its very nature is intended to direct the way shareholders vote. Indeed, the only conceivable reason for distributing a pre-marked ballot is the likelihood of receiving more votes as a result. For this reason, it would have been manifestly improper for BSNC's board to distribute a proxy card under the guise of this subsection that was pre-marked to allocate shareholder votes to a preferred slate of nominees.

The inherent problem with pre-marked ballots was addressed by a court in *In re Gulph Woods Corp.*,<sup>67</sup> a case that arose from Chapter 11 bankruptcy where the creditors of a debtor corporation were asked to vote on a proposed reorganization plan. An individual opposing the plan mailed a letter to the voting creditors urging them to reject it, along with a ballot pre-marked with a "no" vote. In finding that this was improper, the court observed:

Pre-marking the ballot was, we believe, per se improper. We would consider it the equivalent of a plan's proponent pre-marking a ballot with an acceptance. *We have never known any plan proponent to be so presumptuous as to have not instinctively perceived the impropriety of so doing.*<sup>68</sup>

This analysis is not altered by the fact that a limited number of shareholders receiving Mr. Evans's modified proxy card used it to cast votes for other nominees. If anything, those demonstrate the inherent problems with a pre-marked proxy card. Of the nine shareholders who tried to cast votes using the proxy card in Mr. Evans's mailing, almost half assigned 100% of their

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<sup>65</sup> Mr. Evans Motion at p. 14.

<sup>66</sup> *Id.*

<sup>67</sup> 83 B.R. 339 (Bankr. E.D. Pa. 1988).

<sup>68</sup> *Id.* at 343 (emphasis added).



votes to other nominees without scratching out the “100%” after Mr. Evans’s name.<sup>69</sup> Such ambiguous proxy cards create fertile ground for post-election disputes and litigation.

Mr. Evans additionally argues that his modified proxy was permissible under subsection (A) of the regulation since shareholders could have marked his modified proxy card in a manner indicating that “authority to vote for that nominee is withheld.”<sup>70</sup> The problem with this argument is that subsection (A) is clearly intended to cover more traditional proxy cards that list only the names of the board nominees who are supported by the incumbent board of directors (or alternatively, non-board proxies that list only the names of independent nominees). For those proxies to be permissible under the regulation, they must have a box next to each nominee’s name that allows shareholders to sign and return the proxy while specifically withholding votes from one or more of the listed nominees. Here, there were no boxes on Mr. Evans’s modified proxy card that could be easily marked to withhold authority to cast votes for a given nominee. This falls short of what is required under subsection (A) of the regulation.

Finally, the proxy card distributed by Mr. Evans did not include an instruction on the face of the card advising that authority to vote for a given nominee could be withheld by striking out that person’s name. This defeats Mr. Evans’s final argument that his modified proxy card could be viewed as complying with subsection (B) of the regulation.

To summarize the foregoing, a pre-marked proxy card cannot comply with the requirements of 3 AAC 08.335(e)(2)(C) given its inherently suggestive nature. Mr. Evans’s efforts to argue compliance with subsections (A) and (B) of the regulation are unavailing since his modified proxy card did not comply with the explicit requirements set out in the regulatory text. Accordingly, the Division’s determination that Mr. Evans violated 3 AAC 08.335(e)(2) by distributing a pre-marked proxy card to BSNC shareholders is affirmed.

*E. Proof of scienter is not required is not required to establish administrative violations of 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2).*

A separate issue that must be addressed is Mr. Evan’s contention that all the violations alleged by the Division should be overturned due to a lack of evidence showing scienter.<sup>71</sup> In the securities context, “scienter” is commonly defined as “proof of intent to deceive, manipulate or defraud.”<sup>72</sup> Additionally, as noted in *SEC v. Shanahan*,<sup>73</sup> scienter can also be proven through

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<sup>69</sup> Exhibit 5 to Mr. Evan’s Motion at pp. 73-74 and 77-78.

<sup>70</sup> 3 AAC 08.335(e)(2)(A).

<sup>71</sup> Cross Motion at p. 6.

<sup>72</sup> *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976).

<sup>73</sup> 646 F.3d 536 (8<sup>th</sup> Cir. 2011).

proof of “highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care.”<sup>74</sup> Proving scienter (or its absence) typically requires resolution of factual disputes through an evidentiary hearing. Matters where scienter must be proven are rarely resolvable through dispositive motions practice.

The extent to which Mr. Evans sent his mailing to BSNC shareholders with an intent to deceive or defraud, or otherwise acted in a reckless manner, is an issue that is plainly contested by the parties. While Mr. Evans insists that he acted with good intentions,<sup>75</sup> there are undisputed facts that arguably support a contrary conclusion.<sup>76</sup> Thus, to the extent the violations at issue here require proof of scienter, the appropriate course would be denial of both parties’ motions with an evidentiary hearing to follow.

Analysis of this issue is simplified by the conclusion that the modified proxy card in Mr. Evans’s mailing did not constitute a material misrepresentation under the “total mix” doctrine. This eliminates the need to evaluate the extent to which an alleged misrepresentation must be supported by evidence of scienter even in this administrative context.<sup>77</sup>

This leaves the more straightforward question of whether the Division can permissibly enter orders regarding violations of 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2) without a showing of scienter. While the Division acknowledges that the Alaska Supreme Court has not yet addressed this question,<sup>78</sup> a careful review of AS 45.55.920 – the key statute that sets out the Division’s enforcement authority in proxy solicitation matters such as this – offers substantial guidance in answering it.

The statute opens by authorizing the Division to enter enforcement orders against a person who “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.”<sup>79</sup> There is nothing in the statutory text suggesting that the Division must find evidence of scienter, or some lesser level of bad faith, before taking action in response to perceived violations of its regulations.

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<sup>74</sup> *Id.* at 543, quoting *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 654 (8th Cir.2001).

<sup>75</sup> Affidavit of Mr. Evans, attached as Exhibit 1 to Mr. Evans’s Motion at p. 4.

<sup>76</sup> In this regard, the manner in which Mr. Evans solicited votes using an altered proxy card that was clearly labeled as a “PROXY SOLICITED BY THE BOARD OF DIRECTORS” arguably creates a disputed issue of material fact regarding the extent to which he acted with an intent to deceive, or with reckless disregard that shareholders might be confused by this.

<sup>77</sup> In this regard, it should be noted that the primary case relied upon by Mr. Evans, *SEC v. Shanahan*, *supra*, arose from alleged misrepresentations contained in a proxy solicitation.

<sup>78</sup> Cross-Motion at p. 19-20.

<sup>79</sup> AS 45.55.920(a).

From there, the statute goes on to provide that a person who “*knowingly* violates this chapter or a regulation” may be subject to a civil penalty of up to \$2,500 for a single violation, and not more than \$25,000 for multiple violations.<sup>80</sup> This clearly shows that the legislature knows how to impose a culpability requirement when it intends to do so. For all other types of violations, the statute sets the maximum penalty at \$500 for a single violation, and \$2,500 for multiple violations. Nothing in this statutory text suggests that the Division must prove some type of culpable mental state for violations where these lesser penalties are sought. It is worth noting that these penalties are actually less than those that Alaska courts have found appropriate for strict liability offenses where fines and forfeitures can be imposed without any proof regarding a defendant’s mental state.<sup>81</sup>

This statutory language must be interpreted in light of the general principle that “scienter is not required to impose civil penalties for regulatory violations when the regulation is silent to state of mind.”<sup>82</sup> This follows from the longstanding recognition that statutes enacted to protect the public welfare are often drafted with the objective of placing the “burden of compliance upon an otherwise nonculpable person who occupies a position that entails responsibility for preventing a public harm.”<sup>83</sup>

In addition to these settled principles of law, Alaska law provides that statutes should be construed “so as to avoid results glaringly absurd.”<sup>84</sup> Limiting the Division’s enforcement of 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2) to situations where there was evidence of scienter would badly hamper the Division’s ability to swiftly intervene when improper proxy cards were being distributed to shareholders of regulated ANCSA corporations. The public harm resulting from such violations is the same regardless of how willfully they were perpetrated. It would indeed be an absurd outcome if the Division was powerless to enforce these regulations whenever the person violating them claimed to have acted with good intentions.

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<sup>80</sup> AS 45.55.920(b) (emphasis added).

<sup>81</sup> See, e.g., *State v. Dutch Harbor Seafoods, Ltd.*, 965 P.2d 738, 742-43 (Alaska 1998) (finding that strict liability penalties for a commercial fishing violation consisting of gear forfeiture and a \$3,000 fine for a first offender, or \$6,000 fine for a repeat offender, did not violate the Alaska Constitution).

<sup>82</sup> *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1<sup>st</sup> Cir. 1999); see also *Bettor Racing, Inc. v. National Indian Gaming Com’n*, 812 F.3d 648, 652 (8<sup>th</sup> Cir. 2016) (scienter not required for imposition of civil penalties); *Humanitarian Law Project v. U.S. Treasury Dep’t*, 578 F.3d 1133, 1152 (9<sup>th</sup> Cir. 2009) (noting that “civil penalties may be imposed without mens rea requirements”).

<sup>83</sup> *Tart v. Commonwealth of Mass.*, 949 F.2d 490, 502 (1<sup>st</sup> Cir. 1991), citing *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

<sup>84</sup> *Underwater Const., Inc. v. Shirley*, 884 P.2d 150, 155 n.21 (Alaska 1994). See also *Alaska Railroad Corp. v. Native Village of Eklutna*, 142 P.3d 1192, 1206 (Alaska 2006) (“statutes should not be interpreted to reach absurd results”).

For these reasons, no scienter requirement can be implied into the text of 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2). The Division may thus hold Mr. Evans accountable for violating these regulations without having to prove that he acted with a culpable mental state.

F. *The regulations Mr. Evans violated are neither vague, nor an impingement on his constitutional rights.*

Mr. Evans also argues that the regulations at issue here are void for vagueness under the United States and Alaska Constitution, and that they improperly impinge on his First Amendment rights.<sup>85</sup> The primary authority Mr. Evans offers for this argument is *Ahmasuk v. State*,<sup>86</sup> where the Alaska Supreme Court expressed concerns that the Division's proxy regulations could be expansively interpreted in ways that might inhibit "corporate governance debate."<sup>87</sup>

Similar to the issue of scienter that is discussed above, most of the First Amendment concerns raised by Mr. Evans are dispelled by the determination that his mailing to shareholders did not constitute a material misrepresentation under 3 AAC 08.315(a)(1). This eliminates the need to analyze whether the Division's authority to prohibit the distribution of misleading materials was exercised in a manner improperly impinging upon corporate governance debate.

As for Mr. Evans's violations of 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2), those do not implicate free speech concerns – at least under the facts presented here – for the simple reason that proxy cards are not intended to serve as tools for conveying opinions and information.

Proxy cards are unique in the sense of being carefully crafted legal documents whose signatories assign vital shareholder rights to another person. While the holding of *Ahmasuk* demonstrates the constitutional concerns associated with regulations that could be used to restrict corporate governance debate, proxy cards are not intended to be an instrument in that debate. Like an election ballot, proxy cards must be carefully structured to avoid confusing or improperly influencing shareholders who are using them to vote their shares. Given this, the need to carefully regulate the formatting and content of proxy cards should be self-evident. Otherwise, laws granting shareholders the right to elect directors and vote on important corporate transactions could be circumvented through biased, confusing, or misleading proxy cards. Regulations requiring proxy cards to be concise, understandable, and facially neutral are essential for the proper functioning of corporate democracy.<sup>88</sup>

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<sup>85</sup> Mr. Evans's Motion at pp. 19-22; Reply in Support of Mr. Evans's Motion at pp. 11-15.

<sup>86</sup> *Ahmasuk v. State of Alaska, Dept. of Comm., Cty. & Econ. Dev.*, 478 P.3d 665 (Alaska 2021).

<sup>87</sup> *Id.* at 677.

<sup>88</sup> To the extent there is judicial authority for the proposition that board nominees have a constitutional right to utilize whatever form of proxy card they deem most expedient, that has not been cited by the parties here.

As this should indicate, the holding of *Ahmasuk* offers little useful guidance in this context. There, the Division fined the author of a letter published in a local newspaper “at least two months before any director candidates were announced or any election-related materials were distributed to shareholders.”<sup>89</sup> The free-speech concerns implicit with that are self-evident. In contrast, the facts of this matter feature a confusing proxy card that did not comply with the Division’s regulations that was mailed to roughly 2,400 shareholders a few weeks prior to BSNC’s annual meeting. While the court in *Ahmasuk* warned against proxy regulations being enforced in a manner that goes “beyond valid regulation and into free speech infringement,”<sup>90</sup> such concerns are conspicuously absent here.

Mr. Evans’s arguments regarding the alleged vagueness of 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2) are properly analyzed under the standards summarized in *Department of Revenue v. Nabors Int’l Finance, Inc.*,<sup>91</sup> where the Alaska Supreme Court observed:

The basic element of the doctrine of vagueness is a requirement of fair notice. We have recognized . . . that a law which either forbids or requires the doing of an act in terms so vague that [individuals] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. Two considerations are applicable when determining whether a law is void for vagueness. *We first consider whether there is a history or a strong likelihood of arbitrary enforcement and uneven application, and we next determine whether the [statute] provides adequate notice of prohibited conduct.*<sup>92</sup>

As the court went on to note, the fact “people can, in good faith, litigate the meaning of a statute does not necessarily (or even usually) mean that the statute is so indefinite as to be unconstitutional.”<sup>93</sup>

Here, Mr. Evans offers no evidence of past selective enforcement by the Division. While he contends that the regulations are confusing,<sup>94</sup> this falls short of establishing a strong likelihood of arbitrary or uneven enforcement. Thus, Mr. Evans’s vagueness challenge depends on the extent to which 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2) provide adequate notice of the conduct they prohibit.

There are varying standards for evaluating the extent to which a statute or regulation provides adequate notice of prohibited conduct. Criminal statutes require a higher degree of

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<sup>89</sup> *Id.* at 669.

<sup>90</sup> *Id.* at 677.

<sup>91</sup> 514 P.3d 893 (Alaska 2022).

<sup>92</sup> *Id.* at 899 (emphasis added; cites and internal quotes omitted).

<sup>93</sup> *Id.*,

<sup>94</sup> Mr. Evans’s Motion at p. 21.

specificity than “enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.”<sup>95</sup> Similarly, a higher standard is applied to statutes or regulations that interfere with the rights of free speech or association.<sup>96</sup>

Here, however, the sanctions resulting from violations of 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2) are purely civil in nature and are limited to enforcement orders and relatively modest fines. As discussed above, regulations controlling the formatting and content of proxy cards do not implicate free speech or associational rights. Accordingly, they are subject to a more lenient vagueness standard that only requires “legislative language which is not so conflicting and confused that it cannot be given meaning in the adjudication process.”<sup>97</sup> This standard is commonly applied to economic and business regulations having a narrow subject matter based on the belief that those undertaking regulated activities are expected to “plan behavior carefully.”<sup>98</sup>

Turning first to 3 AAC 08.335(c)(1), Mr. Evans argues that requiring a proxy card to show the name of the person who is soliciting it is significantly confusing.<sup>99</sup> This is not supported by even a casual reading of the regulatory text. The gist of the regulation could not be more straightforward – the name of the person soliciting a proxy card must appear on the face of that proxy card. There is nothing to suggest that a board nominee can permissibly take the “proxy solicited on behalf of the board,” alter it in a manner where shareholders signing it direct all their votes to that nominee, and mail this altered proxy to thousands of shareholders while it remains confusingly labeled as having been solicited by the board of directors. Mr. Evan’s vagueness challenge to 3 AAC 08.335(c)(1) is thus easily rejected.

As for 3 AAC 08.335(e)(2), Mr. Evans contends that board nominees could not read the regulation and “know that redistribution of a Board Proxy Form would make them liable for ensuring its compliance with formal proxy requirements.” The first problem with this argument is that it rests on the false premise that Mr. Evans was simply redistributing the Board Proxy Card to the recipients of his mailing. What Mr. Evans actually sent to BSNC shareholders was a modified proxy card which, on its face, was capable of being misconstrued as an official request by the corporation’s board of directors that shareholders cast 100% of their votes for him. While application of the “total mix” doctrine prevents the modified proxy card from being deemed a

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<sup>95</sup> *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

<sup>96</sup> *Id.*

<sup>97</sup> *Williams v. State, Dep’t of Revenue*, 895 P.2d 99, 105 (Alaska 1995).

<sup>98</sup> *Village of Hoffman Estates*, 455 U.S. at, 498.

<sup>99</sup> Mr. Evan’s Motion at p. 21.

material misrepresentation under 3 AAC 08.315(a)(1), this should not disguise the reality of what transpired here.

With that in mind, the question to analyze is whether Mr. Evans could have discerned from the language of 3 AAC 08.335(e)(2) that his modified proxy card was not properly formatted. The language of the regulation plainly states there are only three permissible formats for proxy cards used in board elections. This compels the conclusion that a proxy card failing to strictly comply with one of these specified formats violates the regulation. While the regulatory text does not explicitly forbid the pre-marking of proxy cards utilizing the ballot format permitted by 3 AAC 08.335(e)(2)(C), doing so would plainly contradict the requirement that the ballot allow shareholders to “award votes to selected nominees of the shareholders choosing.” As common sense would suggest, a form of ballot that cannot be freely voted unless shareholders first strike out markings inserted by someone else fails to meet this standard.<sup>100</sup>

In summary, the text of 3 AAC 08.335(e)(2)(C) is not so “conflicting and confused that it cannot be given meaning in the adjudication process.”<sup>101</sup> While the regulatory text may not succinctly forbid the use of proxy cards with pre-marked ballots, that prohibition can be readily drawn from it. In an administrative context where Mr. Evans was obligated to plan his behavior carefully, this is more than adequate to overcome his vagueness challenge to this regulation.

*G. The procedural defenses Mr. Evans raises under AS 45.55.950 are not meritorious.*

Mr. Evans contends that the Temporary Order issued by the Division fails to comply with the provisions of AS 45.55.950, which provides in relevant part:

(a) The administrator may make, adopt, amend, and rescind the regulations, forms, and orders that are necessary to carry out this chapter.

(b) A regulation, form, or order may not be made, adopted, amended, or rescinded unless the administrator finds that the action is necessary or appropriate in the public interest.

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(d) A provision of this chapter imposing liability does not apply to an act done or omitted in good faith in conformity with a regulation, form, or order of the administrator, notwithstanding that the regulation, form, or order may be later amended or rescinded or be determined by judicial or other authority to be invalid.

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<sup>100</sup> The Supreme Court has noted that a non-criminal statute is sufficiently clear when the prohibited conduct is “set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.” *Arnett v. Kennedy*, 416 U.S. 134, 159 (1974), quoting *United States v. Hariss*, 347 U.S. 612, 618 (1954).

<sup>101</sup> *Williams*, 895 P.2d at 105.

Mr. Evans raises two arguments under this statutory language. First, he claims the Temporary Order issued against him is fatally flawed since it does not include a specific finding that it was necessary to protect the “public interest” under subsection .950(b). Second, Mr. Evans views subsection .950(d) as restricting the Division from taking action in any matter without proof of scienter. Neither of these arguments has merit.<sup>102</sup>

With regard to .950(b), the legislature’s broad directive that the Division act in the public interest when performing its assigned duties does not bestow any procedural rights upon Mr. Evans here. The Temporary Order issued against Mr. Evans was signed by the Acting Director of the Division of Banking and Securities, who serves as the “administrator” identified in the statute.<sup>103</sup> A Division order issued to enforce regulations protecting the rights of Alaska corporations and shareholders carries an implicit finding that the specified public official deemed it necessary and appropriate for the public interest. There is nothing in the statutory text to indicate that a more individualized determination is required. Even if such an explicit finding was required, the alleged violations detailed in the Temporary Order, two of which have been affirmed in this decision, demonstrate that the Division had appropriate cause to take action here.

As for .950(d), the Division correctly notes that the text of this subsection simply provides a safe harbor to corporations and individuals that rely on a “regulation, form, or order” that is later revised, amended, or invalidated. There is nothing in the text of this statute from which a scienter requirement can be inferred.

## **V. Issues Raised by the Parties in the Their Proposals for Action**

Following distribution of the proposed decision in this matter, Mr. Evans submitted a proposal for action in which he requested that the temporary order issued by the Division in October 2024 be withdrawn and replaced with a private letter of reprimand. In the alternative, Mr. Evans requested that this final decision be adopted in lieu of the temporary order after being amended to clarify that all votes cast through proxy cards invalidated under the terms of the temporary order be counted.

While this decision concludes that Mr. Evans did not act with the deliberate intent of misleading BSNC shareholders, his request for a private letter of reprimand in lieu of a final public decision is rejected. While the totality of the mailing Mr. Evans sent to BSNC

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<sup>102</sup> Mr. Evans’s Motion at pp. 16-17.

<sup>103</sup> See AS 45.55.990(1) (“‘administrator’ means the commissioner of commerce, community, and economic development or a designee of the commissioner”).



shareholders did not rise to the level of an actionable misrepresentation under 3 AAC 08.315(a)(1), shareholders receiving the modified proxy card who failed to review the accompanying letter could have believed that BSNC's board of directors was asking them to cast their votes for Mr. Evans. Given this, the violations of 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2) being affirmed here cannot be treated as mere technical violations that were unlikely to harm the public. Issuance and publication of this final decision will reduce the likelihood of others committing similar violations in the future.

Consistent with Mr. Evans's alternative request – which is not opposed by the Division – this decision has been modified to clarify that votes cast for Mr. Evans through the invalidated proxy cards should be counted. Since the temporary order invalidated these proxy cards as a remedy for the perceived violation of 3 AAC 08.315(a)(1), the overturning of that violation entitles Mr. Evans to the benefit of those votes.

## **VI. Conclusion**

For the reasons covered above, Mr. Evans's motion for summary adjudication is granted with regard to the Division's determination that his mailing constituted a "material misrepresentation" for purposes of 3 AAC 08.315(a)(1). That determination is accordingly overturned. With this, votes cast for Mr. Evans in the proxy cards invalidated under the terms of the temporary order should be counted in his favor by BSNC. Mr. Evans's motion is denied in all other respects.

The Division's motion for summary adjudication is granted with regard to the determinations that the modified proxy that Mr. Evans sent to BSNC shareholders violated the provisions of 3 AAC 08.335(c)(1) and 3 AAC 08.335(e)(2). Those determinations are accordingly affirmed.

Consistent with the foregoing, the temporary order issued by the Division on October 2, 2024, is rescinded and replaced with this final decision.

REVISED AND REISSUED: July 18, 2025.

By: /s/ Max Garner  
Max Garner  
Administrative Law Judge

## **Adoption**

The undersigned adopts this Decision and Order in OAH Case No. 24-0706-SEC as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 18th day of July, 2025.

By: /s/ Julie Sande  
Julie Sande  
Commissioner  
Department of Commerce, Community,  
and Economic Development