

COPY

STATE OF ALASKA
DEPARTMENT OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT
DIVISION OF BANKING AND SECURITIES
P.O. BOX 110807
JUNEAU, ALASKA 99811-0807

In the Matter of:
Robert Burk
Respondent

ALASKA ORDER #07-01 S

**FINAL ORDER TO CEASE AND DESIST
AND IMPOSING A PREFILING REQUIREMENT**

I. FACTUAL ALLEGATIONS

1. The Division of Banking and Securities (the division), is responsible for administering the Alaska Securities Act (the Act) at AS 45.55 and regulations adopted under the Act at 3 AAC 08.

2. Chugach Alaska Corporation (CAC), of 560 East 34TH Avenue, Anchorage, AK 99503, is an Alaska Native corporation organized under the Alaska Native Claims Settlement Act (ANCSA). It is subject to the requirements of AS 45.55.139 and pertinent regulations due to its having more than 500 shareholders and assets exceeding \$1,000,000.

3. Robert Burk (Respondent) is a shareholder of CAC and was an independent candidate for the board of directors that was elected at the October 14, 2006 annual meeting. As required by 3 AAC 08.355, the Respondent submitted proxy solicitation materials to the division on September 25, 2006 and distributed them to shareholders.

4. The division received a complaint dated October 5, 2006 from CAC alleging that the Respondent violated the Alaska Securities Act and regulations by making materially false or misleading statements in his proxy solicitation materials and failed to make certain disclosures mandated by 3 AAC 08.355 in his proxy statement. The division asked for

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1 responses and clarification from the Respondent and received a response dated October
2 31, 2006.

3 5. A Temporary Order to Cease and Desist; And Notice of a Right to a Hearing
4 Regarding Prefiling (AK order #07-01S) dated January 10, 2007 was sent to the
5 Respondent by certified mail and the delivery receipt was signed on January 19, 2007.
6

7 II. FINDINGS

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9 6. A solicitation of proxies for an annual meeting must be free of materially false and
10 misleading statements as required by AS 45.55.160. According to 3 AAC 08.315, a
11 misrepresentation includes "...a statement that, at the time and under the circumstances in
12 which it is made (1) is false or misleading with respect to a material fact; (2) omits a
13 material fact necessary in order to make a statement made in the solicitation not false or
14 misleading..." "A misrepresentation is material if there is substantial likelihood that a
15 reasonable shareholder would consider it important in deciding how to vote."

16 7. The regulations at 3 AAC 08.355(6) require that a proxy statement include a
17 "...brief description of all legal proceedings to which each participant in the solicitation is a
18 party with interests adverse to the corporation..." The Respondent disclosed the
19 outstanding litigation in which he was involved, but described it as "regarding failure of CAC
20 to provide a shareholder list in a timely fashion." At the time the Respondent disseminated
21 his proxy materials, this issue was no longer part of the referenced lawsuit because the
22 court had previously ruled in August 2006 that CAC did produce the list in a timely fashion.
23 The division finds that the Respondent violated 3 AAC 08.315 by making a material
24 misrepresentation in describing the stipulated matter of the lawsuit.
25

1 8. The regulations at 3 AAC 08.355 state that a non-board proxy solicitation "...must
2 be preceded or accompanied by a dated, written proxy statement..." They also require the
3 disclosure of who will bear the expenses and the amount already spent on the solicitation
4 of proxies. A "...statement indicating whether reimbursement for solicitation expenses will
5 be sought from the corporation" is also required.

6 9. The Respondent's proxy statement is undated. The division finds that the
7 Respondent violated 3 AAC 08.355 by failing to date his proxy statement.

8 10. Respondent's proxy statement failed to state the amount already expended on his
9 proxy solicitation. The division finds that he violated 3 AAC 08.355(8).

10 11. A required statement as to who will bear the costs of the solicitation was missing
11 from the Respondent's proxy statement. The division finds that 3 AAC 08.355(9) was
12 violated.

13 12. Respondent's proxy statement did not include the required statement regarding
14 whether or not reimbursement for solicitation expenses would be requested from the
15 corporation. The division finds the Respondent violated 3 AAC 08.355(10).

17 III. LAW

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19 See Appendix "A" attached and made part hereto for a recitation of the statutes and
20 regulations cited in this Order.
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IV. ORDER AND NOTICE

13. Under AS 45.55.920(c), the Administrator finds that the Respondent committed several violations of the Alaska Securities Act as specified above and further finds it is in the public interest to issue this Order.

14. Respondent is ordered to cease and desist from the acts cited above and from any further acts that would violate the Alaska Securities Act.

15. Respondent is cautioned that all future proxy solicitation materials must contain the disclosures mandated by the Alaska Securities Act and its regulations. Any future violations may be considered knowing or intentional violations and could be subject to the penalties listed in AS 45.55.920(b).

16. The Respondent is directed to file with the division, for a period of three years from the date of this order, all of his proxy solicitation materials at least 10 working days before dissemination to the shareholders as set forth in AS 45.55.920(a)(1)(B).

17. Under AS 45.55.920(d), the Temporary Order to Cease and Desist; and Notice of Right to a Hearing Regarding Prefiling is made a Final Order of the Administrators since the Order was served on the Respondent on January 19, 2007 and no hearing was requested within 15 days after receipt as specified in the Temporary Order.

18. This order is being executed in two original documents.

Feb. 23, 2007

Date

/s/ Mark R. Davis

Mark R. Davis, Administrator
Division of Banking and Securities

Contact Person:

Eileen Buchanan
Securities Examiner
907/465-5452

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6 APPENDIX "A"

7 Applicable and Relevant Parts of Statutes and Regulations for 07-01S

8 Alaska Statutes (AS):

9 Sec. 45.55.138. Application to Alaska Native Claims Settlement Act corporations.
10 The initial issue of stock of a corporation organized under Alaska law pursuant to 43 U.S.C. 1601 -
11 1628 (Alaska Native Claims Settlement Act) is not a sale of a security under AS 45.55.070 and
12 45.55.130(10).

13 Sec. 45.55.139. Reports of corporations.

14 A copy of all annual reports, proxies, consents or authorizations, proxy statements and other
15 materials relating to proxy solicitations distributed, published or made available by any person to at
16 least 30 Alaska resident shareholders of a corporation that has total assets exceeding \$1,000,000
17 and a class of equity security held of record by 500 or more persons and which is exempted from
18 the registration requirements of AS 45.55.070 by AS 45.55.138, shall be filed with the administrator
19 concurrently with its distribution to shareholders.

20 Sec. 45.55.160. Misleading filings.

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

25 Sec. 45.55.920. Orders, injunctions, and civil penalties.

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

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

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

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

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

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

(b) The administrator may issue an order against an applicant, registered person, or other person
who knowingly or intentionally violates this chapter or a regulation or order of the administrator
under this chapter, imposing a civil penalty of not more than \$2,500 for a single violation, or not
more than \$25,000 for multiple violations, in a single proceeding or a series of related proceedings.

(c) For violations not covered by (b) of this section, the administrator may issue an order against an
applicant, registered person, or other person who violates this chapter or a regulation or order of the
administrator under this chapter, imposing a civil penalty of not more than \$500 for a single

1 violation, or not more than \$5,000 for multiple violations, in a single proceeding or a series of
related proceedings.

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

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

8 Sec. 45.55.935. Hearings.

(a) The administrator shall adopt regulations, consistent with the provisions of this chapter,
governing administrative hearings conducted by the administrator or a designee of the administrator
9 for the following:

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

(2) orders issued under AS 45.55.060 ; before the administrator enters an order under AS
11 45.55.060 , the administrator shall send to the person involved a notice of opportunity for hearing; if
the person involved is an agent, then the administrator shall in addition notify the employing broker-
12 dealer, investment advisor, or issuer.

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

14 Regulations (Alaska Administrative Code):

15 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
16 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
17 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,
18 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 substantia
19 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
20 material misrepresentations if considered separately, might be material misrepresentations if there
is a substantial likelihood that a reasonable shareholder would consider the series important in
deciding how to vote. Subjective proof that one or more shareholders actually granted a proxy
because of a misrepresentation is not required. The following are some examples of what,
21 depending upon particular facts and circumstances, might be misleading within the meaning of 3
AAC 08.305 –3 AAC 08.365 :

22 (1) predictions as to specific future market values;

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

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

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

(5) regarding the election of directors, failure to disclose the existence of an agreement or

1 understanding among two or more nominees, proxyholders, or other participants with respect to
2 voting of proxies, and failure to disclose the material provisions of such an agreement or
3 understanding, in circumstances where such participants appear to solicit proxies independently or
4 where there is no apparent affiliation among such participants.

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

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

13 3 AAC 08.365 DEFINITIONS RELATING TO SOLICITATION OF PROXIES.

14 For purposes of 3 AAC 08.304 – 3 AAC 08.365, the following definitions apply:

15 "board" means the board of directors of the issuer of shares for which a proxy is solicited;

16 (10) "nominee" means a person who has consented to being named in a proxy statement and who
17 has agreed to serve if elected;

18 (11) "participant"

19 (A) means the board and the corporation;

20 (B) means a nominee for whose election as director proxies are solicited;

21 (C) means a committee or group which solicits proxies or a member of the committee or group;

22 (D) means a person who finances, directly or indirectly, the solicitation of proxies, except a
23 person who contributes not more than \$500 and who is not otherwise a participant;

24 (E) means a person who solicits proxies;

25 (F) does not include

(i) a person or organization retained or employed by a participant to solicit shareholders whose
activities are limited to the performance of his duties in the course of his employment;

(ii) a person who merely transmits proxy soliciting material or performs other ministerial or
clerical duties;

(iii) a person employed by a participant in the capacity of attorney, accountant, or as an
advertising, public relations, or financial adviser, whose activities are limited to the performance of
his duties in course of his employment; or

(iv) a person regularly employed as an officer or employee of a participant who is not otherwise
a participant;

(12) "proxy" 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;

(13) "proxyholder" means a person to whom a proxy or power of substitution is given;

(14) "proxy 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;

(15) "shareholder" means one who is the holder of record of a share in the corporation;

(16) "solicitation" means

(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.

24 3 AAC 08.930 HEARINGS

25 (a) Setting Hearings. The administrator or his designee will hold hearings under AS 45.55.225 upon
written request by any person aggrieved by any act, threatened act, or failure to act of the
administrator or by any report, ruling, or order of the administrator. The administrator or his
designee will, in his discretion, hold hearings upon his own motion, under AS 45.55.225. The writte

1 request for hearing must specify the grounds to be relied upon as a basis for the relief requested at
the hearing.

2 (b) Time of Hearing. Upon receipt of written request for a hearing, the administrator will either set
down the matter for hearing within 30 days from the receipt of the request or will issue a written
order denying a hearing.

3 (c) Notice of Hearing. Notice of hearings will be given not less than 10 days in advance to all
persons directly affected by the hearings. The notice of hearing will contain the following:

- 4 (1) time and place of hearing;
5 (2) statement of matters to be considered;
6 (3) statement of the legal authority and jurisdiction under which the hearing is to be held;
7 (4) reference to the particular sections of the act or regulations involved.

8 (d) Witnesses. Any person who is a party to the hearing before the administrator and who may be
adversely affected by the order of the administrator has the right to have subpoenas issued to any
witness on his behalf in accordance with AS 44.62.430 (except that the per diem allowance of (b)(3)
of that section shall be \$45 instead of \$15). It is the responsibility of the party or his counsel to
cause the subpoenas to be timely served.

9 (e) Right to Counsel. Any person affected by the hearing has the right to appear in person and by
counsel; counsel may be present during the giving of evidence, may have a reasonable opportunity
to examine and inspect all documentary evidence, may examine witnesses, and may present
evidence in his client's behalf.

10 (f) Rules of Evidence. The following rules and evidence apply in hearings held under this section:

- 11 (1) Oral evidence may be taken only on oath or affirmation.
12 (2) Each party may call and examine witnesses; introduce exhibits; cross-examine opposing
witnesses on matter relevant to the issues, even though that matter was not covered in the direct
examination; impeach a witness regardless of which party first called the witness to testify; and
rebut the evidence against himself.

13 (3) If the respondent does not testify in his own behalf, he may be called and examined as if
under cross-examination.

14 (4) The hearing need not be conducted according to technical rules relating to evidence and
witnesses. Relevant evidence must be admitted if it is the sort of evidence on which responsible
persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a
common law or statutory rule which makes improper the admission of the evidence over objection
in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not
sufficient by itself to support a finding unless it would be admissible over objection in a civil action.
The rules of privilege are effective to the same extent that they are recognized in a civil action.
Irrelevant and unduly repetitious evidence must be excluded.

15 (5) Nothing in this section alters the ordinary rules of burden of proof in judicial proceedings in the
16 state.

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

21 (h) Contents of Record. The record in any hearing will include the following:

- 22 (1) all pleadings, motions, and intermediate rulings;
23 (2) all evidence received or considered, including a statement of matters officially noted;
24 (3) questions or offers of proof, objections, and rulings on them;
25 (4) proposed findings and exceptions;
(5) the decision, opinion, report, or order of the administrator or his designee.

(i) Final Orders. A final order will be in writing or stated in the record. A final order will include
findings of fact and conclusions of law. All findings of fact will be based exclusively on the evidence
presented and on matters officially noticed. Findings of fact will be accompanied by a concise and
explicit statement of the underlying facts supporting the findings. A copy of a final order will be
delivered or mailed to each party affected and to his attorney of record, if any, within 10 days of the
termination of the hearing.

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(j) Rehearings.

(1) At the discretion of the administrator, a rehearing will be granted to any aggrieved party if a written request is made for it within 10 days after the final order is mailed to the person entitled to receive it. In requesting rehearing, the party shall set forth one or more of the following grounds:

- (A) newly discovered evidence or newly available evidence relevant to the issues;
- (B) need for additional evidence to develop the facts essential to proper decision;
- (C) probable error committed in the proceeding or in the administrator's decision which would be grounds for reversal on judicial review of the order; or
- (D) need for further consideration of the issues and the evidence in the public interest.

(2) Nothing in this section prohibits the administrator from rehearing, reopening, or reconsidering any matter in accordance with other applicable statutory provisions or on the ground of fraud by the prevailing party or of procurement of the order by perjured testimony or fictitious evidence. All rehearings will be confined to those grounds upon which the rehearing was requested or granted. All orders or decisions resulting from a rehearing will be delivered or mailed to each party affected and to his attorney of record, if any, within 10 days of the termination of the rehearing.